

# PUBLIC PROCUREMENT REGULATION: AN INTRODUCTION



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## **Preface**

This text provides an introduction to the subject of regulating public procurement. It focuses, in particular, on principles and policies of regulation and on the approach to regulation adopted in the instruments of UNCITRAL, in particular the UNCITRAL Model Law on Procurement of Goods, Construction and Services. The text is designed, in particular, as a text for students of the subject at university level, but will also be a useful introduction to the subject for lawyers, procurement officials and policy-makers.

As explained on the cover page, the book was prepared as a part of a collaborative project in higher education, the EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation 2009-2011, funded by the EU. This project involved several universities in Europe and Asia and has sought to promote and support the teaching of public procurement in Europe, Asia and globally. This text is one of five books produced under the auspices of the project that are designed to be used as resources in the teaching of public procurement law and regulation.

The main editors and chapter authors are listed on the cover pages, but it should be recognised that the text is a collaborative effort of all the partners to the extent that it has benefited from input by, and discussions between, many different persons at the different partner institutions. In addition to the authors and editors mentioned on the cover pages, the text has benefited from administrative, editing and proof reading by Gabor Soos, Debbie Yu, Elly Aspey and Pamela Hoebling during their time as students at the University of Nottingham, and the project would like to acknowledge gratefully the assistance they have provided.

The contents of the book are up to date as of July 2010. It has also been possible to include later developments in some parts of the book.

## Table of Contents

<b>CHAPTER 1: PUBLIC PROCUREMENT: BASIC CONCEPTS AND THE COVERAGE OF PROCUREMENT RULES</b>	<b>1</b>
<b>1.1 What is public procurement?</b>	<b>1</b>
<b>1.2 Public procurement distinguished from in-house provision</b>	<b>2</b>
<b>1.3 The legal framework for public procurement contracts</b>	<b>3</b>
<b>1.4 The objectives of public procurement systems and regulatory provisions</b>	<b>4</b>
1.4.1 Introduction	4
1.4.2 Objective 1: Value for money (efficiency) in the acquisition of required goods, works or services	5
1.4.3 Objective 2: integrity - avoiding corruption and conflicts of interest	8
1.4.4 Objective 3: accountability	11
1.4.5 Objective 4: equal opportunities and equal treatment for providers	11
1.4.6 Objective 5: Fair treatment of suppliers	14
1.4.7 Objective 6: efficient implementation of industrial, social and environmental policies in procurement	15
1.4.8 Objective 7: opening up public markets to international trade	15
1.4.9 Objective 8: Efficiency in the procurement process	19
<b>1.5 Key principles for implementing procurement objectives: transparency, competition and equal treatment</b>	<b>20</b>
1.5.1 Introduction	20
1.5.2 Transparency	21
1.5.3 Competition	23
<b>1.6 The purpose and nature of regulatory rules in the public sector</b>	<b>24</b>
<b>1.7 The diversity of public procurement systems</b>	<b>25</b>
<b>1.8 Introduction to the UNCITRAL Model Law on Procurement of Goods, Construction and Services</b>	<b>27</b>
1.8.1 The Model Law	27
1.8.2 Review of the Model Law	28
<b>1.9 Coverage of public procurement rules</b>	<b>28</b>
1.9.1 Which entities are covered?	28
1.9.2 Which transactions are covered?	29
1.9.3 Value thresholds	31
<b>CHAPTER 2: METHODS OF PROCUREMENT FOR GOODS AND CONSTRUCTION</b>	<b>33</b>
<b>2.1 Introduction</b>	<b>33</b>
<b>2.2 Formal tendering procedures</b>	<b>34</b>
2.2.1 Open tendering	34
2.2.1.1 The open tendering procedure and “tendering” under the UNCITRAL Model Law	34
2.2.1.2 Derogations from tendering under the UNCITRAL Model Law	35
2.2.2 Two-Stage Tendering	37
2.2.3 Restricted tendering	39

<b>2.3 Informal procurement</b>	<b>40</b>
2.3.1 Request for proposals	40
2.3.2 Competitive negotiation	41
2.3.3 Request for quotations	42
2.3.4 Single-source procurement	44
<b>2.4 Review of the Model Law’s rules on choice of procurement methods</b>	<b>45</b>
<b>CHAPTER 3: THE CONDUCT OF OPEN TENDERING PROCEDURES</b>	<b>47</b>
<b>3.1 Introduction</b>	<b>47</b>
<b>3.2 Specifications and other solicitation documents</b>	<b>47</b>
3.2.1 The solicitation documents in general	47
3.2.2 Modifications and clarifications to the solicitation documents	50
3.2.3 Legal rules on drafting specifications	50
3.2.3.1 Introduction	50
3.2.3.2 The rules on specifications in UNCITRAL and other approaches	50
3.2.3.3 The relationship between specifications and choice of award procedure	52
3.2.3.4 What are the likely practical consequences of not complying with legally binding rules on specifications or of ambiguous specifications?	53
<b>3.3 Advertising the contract</b>	<b>54</b>
<b>3.4 Qualification and pre-qualification proceedings</b>	<b>55</b>
3.4.1 Introduction	55
3.4.2 Criteria for exclusion	56
3.4.3 Providing incomplete or incorrect information	58
3.4.4 Administrative suspension or debarment	59
3.4.5 Disclosure of qualification criteria and required evidence	59
3.4.6 Evidence and legalisation of documents	60
3.4.7 Pre-qualification proceedings	60
<b>3.5 Modification and withdrawal of tenders and tender securities</b>	<b>61</b>
<b>3.6 The form of tenders and tender opening</b>	<b>63</b>
3.6.1 Form of tenders	63
3.6.2 Tender opening	63
<b>3.7 Non-conforming tenders</b>	<b>64</b>
3.7.1 Introduction: policy considerations	64
3.7.2 The regulatory treatment of non-conforming tenders	66
3.7.2.1 Introduction	66
3.7.2.2 General obligation not to accept non-conforming tenders	68
3.7.2.3 The possibility for correction: non-conformity that arises from certain kinds of errors in the tender	69
3.7.2.4 The possibility for the procuring entity to waive certain minor deviations	71
3.7.2.5 Possibility of a new tendering exercise to enable the procuring entity to consider tenderers whose initial tenders did not conform	74
<b>3.8 The deadline for tenders, including extending the tender deadline and late tenders</b>	<b>75</b>
3.8.1 The tender deadline	75
3.8.2 Extensions to the deadline	75
3.8.3 Review of the Model Law’s provisions on deadlines	76
3.8.4 Late tenders	76
<b>3.9 Amendments and corrections to tenders and post-tender negotiations</b>	<b>77</b>

3.9.1 Introduction and basic principles	77
3.9.2 Correction of errors	78
3.9.2.1 Introduction	78
3.9.2.2 The rules on errors in tenders under the UNCITRAL Model Law	79
3.9.2.3 What types of errors are covered by the provision on arithmetical errors?	80
3.9.2.4 The rule that the supplier must accept the correction for the tender to be considered	81
3.9.2.5 A duty towards suppliers?	81
3.9.2.6 The position when an error remains uncorrected	82
3.9.3 Clarifications	83
3.9.4 Negotiations to seek improvements to tenders	83
3.9.5 Negotiations with the winning tenderer	85
<b>3.10 Award of the contract</b>	<b>85</b>
3.10.1 Introduction	85
3.10.2 Basic principles: lowest price or lowest evaluated tender?	86
3.10.3 Limiting discretion in choosing and applying non-price criteria: objective and quantifiable criteria under the Model Law	88
3.10.4 More flexible criteria	89
3.10.5 The problem of unbalanced tenders	90
3.10.6 Advance formulation and disclosure of the criteria and the methodology for the award	91
3.10.7 Abnormally low tenders	92
3.10.8 Cancellation of the procurement	94
<b>CHAPTER 4: PROCUREMENT OF SERVICES AND COMPLEX PROCUREMENT</b>	<b>96</b>
<b>4.1 Procurement methods for services</b>	<b>96</b>
4.1.1 Introduction	96
4.1.2 Use of the principal method for procurement of services and its relationship with the methods for procuring goods and construction	96
4.1.3 Outline procedure for the principal method for procurement of services	98
<b>4.2 Selection (shortlisting)</b>	<b>101</b>
<b>4.3 Issues in the evaluation and award phase in services procurement and complex procurement</b>	<b>105</b>
4.3.1 Introduction	105
4.3.2 Evaluation and award under the principal method for procurement of services	106
4.3.2.1 Permitted criteria for the award in the principal method for procurement of services	106
4.3.2.2 Absence of a requirement for objective and quantifiable criteria	108
4.3.2.3 Advance formulation and disclosure of the criteria and the methodology for the award	109
4.3.2.4 Applying the criteria for the award in the principal method for procurement of services: the three procedures of selection without negotiation, simultaneous negotiation and consecutive negotiation	109
4.3.3 Evaluation and award under the request for proposals procedure	112
4.3.3.1 Permitted criteria and disclosure of criteria	112
4.3.3.2 Applying the criteria for the award in the request for proposals	113
<b>CHAPTER 5: SUPPLIER LISTS AND FRAMEWORK AGREEMENTS</b>	<b>115</b>
<b>5.1 Introduction</b>	<b>115</b>
<b>5.2 Supplier lists (qualification lists or approved lists)</b>	<b>116</b>

5.2.1 Policy issues	116
5.2.2 Supplier lists under regulated procurement systems: the example of the WTO's Agreement on Government Procurement	117
5.2.3 Supplier lists under the UNCITRAL Model Law	119
<b>5.3 Framework agreements</b>	<b>121</b>
5.3.1 The concept and types of framework agreements	121
5.3.2 Advantages and potential problems	122
5.3.3 Framework agreements under the UNCITRAL Model Law	124
<b>CHAPTER 6: PROCUREMENT OF PRIVATELY FINANCED INFRASTRUCTURE</b>	<b>127</b>
<b>6.1 Introduction to privately financed infrastructure projects</b>	<b>127</b>
6.1.1 General introduction	127
6.1.2 Basic concepts and terminology	127
6.1.3 The objectives and benefits of private finance	131
<b>6.2 Regulating the procurement process for privately financed infrastructure projects</b>	<b>132</b>
6.2.1 Features of privately financed infrastructure projects relevant to procurement	132
6.2.2 The UNCITRAL provisions on privately financed infrastructure procurement	133
6.2.2.1 Introduction	133
6.2.2.2 Which transactions are covered?	134
6.2.2.3 Procedure: the basic approach	135
6.2.2.4 Advertisement of the contract	135
6.2.2.5 Pre-qualification	135
6.2.2.6 Selection of those to tender from amongst those qualified ("shortlisting")	135
6.2.2.7 The award phase of the procedure	136
6.2.2.8 Participation of consortia	139
<b>CHAPTER 7: ELECTRONIC PROCUREMENT AND ELECTRONIC REVERSE AUCTIONS</b>	<b>140</b>
<b>7.1 Electronic communications</b>	<b>140</b>
7.1.1 Introduction	140
7.1.2 Electronic publication of information	141
7.1.3 Electronic communications in the award process	141
<b>7.2 Electronic auctions</b>	<b>150</b>
7.2.1 Introduction	150
7.2.2 Regulation of electronic auctions	152
7.2.3 Proposals under the UNCITRAL Model Law	153
7.2.3.1 Introduction	153
7.2.3.2 Conditions for using auctions	153
7.2.3.3 The proposed procedure for auctions	154
<b>CHAPTER 8: REMEDIES AND ENFORCEMENT</b>	<b>156</b>
<b>8.1 Introduction</b>	<b>156</b>
<b>8.2 Remedies</b>	<b>158</b>
8.2.1 Interim measures	158
8.2.2 Damages	160
8.2.3 Setting aside concluded contracts	161
8.2.4 Preclusive time limits	164

<b>CHAPTER 9: SOCIAL AND ENVIRONMENTAL POLICIES: A CASE STUDY OF EU PUBLIC PROCUREMENT LAW</b>	<b>166</b>
<b>9.1 Introduction</b>	<b>166</b>
<b>9.2 Social and environmental policies in all kinds of procurement situations</b>	<b>167</b>
<b>9.3 The Case law of the Court of Justice of the European Union</b>	<b>169</b>
<b>9.4 Concluding remarks</b>	<b>176</b>
<b>CHAPTER 10: REGULATING PUBLIC PROCUREMENT IN INTERNATIONAL TRADE</b>	<b>177</b>
<b>10.1 Introduction</b>	<b>177</b>
<b>10.2 Procurement instruments/Initiatives within the WTO framework</b>	<b>177</b>
10.2.1 Multilateral rules and initiatives in the WTO	177
10.2.2 The Government Procurement Agreement ('GPA')	180
10.2.2.1 Introduction, objectives and regulatory approach	180
10.2.2.2 Coverage	182
10.2.2.3 Main features of rules	183
10.2.2.4 Horizontal policies	184
10.2.2.5 Inter-governmental dispute settlement procedures	185
10.2.2.6 Bid challenge procedures	186
<b>10.3 Regional Instruments Regulating Procurement towards Market Liberalisation</b>	<b>186</b>
10.3.1 Introduction	186
10.3.2 The European Union ('EU')Procurement Regime	187
10.3.2.1 Introduction, objectives and regulatory approach	187
10.3.2.2 Coverage	187
10.3.2.3 Main features of the rules	189
10.3.2.4 Horizontal policies	191
10.3.2.5 Dispute settlement procedures: inter-governmental and centralized enforcement	192
10.3.2.6 Remedies for suppliers	193
10.3.3 North American Free Trade Agreement ('NAFTA')	194
10.3.3.1 Introduction, objectives and regulatory approach	194
10.3.3.2 Coverage	194
10.3.3.3 Main features of the rules	195
10.3.3.4 Horizontal policies	195
10.3.3.5 Dispute settlement procedures and bid challenge	196
10.3.4 Common Market for Eastern and Southern Africa ('COMESA')	197
10.3.4.1 Introduction, objectives and regulatory approach	197
10.3.4.2 Coverage	197
10.3.4.3 Main features of rules	197
10.3.4.4 Horizontal policies	198
10.3.4.5 Dispute settlement procedures	198
10.3.5 Asia-Pacific Economic Cooperation Forum ('APEC')	199
10.3.5.1. Introduction, objectives and regulatory approach	199
10.3.5.2 Coverage	199
10.3.5.3 Main features of rules	199
10.3.5.4 Horizontal policies	200
10.3.5.5 Dispute settlement procedures	201

**10.4 The OECD Convention on Combating Bribery of Foreign Public  
Officials in International Business Transactions ('the Convention')** **202**

10.4.1 Introduction, objectives and regulatory approach 202

10.4.2 Main features of rules 202

10.4.3 Dispute settlement procedures 203

# Chapter 1: Public Procurement: Basic Concepts and the Coverage of Procurement Rules

## 1.1 What is public procurement?

Public procurement refers to the government's activity of purchasing the goods and services which it needs to carry out its functions. Public procurement is the phrase generally used now to refer to this activity in the English language in the EU since it is the phrase used in EU legislation. However, other systems use different terminology to cover the same concept – for example, the World Trade Organization system refers to “government procurement” and the US system, generally, to government contracts or public contracts.

There are three phases of the public procurement process:

- i) Deciding which goods or services are to be bought and when (procurement planning);
- ii) The process of placing a contract to acquire those goods or services which involves, in particular, choosing who is to be the contracting partner and the terms on which the goods or services are to be provided; and
- iii) The process of administering the contract to ensure effective performance.

The concept of public procurement can be used to refer to all three phases. Regulatory rules on public procurement generally focus on the second stage, since it is in this phase that legal rules and other regulatory measures become important tools of policy; and this is the focus of our present text. Obviously, however, in terms of procurement practice the three stages need to be closely integrated and regarded as separate phases of a single cohesive “cycle”. For present purposes, it also needs to be understood that there is a significant connection between the regulatory measures that apply at the second stage and the first and third phases of the process – and that in certain cases the regulatory provisions that we consider will have a direct impact on the first and second stages. For example:

- Procuring involves a need to plan future procurement carefully to ensure they leave enough time to run a procurement procedure in full compliance with the various procedures and time limits set out in procurement legislation. Procurement laws often allow the use of procedures without an advertisement and competition to deal with cases of urgency - but this is often not permitted when the urgency was foreseeable.
- Changes to a contract made during the execution phase may sometimes be held by the courts to constitute a “new” contract that must be retendered under public procurement laws<sup>1</sup>.
- The terms on which the contract is concluded, including terms relating to termination and other aspects of contract administration, may be determined at least to some extent during the contract award process.

From a policy perspective there is a relationship between the two in that there is a danger that tight regulation at the contract award stage can be undermined if there is no adequate control of the contract execution stage<sup>2</sup>. First, without careful management and oversight of the execution of the contract fraudulent behaviour can be carried over into the execution stage. Thus a favoured bidder in collusion with the procuring entity could make a very favourable bid to win the contract in accordance with the rules of the competition – but the procuring entity could then allow the bidder to undermine the terms of its bid by, for example, failing to enforce deliveries or quality standards under the

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<sup>1</sup> For example, in the European Union system: see Case C-454/06, *Pressetext Nachrichtenagentur v Republik Österreich (Bund)* CJEU judgment of 19 June 2008.

<sup>2</sup> See, for example, Auricchio, “The Problem of Discrimination and Anti-competitive Behaviour in the Execution Phase of Public Contracts” (1998) 7 *Public Procurement Law Review* 113.

contract, or allowing price revisions that are favourable to the contractor. Secondly, even when the procuring entity is behaving honestly the bidder may bid deliberately low and then seek to manipulate the contract execution phase to obtain better terms (for example, by refusing to perform without extra payments, with the potential to cause great inconvenience to the procuring entity). This is one of the reasons why changes to a contract made during the execution phase may sometimes be required by procurement laws to constitute a "new" contract that must be retendered, as mentioned above. However, changes made during the execution phase are often harder to monitor than violations of rules that govern the contract award phase, since other suppliers will not be policing the process in the same way as during a tendering procedure.

It can also be noted that there is perhaps a distinction between common law and international systems, on the one hand, and civil law systems - contractual terms and execution are more heavily regulated under civil law systems<sup>3</sup>.

It is common - including for the purpose of laws on public procurement<sup>4</sup> - to divide procurement into three categories, which is useful to set out in order to illustrate the diversity of types of procurement transactions:

- **Goods** (supplies or products) (e.g. simple items such as office furniture or very complex items such as guided missiles)
- **Works** (construction) (e.g. building of roads, bridges and government buildings)
- **Services** This includes manual services such as maintenance of government buildings or cleaning of roads, as well as professional services such as those connected with construction (architectural and engineering services), legal services or consultancy services.

The term "services" is often used in legislation to refer to the provision of non-construction services. However, construction is a type of service and the concept of "services" is also sometimes used in legal rules in its broader sense, covering both construction and non-construction services.

When we refer to public procurement in this text we are assuming a process whereby the goods, works and services in question are being acquired from another party through market mechanisms. We are referring to the regulatory measures used in a system in which those supplying the government are free in law to choose whether or not to contract with the government, and we are considering the processes that apply in choosing a contracting partner in that context. This may not apply, or may apply only to a limited degree in a centrally-planned economy, for example.

In most countries public procurement accounts for a significant proportion of Gross Domestic Product - around 10-15% in OECD countries. The proportion is much higher in many developing countries - often up to 25%. In countries making the transition from centrally planned to market economies these figures can be even higher<sup>5</sup>.

## 1.2 Public procurement distinguished from in-house provision

We should also be clear at the outset that the concept of public procurement refers to the acquisition of goods, works or services from entities outside the procuring entity itself - often from the private sector, although in some cases a public procuring entity may

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<sup>3</sup> Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (2004), pp.18-19.

<sup>4</sup> Inter alia in the UNCITRAL Model Law on Procurement of Goods, Construction and Services which we consider further below.

<sup>5</sup> A comprehensive analysis of the size of procurement markets can be found in Audet, "Government Procurement: A Synthesis Report" 2 *OECD Journal on Budgeting* (2002) 149.

procure from another public body or body connected with the state (such as another local authority, or a state-owned enterprise). This requirement of acquisition from an outside entity can be distinguished in principle from the in-house provision of goods, works or services - that is, provision through the government's own employees and organisation. The term "force account" is also sometimes used to describe the case in which the government obtains works and services using its own resources, especially in developing countries (where this term is used by the World Bank and other lending banks, which often place restrictions on its use).

In developed countries there has been a significant trend in the last 20 years or so towards contracting out activities formerly carried out in-house. The term "outsourcing" is often used to refer to this contracting out to an outside entity of services previously provided in-house. Services that are now often outsourced include activities, such as cleaning of government buildings, maintenance of vehicles and equipment, printing and publishing of government documents and even provision of professional advice on matters such as law, information technology, management etc. It is also increasingly common for the state to entrust the actual delivery of public services to private enterprise. Thus, whilst many countries do still use public employees to deliver services, many others now make agreements for this purpose with private contractors, who are responsible for ensuring the provision of the service to the public in accordance with the terms set out in the contract. Outsourcing has often extended (in the UK and the United States, for example) to a very wide range of public services, including refuse collection, school catering, public transport, and even social services, prison services - the construction and operation of prisons - and school management<sup>6</sup>. However, in developing countries the position tends to be rather different - and there is often no supply-side market within those countries to deliver the required goods and services in any case. As Trepte has stated: "Whilst developing countries are grappling with the often political controversy involved in privatizing a whole range of services from refuse collection to health care, developing countries and countries in transition are mainly still in the throes of encouraging the establishment and development of private manufacturing and construction companies and remain largely dependent on public provision and on the use of force account"<sup>7</sup>.

It is sometimes necessary for the purpose of applying legal rules to make a distinction between public procurement and "in-house" activity - in particular, "procurement" may be subject to legal rules that require a competition between interested parties to choose a contracting partner, whilst a decision to allocate a task to be done "in-house" can be made without following those processes. However, the line is not always easy to draw - for example, should a company set up by a local authority together with another local authority to provide a joint service for the two of them be considered an "in-house" entity or not?

As noted above, the lending banks generally place restrictions on the use of in-house as opposed to external resources to undertake work for government where the work is funded by the lending banks.

### **1.3 The legal framework for public procurement contracts**

Contracts of government are often subject to the ordinary private law of the state concerned. This is the position in the United Kingdom, for example. However, where that is the case there are often special and additional rules which apply to government contracts which are not relevant to ordinary private contracts. This is especially so in relation to the formation of government contracts, where special "administrative law"

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<sup>6</sup> See e.g. Freeman and Minow (eds), *Government by Contract: Outsourcing and American Democracy* (2009) on the United States.

<sup>7</sup> Trepte, note 3 above, p.21.

rules on tendering procedures etc often apply. In countries with a separate system of administrative courts these tendering rules are sometimes applied by the administrative courts, whilst other matters (e.g. concerning the performance of the contract) are subject to the private law and courts. In the United Kingdom, however, rules on tendering as well as other matters relating to government contracts are dealt with in the ordinary private courts, like most matters of administrative law.

In other countries, government contracts are subject to a body of rules, wholly separate from private contracts. This is the case in France where government procurement contracts are subject to a distinct *droit administratif* (administrative law) regulating both the formation and execution of the contract, which is applied by a special system of administrative courts.

## 1.4 The objectives of public procurement systems and regulatory provisions

### 1.4.1 Introduction

There are a number of objectives of public procurement that can be identified that are shared by some, most or many systems of public procurement. These objectives are implemented through various means - and legal and regulatory rules on conducting public procurement procedures are one of those means. Both in designing regulatory rules, in applying and interpreting those rules and in exercising any discretion that exists within those rules to resolve particular problems (a common situation for a procuring office) it is crucial to understand these possible objectives and also to understand how they relate to each other - and, of course, to understand their relevance for the particular procurement system in question. In this text we will identify eight key objectives, summarised in the Table below. It should be noted, however, that different commentators adopt various different classifications. For example, Trepte<sup>8</sup> identifies economic efficiency, promotion of social and political objectives and trade objectives as the three "most readily identifiable policy objectives" and treats the objective of reducing corruption as an aspect of allocative efficiency - although we will suggest below that, whilst this is one important aspect of that objective it is not the only one<sup>9</sup>.

Table: Objectives of Public Procurement Systems

1. Value for money (efficiency) in the acquisition of required goods, works or services
2. Integrity - avoiding corruption and conflicts of interest
3. Accountability
4. Equal opportunities and equal treatment for providers
5. Fair treatment of providers
6. Efficient implementation of industrial, social and environmental objectives ("horizontal policies") in procurement
7. Opening up public markets to international trade
8. Efficiency in the procurement process

<sup>8</sup> Trepte, note 3 above, p.59.

<sup>9</sup> Steven Kelman in his book *Procurement and Public Management* (1990) identifies economy and efficiency, equity and integrity as the three key objectives, and a similar classification is also adopted by O. Dekel, "The Legal Theory of Competitive Bidding for Government Contracts" (2008) 37 P.C.L.J. 237. On objectives see also S.Arrowsmith, J.Linarelli and D.Wallace, *Regulating Public Procurement: National and International Perspectives* (2000), chapter 1 and chapter 2; and S. Schooner, "Desiderata: Objectives for a System of Government Contract Law" (2002) 11 *Public Procurement Law Review* 103.

It is important to recognise that within different public procurement systems the existence of different objectives and the weight attached to the various objectives differs quite markedly. For example, some systems attach much more importance than others to policies of fair and equal treatment of providers, to the use of procurement to promote social objectives or to accountability – with the result that the government may be willing to pay higher prices for goods or services or to accept greater process costs to implement these values.

Many of the objectives of public procurement set out below are shared to a greater or lesser degree with private persons engaged in procurement. Most obviously, both public and private procurement has a major goal of obtaining value for money, and both public and private purchasers are concerned to ensure an efficient procurement process. Further, although it has sometimes been asserted that public procurement differs from private purchasing in that public purchasers are concerned to use procurement to promote social and environmental objectives, in fact this use of procurement is also common in the private sector, and has become increasingly prominent with the development of the concept of Corporate Social Responsibility. However, it is certainly true that there are often differences in the objective sought in public and private systems and in the weight placed on those objectives – for example, addressing corruption is arguably seen more as an issue for achieving value for money in some private sector organisations than as an independent objective of procurement policy as it may be in the public sector, as is explained further below.

As we will discuss below, the differences in the objectives both between different public procurement systems, and between private bodies and public bodies, to some extent explain the difference in the approach to procurement and the rules that govern it. To give just one example, a system that places great weight on accountability is more likely to provide for a detailed, rule-based system which allows for close public monitoring of the procurement process than one that does not, even to the extent that adherence to rigid rules may cause some loss to value for money or efficiency in particular procurement procedures.

However, even to the extent that different public procurement systems, and private and public bodies share the same objectives and attach the same importance to those objectives, the means for addressing them may be different. This may be either because the nature of the problem – for example, the degree of corruption in the society or organisation - is different, or because of the different nature of the organisation itself – for example, it has been suggested that the public sector places greater reliance on regulatory rules to achieve its objectives than does the private sector because of the more limited nature of control over employees than exists in private organisations.

#### **1.4.2 Objective 1: Value for money (efficiency) in the acquisition of required goods, works or services**

A major objective of most – perhaps all – procurement systems is to successfully acquire the goods, works or services concerned on the best possible terms. This is often referred to as value for money<sup>10</sup> or efficiency or economic efficiency<sup>11</sup>.

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<sup>10</sup> S.Arrowsmith, J.Linarelli and D.Wallace, *Regulating Public Procurement: National and International Perspectives* (2000).

<sup>11</sup> See Dekel, note 9 above, and Trepte, note 3 above. However, note that Dekel includes within the objective of efficiency as one meaning of that concept not merely obtaining value for the goods, works or services acquired, but also the overall economic benefits to society of efficient allocation of resources (see further below) and Trepte seems also to refer to this latter concept of efficiency. Trepte also incorporates the goal of efficiency in the process into this single concept of efficiency.

It should be emphasised that we are referring under this heading to obtaining value for money in acquiring the goods, works or services needed to carry out the government’s activities. Procurement may also be used to achieve other benefits that go beyond the mere acquisition of these goods, works or services, which are of a social or environmental nature – for example, creation of jobs, or jobs for disadvantaged groups. It is appropriate to consider this issue as a separate objective, as it is to a large extent a distinct facet of procurement that involves special policy issues. A procuring entity will also want to ensure that these other benefits are obtained in a way that gives good value (is efficient). It is for this reason that we have labelled the current objective ‘value for money (efficiency) in the acquisition of required goods, works or services’, rather than simply ‘value for money’.

This objective can be seen to have three aspects:

Ensuring the goods, works or services acquired are suitable. This means both: i) that they can meet the requirements for the task in question and ii) that they are not over-specified (“gold-plated”);
Concluding an arrangement to secure what is needed on the best possible terms (which does not necessarily mean the lowest price);
Ensuring the contracting partner is able to provide the goods, works or services on the agreed terms.

It has often been said that this is the primary goal of most procurement systems, although this is by no means a universal view, nor perhaps true of every procurement system (Dekel, for example, considers that integrity rather than efficiency is the overriding goal of competitive bidding in public procurement, and also that the principle of equal treatment as an independent objective of the procurement process should be equal in status to value for money<sup>12</sup>). Certainly this is the case, however, many of the regulatory rules that apply in public procurement – such as the basic requirements for transparency and competitive bidding discussed below - have the realisation of value for money as one of their aims. Such rules are designed, in particular, to ensure that value for money is not prejudiced by inefficient behaviour, and also that it is not prejudiced by deliberate conduct, notably corrupt behaviour and discrimination in favour of national firms. We will see below that elimination of corruption and elimination of national preferences (an aspect of opening up procurement to international trade) can also be seen as independent objectives of procurement systems that go further than the objective of obtaining value for money in acquiring goods, works or services – but they are also one important part of that last objective.

Value for money is implemented in public procurement systems by various means, but legal and other regulatory rules – generally legally enforceable by suppliers - that set out how contracts are to be awarded are a primary tool for this in most systems, although not all, as is discussed below. For the most part this goal is implemented in these regulatory systems by rules that require procuring entities to hold a competition to choose their contracting partner and regulate how that competition should be conducted, and through the principle of transparency. How these particular principles of competition and transparency help to ensure value for money, as well as their role in serving other objectives of the procurement process, is discussed further below.

Value for money is, of course, an important objective of the private sector as well as of the public sector. However, there are some differences both in the problem of obtaining value for money and in the tools used to address it – although these should not be exaggerated. First, it has sometimes been suggested that obtaining value for money in acquiring goods, works or services may be a greater problem for the public sector than

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<sup>12</sup> Dekel, note 9 above.

for the private sector – in that there is possibly a greater tendency towards inefficiency in the public sector and/or towards other behaviour that could prejudice value for money, notably corruption and national preference. A greater tendency towards inefficiency could derive from the fact that, for example, governments are unlikely to go bankrupt and the procurement officer is less likely to be made redundant<sup>13</sup>. Secondly, it is generally true to say that neither one of the key tools used to address the issue of value for money in obtaining goods, works or services in the public sector, namely legally binding and enforceable rules, nor the actual content of the policy that is followed – such as heavy reliance on formal competitive bidding – are generally shared by the private sector.

The relationship between the objective of the procurement process of obtaining value for money in acquiring goods, works or services and the other objectives is considered below when considering those other objectives and the means for achieving the various objectives. We have already noted that eliminating corruption and opening up procurement to international trade are objectives that directly support value for money since they are directed at practices that detract from obtaining value for money, as well as being concerned with matters additional to value for money. We will also see that to a certain extent policies and tools that support the goal of value for money in acquiring goods, works and services - such as competitive bidding and transparency - are the same policies and tools that support other objectives, and thus there is a complementary relationship between them.

On the other hand, there are also situations in which achieving value for money in the goods, works or services acquired, especially if the focus is on the particular procurement in question, may come into conflict with other goals, and an appropriate balance must be drawn between the two. An example is the case in which a procuring entity receives a bid which does not comply with some formal requirement of the tendering process – for example, is late or does not contain a bid bond in the required form. In this case a principle of equal treatment might suggest that the bid should be rejected – but if the bid is the best one submitted the principle of value for money as applied in the particular transaction might indicate that it should be accepted, as it will provide better value for the procuring entity<sup>14</sup>. Another potential area for conflict is with rules to prevent corruption – as elaborated at below, the rules that are designed to reduce corruption by limiting the discretion of procuring entities, and hence limiting opportunities for abuse to favour a particular supplier – as these may also curtail discretion that could be used to obtain better value for money.

Further, in considering how to achieve value for money often there are also conflicts to be resolved between actions which will achieve value for money in the short term and those based on principles that are designed to promote value for money in the longer term by encouraging suppliers to have confidence in, and participate in the public market. An example can again be given by reference to the issue of late tenders (discussed in more detail in chapter 3 of this text). As well as being an independent objective of the procurement process, the principle of equal treatment can also operate to support other objectives, including supporting value for money by maintaining confidence of tenderers in the procurement process, which will encourage them to tender in the future and hence promote greater value for money. Thus in the case of the late tender referred to above, if rejection of late tenders is considered as giving effect to equal treatment, this can be seen not merely as supporting a separate objective of equal participation but also as supporting value for money in the procurement system as a whole – rather than the individual transaction – by encouraging participation. In this case a conflict can be seen between short term value for money (value in the particular procurement) and value for money overall in the system.

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<sup>13</sup> See Trepte, note 3 above, at pp.77-83.

<sup>14</sup> This kind of case is discussed further in Dekel, note 9 above.

### 1.4.3 Objective 2: integrity - avoiding corruption and conflicts of interest

A second very important objective of many public procurement systems, and of public procurement regulation is to ensure integrity in the system<sup>15</sup>. Integrity refers, first, to the idea that procurement should be carried out without any influence of corruption. Corruption can cover various types of practice. Many such practices involve various forms of collusion between government and bidders, notably:

Awarding contracts on the basis of bribes;
Awarding contracts to firms in which one has a personal interest;
Awarding contracts to firms in which one's friends, family or business acquaintances have an interest; and
Awarding contracts to political supporters (e.g. to firms who have provided financial support; or to regions which have voted for a particular political party).

Such corruption can occur in the execution as well as award of contracts e.g. officials can collude with bidders to allow them to claim extra payments for non-existent work. Obviously states need to have a clear idea and clear rules on which of these practices are, and are not acceptable. (For example, in some countries small gifts between those in business are regarded as "expected" rather than corrupt). It is often said that corruption is more of a problem in public sector procurement than private sector procurement, because of factors such as (in some countries) low wages, and the structure of government<sup>16</sup>.

There is a close and obvious connection and complementary relationship between this second objective of integrity and the first objective of ensuring value for money in acquiring the needed goods, works or services.

First, the award of contracts on the basis of corrupt considerations such as a bribe or personal relationship may prevent authorities achieving value for money in their acquisitions, since it may mean that contracts will not be awarded to the best firms (as often in the case of contracts awarded to family or political supporters) or, even when this

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<sup>15</sup> See further, for example, F. Anechiarico, "Reforms in Procurement Policy and their Prospects", Ch. 9 in S. Arrowsmith and M. Trybus (eds.), *Public Procurement: the Continuing Revolution* (London: Kluwer Law International 2002); F. Anechiarico and J. Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective* (Chicago: University of Chicago Press 1996); S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (London: Kluwer Law International 2000), pp.32-61; International Trade Centre UNCTAD/WTO, *A Framework for Balancing Business and Accountability within a Public Procurement System*; International Trade Centre UNCTAD/GATT, Guide No. 23, *Improving Public Procurement Systems* (1993), Ch. 1; OECD, *Bribery in Public Procurement: Methods, Actors and Counter-measures* (OECD 2007); OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (2005) Chs. 26-34; OECD, *Integrity in Public Procurement: Good Practice from A to Z* (OECD 2007); S. Kelman, *Procurement and Public Management* (Washington: AEI Press 1990), pp.99-100; W. Kovacic, "The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets" (1998) 6 *Supreme Court Economic Review* 201; J. Linarelli, "Corruption in Developing Countries and Economies on Transition: Economic and Legal Perspectives", Ch. 7 in S. Arrowsmith and A. Davies (eds.), *Public Procurement Global Revolution* (London: Kluwer Law International 1998) ; J. Linarelli, "Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspectives", Ch. 14 in S. Arrowsmith and A. Davies (eds.), *Public Procurement Global Revolution* (London: Kluwer Law International 1998); S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge: CUP 1999), Chs. 1-5; I. Shihata, "Corruption: a General Review with an Emphasis on the Role of the World Bank" (1997) 15 *Dickinson Journal of International Law* 451; F. Stapenhurst and P. Langseth "The Role of the Public Administration in Fighting Corruption" (1997) 10 *International Journal of Public Sector Management* 311 ; Transparency International Sourcebook, chapter 12 on Public Procurement; available at <http://www.transparency.org/publications/sourcebook>; P. Trepte, *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Public Procurement* (2005) (paper to OECD Expert Group meeting on Integrity in Public Procurement); W. Wittig, "A Framework for Balancing Business and Accountability within a Public Procurement System: Approaches and Practices of the United States" (2001) 10 *Public Procurement Law Review* 139; C. Yukins, "Integrating Integrity and Procurement: the United Nations Convention against Corruption and the UNCITRAL Model Procurement Law" (2007) 36 *Public Contract Law Journal* 307.

<sup>16</sup> See further Trepte, note 3 above, at pp.7-77.

is the case, the government will not obtain the benefit of the most competitive offer that would be put forward in a fair competition. (It can be noted that where bribery is endemic the contract may often in fact be awarded to the best firm, since the firm with highest profit margin will be able to pay the highest bribe). In addition, corruption scandals may deter firms from bidding for future contracts. The terms obtained by government may also generally be less favourable in a market in which corruption is a problem because contractors doing government work need to add on a premium to take account of the risk of corruption (that may affect them because they are denied contracts that they would have won under fair competition). Thus reducing corruption will often have the result of improving the value for money obtained when acquiring the goods, works or services.

Secondly, to a great extent the same kind of measures are useful to address both the damage to value for money that can occur from a failure to act efficiently and damage to value for money resulting from corruption (and also from other unlawful abuses, such as preferences for national firms in contravention of international trade rules, as discussed further below). Thus competitive bidding and transparency, as discussed at further below, are fundamental tools for addressing corruption as well as many other facets of value for money.

However, whilst it is the case both that achieving value for money is an important reason to provide for integrity in the procurement system, and that the means for doing so are similar to the means used for achieving other aspects of value for money, integrity cannot necessarily be seen only as a step towards value for money – there are many reasons going beyond it why this is an objective of procurement systems. One reason is that it is considered that governments should seek to follow the highest standards of conduct for their own sake, and that individuals should not make profits from public office; another is that it is considered important for the government to set an example as a means of discouraging corruption in the economy more generally, particularly if this is a significant problem in economic life. In countries in which organised crime groups are heavily involved in corrupt practices in public contracts (e.g. New York State in the United States<sup>17</sup>), preventing corruption may also be seen as important in reducing the financial resources of those groups. For these reasons preventing corruption can be seen as an independent objective of procurement regulation, which is not necessarily tied to value for money.

Political considerations probably also help to explain why governments are often particularly concerned to address corruption even if this is not justified on other grounds – governments are likely to suffer political damage if corrupt practices come to light. However, it would be surprising to find these considerations openly articulated, and addressing these political concerns cannot normally be considered a legitimate objective of the procurement system.

So far as the relationship of this objective with equal treatment is concerned, probity can be considered as one aspect of equal treatment in that a decision made for corrupt motives violates that principle – it prevents equal participation of firms in the procurement process for reasons that are wholly without relevance or justification in the process<sup>18</sup>. However, it is justified to treat probity as a separate objective for many reasons, as is discussed in the reading – not least because of the special importance of this consideration and the wide range of special measures taken to address it.

As is the case with the relationship between many of the procurement objectives discussed in this section, the objective of probity may sometimes conflict with other objectives of the system.

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<sup>17</sup> On this see further Anechiarico and Jacobs, note 15 above.

<sup>18</sup> Dekel, note 9 above.

Thus there may sometimes be a tension between the objective of preventing corruption and ensuring efficiency in the administration of the procurement process. For example, requirements for all major contracts to be approved by a special committee, and not just by the contracting officer responsible for the procurement, may cost £500 000 per annum (in terms of extra staff time, paperwork etc). This will always be considered justified if, by deterring corruption, more than £500,000 is saved through obtaining improved value for money. However, if corruption in a particular country is very rare for other reasons and only, say, £100,000 would be lost from corruption, the approval procedure will not be justified financially. The government must then ask whether preventing corruption is so important in its own right for the other reasons given above that financial resources should be spent to prevent it. The desire to promote the non-financial objectives of probity is generally more important for the government than in the private sector.

Whilst to a large extent, as we have noted, ensuring integrity also supports and promotes value for money in acquiring goods, works or services, there are also situations in which there may be a conflict. For example, if value for money were the only concern it might, in a particular system, be appropriate to allow a certain degree of discretion to procuring officers – for example, to allow use of procedures that allow non-price as well as price criteria in evaluating tenders, or to allow a degree of negotiations with tenderers after the submission of initial tenders to allow them to adapt their tenders and enhance value for money after feedback from the procuring entity. However, greater discretion that might produce improved value for money across the whole procurement system (even taking account of corruption) can also open up greater opportunities for corruption than would apply if this discretion were constrained – and for this reason a procurement system might choose to forego value for money to some degree in order to reduce corruption. This issue of transparency versus discretion is discussed further in section 5 below.

It is the view of a number of commentators that – in developed systems at least – preventing corruption is often given more weight than it deserves, or at least that the concrete advantages and disadvantages of anti-corruption measures are not carefully debated. This may be because of the political damage caused by corruption, as mentioned above – it is common to react to isolated corruption scandals by quickly introducing new measures that have immediate popular appeal, but which may not contribute much to addressing the problem and/or may have more disadvantages than benefits, given their adverse effect on other objectives (such as reduced discretion or procedural costs)<sup>19</sup>.

We have so far considered the issue of actual corruption but the concept of integrity, or probity, often embraces not only the prevention of actual corruption but also the goal of preventing any appearance of impropriety. For example, there may be rules that prohibit certain kinds of conflicts of interest or require these interests to be declared. One important reason for this is that it might help prevent corruption by deterring corrupt behaviour and improving detection rates. Such rules also, however, can be seen to support the separate objective of accountability.

In this text we will consider how public procurement laws can help ensure the integrity of the process to an extent, in that we will examine how the problem of corruption is addressed through rules governing the contract award procedure – particularly rules on competition and transparency. It is perhaps the case that procurement award procedures that meet basic standards of competition and transparency have more of a role in addressing opportunistic corruption than systematic corruption<sup>20</sup>. However, addressing corruption in general, including systematic corruption is a particularly complex problem and also needs to be addressed through a whole raft of additional measures, ranging from criminal and disciplinary sanctions, through education measures, to structural reform<sup>21</sup>.

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<sup>19</sup> For a recent example from the US system see Branstetter, "Darleen Druyun: an Evolving Case Study in Corruption, Power and Procurement" (2005) 34 *Public Contracts Law Journal* 443.

<sup>20</sup> Trepte, note 3 above, pp.74-77.

<sup>21</sup> See further the reading in note 15 above.

We should note that corruption may also occur as a result of private sector action, without any collusion on the part of public authorities. One important practice is "collusive tendering" by private firms. Obviously this will prevent effective public contracting and, in particular, attainment of value for money, and states will wish to ensure that effective laws are in place to deal with this kind of problem. (This is usually dealt with by the area of law known as competition law). Another problem is the provision of false information by contractors - for example, concerning their qualifications and experience - to obtain contracts, and fraudulent practices in the execution of contracts - such as billing for services not actually provided to the public (e.g. for non-existent patients under health care contracts).

#### **1.4.4 Objective 3: accountability**

A third objective of many public procurement systems is to ensure accountability in the sense that the system provides means for interested parties to establish whether the government is meeting its objectives. Such interested parties can include, for example, the general public, tenderers, and – under international systems of procurement – other states.

Ensuring that the objectives and rules of the procurement system can be monitored and enforced is one of four dimensions of the general concept of transparency that we discuss in section 5 below. Further, as we explain their transparency in general, including this accountability aspect is important as a means to achieve many of the objectives of a procurement system, including value for money and integrity. However, accountability can also sometimes be considered as a value in its own right, especially in democratic countries. As Dekel states<sup>22</sup> "Whilst [transparency] may play some role in the prevention [of corruption] by making it more difficult for the culprit to get away with it, transparency is of more importance to restore faith in the system for contractors and the taxpayers by allowing them to see exactly what transpires in the government contracting arena".

To the extent that accountability is a separate objective of the procurement system governments may accept costs to accountability mechanisms – for example, costs of publishing information or loss of value for money from reducing discretion – even if these accountability mechanisms do not produce, for example, financial savings or any actual reduction in corrupt activity.

#### **1.4.5 Objective 4: equal opportunities and equal treatment for providers**

Many public procurement systems refer to a principle of the equal treatment of those participating in the system. For example, this is often referred to in the public procurement systems of the United States<sup>23</sup> and it is also a fundamental principle of EU procurement law<sup>24</sup>. In the United Kingdom the government has stated that competition is important not only as an aid to value for money "but because it provides fair access to work paid for by the taxpayer"<sup>25</sup>.

It is important to realise that the concept of equal treatment in public procurement may take on two different roles.

First, equal treatment may serve simply as a means to achieve other objectives of the public procurement system, such as value for money in obtaining goods, works and

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<sup>22</sup> Dekel, note 15 above.

<sup>23</sup> See Dekel, note 15 above.

<sup>24</sup> Joined Cases C-21/03 and C-34/03, *Fabricom v État Belge* [2005] E.C.R. I-1559.

<sup>25</sup> In the 1995 White Paper, *Setting New Standards: a Strategy for Government Procurement*, (1995) Cm.2840.

services, preventing corruption and opening up markets to competition. Thus holding a competition in which all interested firms have an equal opportunity to participate is often the method chosen for seeking out the best terms for the goods, works and services. Requiring that those involved in the competition are treated on an equal basis during the conduct of the competition can help ensure value for money and/or prevent corruption in the procedure in two ways:

- By limiting the opportunities for the procuring entity to make discretionary decisions that could be abused to favour particular firms (for example, a firm that has paid a bribe or – from the perspective of opening up markets – a national firm).
- By encouraging firms to have confidence in the process and thus encouraging the best firms to participate in the procedure.

Secondly, however, in addition to serving as a means to support other procurement objectives, equal treatment may also serve as an objective of the procurement process in its own right. As Dekel has explained:

*"In selecting its business partners, a procuring entity determines who will benefit from the economic advantage inherent in a contractual relationship with it... The fact that the transaction involves public funds or assets, coupled with the fact that Government owes a fiduciary duty to the public at large, obliges the contracting authority to accord all members of the public an equal opportunity to enjoy this public benefit that the government has decided to allocate"<sup>26</sup>.*

Equal treatment may also be seen as an independent objective of procurement systems from another perspective, in that it is a reflection of a more general value adopted in some countries of equal treatment of persons by the administration.

One problem with the equal treatment principle is that it is often not entirely clear in a given system what role it is supposed to play – whether it is merely a means to other objectives or an objective in its own right. Dekel, for example<sup>27</sup>, notes that some US instruments seem to regard the principle as a separate objective, but on the whole whilst the courts treat it as a fundamental (important) principle; it is as a subsidiary one – a means to other ends. Similarly, whilst the UNCITRAL Model Law on Procurement of Goods, Construction and Services lists this as an objective in the preamble to the Model Law, the Guide to Enactment seems to suggest that it is subsidiary to other listed objectives.

There is also potential for conflict between this objective and other objectives, and it is important in deciding how much weight to give equal treatment as an intrinsic value rather than merely instrumental to securing value for money and integrity. This observation also helps to highlight the fact that for a system in which equal treatment is not an intrinsic value, those involved in the system may give it less weight than it is given in a system that does regard it from that perspective: for example, financial considerations may suggest that a late or non-conforming tender should be accepted if it is better value for money than other tenders, but considerations of equal treatment may suggest that it should not. (See further the discussion of these aspects of procurement regulation in chapter 3).

Another situation in which values of equal treatment may conflict with other objectives concerns the decision on whether or not to use open tendering proceedings in which any qualified firm may tender, or to use some form of selective tendering, in which only a limited number of firms are permitted to tender. It may be that from a financial point of view the procuring entity would obtain the best possible offer by inviting merely a limited

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<sup>26</sup> Dekel, note 15 above, p.246.

<sup>27</sup> Dekel, note 15 above.

number of firms, both because that is enough competition to secure the best possible offer and because inviting more would involve extra costs in the process (e.g. costs of assessing tenders) without any benefit. In this case considerations of value for money and an efficient procurement process might suggest open tendering should not be used – but the objective of equal treatment in the sense of equal access to the benefits of government business would suggest that open tendering should be preferred.

What is equal treatment? Clearly the concept of equal treatment does not refer in any system to absolute equality for every person, as this would involve spreading of business amongst all interested regardless of price, quality or ability to provide the goods or services! The essence of the definition of equal treatment in most public procurement systems is, rather, that no distinction should be made between firms except where this is justified based on relevant considerations. For example, in the European Union the equal treatment principle under the procurement directives (which regulate the award of most major contracts in the EU) has been defined as follows in the *Fabricom* case:

*"...the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified"*<sup>28</sup>.

It will be clear that certain matters violate this principle: this will be the case, for example, when decisions are made on the basis of considerations that are illegal under the system in question. For example, if one firm is given a contract rather than another because it has given a bribe, that clearly violates the equal treatment principle. (As we have noted above, to this extent rules against corruption might be regarded as one aspect of the equal treatment principle – but there are also reasons for treating integrity as a separate objective of procurement systems). Similarly, under a procurement system that prohibits discrimination on grounds of nationality, awarding a contract to one firm rather than another on the basis that the former is a national firm would also violate any equal treatment principles.

However, in many cases such definitions cannot be applied automatically to give solutions to a problem, but involve the court or other regulator in making policy decisions on how to balance the principle of equality of treatment with other goals of the procurement process when deciding what is a justification/relevant consideration for different treatment. Under the EU definition above, for example, this is done at two stages – first in deciding who is in a “comparable” position and who is not and, secondly – if two firms are considered to be in comparable position - in deciding whether there are objective grounds for different treatment.

Take, for example, the case of a procedure for complex services which allows discussions between the procuring entity and potential providers based primarily on negotiations and culminating in a best and final offer from those involved, in which a procuring entity has commenced negotiations with four providers. Suppose it quickly becomes apparent in the negotiations that one firm is very unlikely to offer the kind of technical solution that the procuring entity can accept or that its financial terms will be unaffordable. On the one hand, it might be argued that certain objectives of the procurement process favour allowing a final offer from the firm – arguments in favour of this are, in particular, equal treatment as an independent objective (the right to participate in government business), (the small possibility) that it might produce the best offer and the danger of abuse of any discretion that the procuring entity is given to reject certain firms before they have submitted an offer. On the other hand, the objective of an efficient process might suggest the procuring entity should be allowed to reject the firm early on if there will be significant costs to continuing negotiations, which will be wasted. Can the procuring entity decide not to invite that firm to submit a detailed final offer after balancing these different

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<sup>28</sup> Joined Cases C-21/03 and C-34/03, *Fabricom v État Belge* [2005] ECR I-1559, para. 27 of the judgment

considerations – or should this be considered a violation of the principle of equal treatment in the procurement process?

In answering this question under the EU definition of equal treatment the court might say:

that rejection is possible on the basis that the firm that cannot submit a strong offer is not in a comparable position with one that can; or  
that the firms are in a comparable position as both have been invited into negotiations but that there is an objective justification for rejecting one before the final offer stage i.e. cost considerations.

Which view is adopted will essentially depend on how the regulator wishes to give effect to the different policy considerations involved in the procurement process – including the policy of equal treatment as an independent objective or as a means to support other objectives. Simply invoking the concept of equal treatment here does not dictate a particular answer, however.

As noted above, the conclusion reached – for example, in balancing equal treatment and value for money - may in fact depend on whether or not equal treatment is regarded as a separate objective in its own right or merely as a means to support other objectives.

#### **1.4.6 Objective 5: Fair treatment of suppliers**

The fair treatment of suppliers is also sometimes regarded as a separate value in the procurement process. This can involve, for example, concepts of procedural fairness (or “due process”) according to which suppliers have a right to have their case heard before a decision is made that affects them adversely, and/or a right to know the reasons for such decisions – for example, a decision to debar them from government contracts. It may even involve the concept of protection of “rights” – for example, a firm’s right to its reputation.

Some of the rules or procedures associated with the fair treatment of suppliers may, of course, help to support other objectives of the procurement process. Thus allowing a supplier to put its case before being debarred from procurement can improve the quality of debarment decisions and perhaps thus avoid unjustified debarment of a firm that could provide the best value for money; whilst requiring that suppliers are to be given reasons for decisions against them can help improve both the quality of decisions and supplier monitoring of the procurement process (for the benefit of, inter alia, value for money and integrity). More generally fair treatment will encourage the best firms to participate in government procurement, again enhancing value for money. However, as with equal treatment, to the extent that fair treatment is considered an independent value in the procurement process, there may sometimes be a degree of conflict between this value and other objectives, such as value for money and procedural efficiency.

For example, the principle of fair treatment might suggest that a supplier who has invested significant resources in a procurement process (for example, in preparing a tender for a complex project) and then has been excluded because doubts have been raised over its integrity should be allowed to defend itself against these allegations before the contract is awarded, so that it does not lose the chance to compete if the allegations are ill-founded. However, the need for a speedy conclusion of the procurement process in order to ensure the timely acquisition of the goods, works and services may make it difficult to delay the procurement until an appropriate hearing is held.

There is in fact a debate in many legal systems over whether certain standards of fair treatment – such as due process - that apply generally to those dealing with the administration should also be applied to suppliers dealing with the government in the context of public procurement, or whether procurement should be treated as a

“commercial” function that is an exception to general principles of fair dealing that apply to the conduct of the government towards its citizens<sup>29</sup>. To the extent that it is recognised that principles of fair dealing do apply, the difficult issue then arises as to how far to compromise other procurement objectives in particular situations in order to implement these principles of fair dealing in procurement.

### **1.4.7 Objective 6: efficient implementation of industrial, social and environmental policies in procurement**

As we have already noted above, procurement may be used to achieve benefits that go beyond the mere acquisition of these goods, works or services. For example procurement may be used to support the economic development of disadvantaged groups of society or regions of the country, by setting aside some public contracts for those groups or regions; or it may be used to promote government objectives such as fair treatment of workers by denying public contracts to firms that do not comply with specified standards on these matters. Procurement policies of this kind can be industrial, social, environmental or political in nature, and are sometimes referred to generically as “secondary” policies (common terminology in the EU for example), “collateral” policies (US terminology), socio-economic policies, or “horizontal” policies<sup>30</sup>. As with the acquisition of the required goods, works or services, governments will wish to ensure efficiency in the way that horizontal policies are implemented – for example, that it does not pay more than is necessary for the additional of horizontal benefits in the procurement, and that the selected supplier is able to actually deliver any horizontal benefits that it has undertaken to provide. The implementation of such objectives through public procurement may sometimes be supportive of other objectives, or at the very least neutral. An example, of one way in which the implementation of horizontal objectives may support value for money in acquiring goods, works or services is a policy of improving access to procurement for small and medium sized enterprises (SMEs) in procurement by providing training on public procurement procedures or by providing better information – the wider participation that results may result in participation by additional firms leading to better quality tenders and hence improved value for money.

However, more often, implementing horizontal policies will involve a trade-off with other objectives. For example, allowing entities to consider horizontal benefits as well as “commercial” benefits in a procurement may increase the degree of discretion in the procurement process in a way that may make it easier to favour particular firms, to the detriment of the objective of integrity; or may make the procurement process more complex and so increase procedural costs for both the procuring entity and suppliers. It may also have the effect of limiting access to markets for foreign suppliers to the detriment of the objective of opening up markets to trade – for example, a set-aside of a proportion of government contracts for firms in a region of high unemployment in order to increase regional equality in the country will have the effect of shutting out firms from abroad.

This subject of horizontal policies in public procurement is considered further in chapter 9, which is devoted specifically to this subject.

### **1.4.8 Objective 7: opening up public markets to international trade**

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<sup>29</sup> For example, in the United Kingdom see S.Bailey, “Judicial Review of Contracting Decisions” [2007] *Public Law* 444.

<sup>30</sup> S. Arrowsmith and P.Kunzlik (eds), *Social and environmental policies in EC procurement law: new directives and new directions* (2009; Cambridge University Press).

One of the most important developments in public procurement in the last 20 years has been the conclusion instruments - by groups of states or in regional and global organisations - that are designed to open up public procurement to international trade - that is, to provide for foreign suppliers, products and services to have access to the public procurement markets of other states. These instruments either require or encourage countries to implement measures to improve foreign access to their public procurement markets<sup>31</sup>.

Often public procurement policies have been relatively closed to foreign suppliers for various reasons, most notably the fact that governments have deliberately favoured domestic industry in awarding contracts. The development of rules to open up public procurement markets has been part of a general movement towards free trade that has occurred since the Second World War, and the subject of public procurement has become increasingly important in this context as other barriers to trade - such as tariffs and import quotas - have gradually been removed or reduced. The basic rationale for such free trade policies is that opening up markets to foreign competition improves economic prosperity. Underlying this is the theory of comparative advantage elaborated by Ricardo. In brief, this states that both total economic welfare of the free trade group and the welfare of each individual country will be maximised by free trade between the members: such free trade leads each state to specialise in those areas in which it has a comparative advantage, resulting in the most efficient use of resources and thus enhancing wealth<sup>32</sup>.

As we will see in section 8 below, the initial rationale for adopting the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which is considered throughout this text, is to promote trade in procurement through greater harmonisation of procurement procedures. Another key regime at international level is the World Trade Organisation (WTO) rules on public procurement, which seek to open up public procurement markets between WTO members. The main instrument for this in the WTO is the Government Procurement Agreement (GPA). This does not, however, apply to all WTO members but is a plurilateral agreement (i.e. optional for members). This regime, which has in turn been modeled on and served as the inspiration for various regional and bilateral regimes, is considered separately in chapter 10, by way of a case study of this objective of opening up trade in public procurement. There are also many regional trade regimes, including:

1. the European Union regime on public procurement. This seeks to open up procurement markets between the 27 Member States of the EU and also applies, effectively, to a number of other states under agreements concluded with the EU<sup>33</sup>. It is one of the most longstanding regimes, dating back to the 1960s, and the

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<sup>31</sup> R. D. Anderson, A. C. Müller, K. Osei-Lah, J. Pardo De Leon and P. Pelletier, Government Procurement Provisions in Regional Trade Agreements: a Stepping Stone to GPA Accession?, chapter 20 in S. Arrowsmith and R. D. Anderson (ed.), *The WTO Regime on Government Procurement: Challenge and Reform* (forthcoming CUP).

<sup>32</sup> On this theory in general and discussion in the specific context of public procurement see S. Arrowsmith, *Government Procurement in the WTO* (London: Kluwer Law International 2003), chapter 1; Cecchini, *The European Challenge: the Benefits of a Single Market*, section 3, 16-21 (1988) (also extracted in S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (London: Kluwer Law International 2000)); F. Trionfetti, "Home biased government procurement and international trade", in S. Arrowsmith and M. Trybus (eds.), *Public Procurement: the Continuing Revolution* (London: Kluwer Law International 2002); S. Evenett and B. Hoekman, "Government Procurement of Services and Multilateral Disciplines", ch.6 in P. Sauvé and R. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Washington: Brookings Institution Press 2000); Mattoo, "The Government Procurement Agreement: Implications of Economic Theory" (1996) 19 *World Economy* 695; F. Sseneoga, "Examining Discriminatory Procurement Practices in Developing Countries" (2006) 6 *Journal of Public Procurement* 218.

<sup>33</sup> See further S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (London: Sweet & Maxwell 2005); P. Trepte, *Public Procurement in the EU: a Practitioner's Guide* (Oxford: OUP 2007); J.M. Heblly (ed.), *European Public Procurement: History of the 'Classic' Directive 2004/18/EC* (2007, Kluwer Law International); S.E. Hjelmborg and P.S. Jakobsen, *Public Procurement Law - the EU directive in public contracts* (Copenhagen: Djøf 2006); R. Nielsen and S. Treumer (eds), *The New EU Public Procurement Directives* (Copenhagen: Djøf 2005); C. Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford: OUP 2006); C. Bovis, *Public Procurement in the European Union* (Basingstoke: Palgrave MacMillan 2005).

most stringent and has influenced many other procurement regimes, including that of the World Trade Organisation;

2. The North American Free Trade Agreement (NAFTA) chapter 10, which opens up procurement between NAFTA states in North and South America<sup>34</sup>;
3. MERCOSUR, a trade agreement between countries in South America, also now contains rules on public procurement<sup>35</sup>;
4. COMESA. In the context of COMESA a number of African states have agreed (although this agreement is non-binding) on a degree of harmonisation of their public procurement rules on the basis that common procedures will per se encourage trade. The agreed rules are not, however, legally binding in international law like most of the above but – like APEC – involve a non-binding agreement<sup>36</sup>.

There are a number of different means employed by trade rules on public procurement to achieve their objectives of opening up markets which include, although are not limited to, the following. Individual trade regimes may use any one or more of these approaches.

1. **Prohibiting discrimination against the suppliers, goods and services of other countries.** Many trade agreements including the World Trade Organisation's Government Procurement Agreement (GPA) and the European Community regime prohibit discrimination against foreign industry, so that in principle procurement cannot be used to support and promote domestic industry. The degree to which such prohibitions operate varies – the EU is an advanced trade regime that has been able to adopt legally binding rules that prohibit discrimination in all public procurement in principle, but other regimes – including that of the WTO, as explained in chapter 10 – prohibit discrimination only for specific procurement that parties have agreed, in order to open up to their trading partners. The UNCITRAL Model Law on procurement also provides for a general rule against discrimination, although – pragmatically - it also recognises that states may want to make exceptions.
2. **Requiring the adoption of transparent procedures for awarding procurement contracts.** Many regimes, including those of the WTO and EU regimes also place a great deal of emphasis on improving transparency in government procurement. Transparency is both an objective in its own right, since lack of transparency can be a barrier to trade, and a means of ensuring that there is no discrimination, since where transparent procedures are applied it is difficult to disguise discrimination. Both EU and WTO rules have been based mainly on the latter function of transparency. To secure transparency in these regimes – and others such as NAFTA - both lay down detailed procedures which must be followed in making major contract awards, and provide also for means of enforcing these rules.
3. **Standardisation (harmonisation) of procedures for awarding public procurement contracts.** A degree of standardisation in public procurement procedures can also help international trade, since suppliers are able to deal with familiar procedures. A degree of standardisation is a by-product of international trade agreements on procurement that set out a framework for transparent award procedures, such as those of the EU and WTO, although it should be noted that these agreements do not seek to promote standardisation per se. On the other hand, as already mentioned, the UNCITRAL Model Law on procurement for states seeking to improve or reform public procurement systems, in fact has as its main

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<sup>34</sup> S. Greenwold, "The Government Procurement Chapter of the North American Free Trade Agreement" (1994) 3 P.P.L.R. 129.

<sup>35</sup> G.Bizai, "Mercosur and Public Procurement" (2000) 9 P.P.L.R. CS59;

<sup>36</sup> On this and other agreements in Africa see E. Nwogwugwu, "Towards the Harmonisation of International Procurement Policies and Practices" (2005) 14 P.P.L.R. 131.

objective the enhancement of international trade through increased standardisation of national procedures for awarding contracts.

4. **Addressing corruption.** One barrier to trade in public procurement is the influence of corruption and patronage. The main way in which corruption has been addressed in international trade rules so far is through international agreements that seek to "level the playing field" by rules against bribery by those seeking contracts abroad, so that firms from all countries are treated equally in this respect, rather than being subject only to the level of prohibition applied by their own domestic systems (which used to vary substantially). The most important international instrument in this respect is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, and its various supplementary instruments<sup>37</sup>. In addition, it is worth mentioning that the increased transparency provided by some trade agreements, such as those of the EU and WTO, can have an impact on corruption. However, that is not the reason they have been adopted in those current regimes. On the other hand, the recent revised text of the WTO's GPA (which has not yet been formally adopted: see further chapter 7) expressly refers in its preamble to the role of transparency in addressing corruption and conflicts of interest, indicating that addressing these matters might be seen as an objective of the new agreements ("Recognizing the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner, and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption"...: see Revision of the agreement on government procurement as at 8 December 2006 (GPA/W/297), 11 December 2006, available at [www.wto.org](http://www.wto.org)). It is also worth mentioning that opening up procurement to international trade can help address corruption and collusion as a result of broadening the number of suppliers in the market so as to make such practices more difficult to operate. This is important for some countries and markets.

The relationship between trade rules and other procurement objectives is quite complex.

To a very large extent the objectives of opening up procurement to trade and value for money in acquiring goods, works and services are complementary<sup>38</sup>. Thus opening up

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<sup>37</sup> There is an extensive literature on this subject: see, for example; B. Earle, "The United States Foreign Corrupt Practices Act and the OECD Anti-bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument" (1996) 14 *Dickinson Journal of International Law* 207; N. Ehlermann-Cache, "Fighting Corruption in International Business Transactions; Impact on Public Procurement" (2006) 15 *Public Procurement Law Review* NA195; K. Elliott (ed.), *Corruption and the Global Economy* (Washington: Institute for International Economics 1996); D. Gantz, "Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus" (1998) 18 *Northwestern Journal of International Law and Business* 457; B. Harms, "Holding Public Officials Accountable in the International Realm: a New Multi-layered Strategy to Combat Corruption" (2000) 33 *Cornell International Law Journal* 159; M. Murphy, "International Bribery: An Example of an Unfair Trade Practice?" (1995) 21 *Brook Journal of International Law* 385; P. Nichols, "Are Extra-territorial Restrictions on Bribery a Viable and Desirable International Policy Goal under the Global Conditions of the Late Twentieth Century?" (1999) 20 *Michigan Journal of International Law* 451; P. Nichols, "Regulating Transnational Bribery in Times of Globalization and Fragmentation" (1999) 24 *Yale Journal of International Law Journal* 257; P. Nichols, "The Myth of Anti-bribery Laws as Transnational Intrusion" (2000) 33 *Cornell International Law Journal* 627; S. Salbu, "A Delicate Balance: Legislation, Institutional Change and Trans-national Bribery" (2000) 33 *Cornell International Law Journal* 657; S. Salbu, "Extra-territorial Restriction of Bribery: A Premature Evocation of the Normative Global Village" (1999) 24 *Yale International Law Journal* 223; S. Salbu, "The Foreign Corrupt Practices Act as a Threat to Global Harmony" (1999) 20 *Michigan Journal of International Law* 419; K. Surjadinata, "Revisiting Corrupt Practices from a Market Perspective" 12 *Emory International Law Review* 1021; R. Zedalis, "How does the New OECD Convention on Bribery Stack up Against the Foreign Corrupt Practices Act?" (1998) 32 *Journal of World Trade* 167; R. Zedalis, "Internationalizing Prohibitions on Foreign Corrupt Practices" (1997) 31 *Journal of World Trade* 45; N. Zucker Boswell, "An Emerging Consensus on Controlling Corruption" (1997) 18 *University of Pennsylvania Journal of International Economic Law* 1165.

<sup>38</sup> S.Arrowsmith "The National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?", in *Gospodarka Administracja Samorząd*, ed. H.Olszewskiego and B.Popowskiej (1997), 9; also published in *Public Procurement Global Revolution*, S.Arrowsmith and A.Davies eds. (Kluwer 1998), 1. See also F. Neumayr, "Value for Money v. Equal Treatment: The Relationship Between the Seemingly Overriding National

markets to trade leads to cheaper/better value purchases by government for various reasons, including the benefit of purchasing from better-value foreign suppliers and the stimulus to domestic suppliers to improve their performance. Further, some of the specific means listed above for achieving open markets generally support value for money in other ways: thus increased transparency has the effect not only of allowing the monitoring of non-discrimination rules to the benefit of foreign suppliers but also of reducing corruption, of providing better information for domestic firms etc, which can lead to better value for money.

However, there is also a potential for conflict between opening up markets to trade and the ability of particular government procuring entities to obtain value for money. For example, as Arrowsmith has argued<sup>39</sup>, the extent of transparency needed to prevent discrimination against foreign suppliers may exceed what is needed to ensure value for money in a particular procurement system, and may imply restrictions on the discretion of procuring entities (for example, on entering into negotiations with suppliers) that are actually detrimental to value for money in the context of a particular national procurement system. As well as conflict with the value for money objective there is also the possibility of conflict with the goal of procedural efficiency. For example, international regimes may require that information is made available in foreign languages in order to promote international trade, even though the direct financial benefits of increased participation in terms of better value for money for the procuring entity do not justify the increased costs involved. Westring has criticised the contents of the rules on the Model Law on awarding contracts from this perspective, as involving an excessive focus on facilitating foreign access to procurement at the expense of the immediate interests of public procuring entities<sup>40</sup>. Finally, we should note that one of most controversial aspects of trade rules on procurement concerns their impact on the government's ability to use procurement to promote "horizontal" objectives, including social and economic objectives. Of course, curtailing the ability of governments to use procurement as a tool to promote domestic industry is the very rationale of trade rules, and clearly such rules inevitably have a restrictive effect on the government's ability to do this. However, many horizontal policies in procurement are not concerned merely with protecting national industry against competition contrary to the very rationale of trade rules, but have wider and perfectly legitimate objectives. Even these objectives that are recognised as legitimate in the eyes of the trade system may be adversely affected by the various rules designed to open up trade. For example, as already noted above, a policy of reserving contracts for firms in poor regions in order to increase quality between regions and avoid political unrest may conflict with a rule not to discriminate against foreign suppliers, since it will exclude most or all foreign suppliers. Horizontal policies may also potentially be affected by transparency rules. In these situations of conflict it may be necessary to consider how far to allow qualifications or exceptions to the basic rules to accommodate horizontal policies. The regimes of the EU and WTO have often been criticised for unduly favouring open markets when seeking to balance their open market policies with national governments' interests in using procurement for horizontal objectives<sup>41</sup>.

#### **1.4.9 Objective 8: Efficiency in the procurement process**

A final goal of any procurement system is to ensure that the procurement process itself is carried out efficiently. This requires that the process is carried out without unnecessary or

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Rationale for Regulating Public Procurement and the Fundamental EC Principle of Equality of Treatment" (2002) 11 *Public Procurement Law Review* 215.

<sup>39</sup> For example, Arrowsmith, "The EC procurement directives, national procurement policies and better governance: the case for a new approach" (2002) 27 *European Law Review* 3.

<sup>40</sup> Westring, "Multilateral and Unilateral Procurement Regimes: to which Camp does the Model Law Belong?" (1994) 3 *Public Procurement Law Review* 142.

<sup>41</sup> See, for example, in the context of EU law S. Arrowsmith and P.Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directive and New Directions* (2009; CUP), chapters 1-4; C. McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP; 2007); J.M. Fernandez Martin, *The EC Public Procurement Rules: A Critical Analysis* (Oxford: Clarendon Press 1996), chapters 2 and 3.

disproportionate delay or waste of resources for the procuring entity, and also without unreasonable costs for suppliers.

To a certain extent this is complementary to other goals – good suppliers will be more willing to participate in an efficient process and this can produce better value for money. We have already observed above, however, that some trade-off is necessary between this goal and other objectives of the process. For example, both the objective of value for money in acquiring the goods, works or services and the objective of equal treatment (in the sense of equal access to the opportunities of government business) might suggest that contracts should generally be awarded by open tender in which any qualified firm may participate; but the costs of submitting and evaluating a large number of tenders may be considered to be disproportionate to any benefits to these objectives, with the result that a selective tendering procedure (limited to invited firms only) is considered more appropriate.

## **1.5 Key principles for implementing procurement objectives: transparency, competition and equal treatment<sup>42</sup>**

### **1.5.1 Introduction**

There are three important principles that are found in most regulatory systems on public procurement. Two of these principles are generally not, however, considered ultimate objectives of public procurement policy but a means used to achieve one or more of the objectives outlined in section 4 above. These are the principles of:

- Transparency
- Competition

A third principle is that of equal treatment. As we have already discussed in section 4 above, this can be both a separate objective of the system and/or a means for achieving other objectives.

In some cases there can be a conflict between upholding these principles as a means to achieve the objectives of the procurement system in the longer term, and implementing an objective in the particular procurement. For example, allowing a tenderer to improve a tender once the deadline for tenders has passed may allow a procuring entity to get better value for money in the particular procurement – but this is generally prohibited because it violates the principles of equal treatment and transparency which are considered to promote value for money in the longer term<sup>43</sup>.

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<sup>42</sup> See further S. Kelman, "Remaking Federal Procurement" (2002) 31 *Public Contract Law Journal* 581; S. Kelman, *Procurement and Public Management* (Washington: AEI Press 1990); S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (London: Kluwer Law International 2000), p.72 *et seq*; S. Arrowsmith, "The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach" (2002) 27 *European Law Review* 3; S. Schooner, "Commercial Purchasing: the Chasm between the United States Government's Evolving Policy and Practice", Ch. 8 in S. Arrowsmith and M. Trybus (eds.), *Public Procurement: the Continuing Revolution* (London: Kluwer Law International 2002); S. Schooner, "Fear of Oversight: the Fundamental Failure of Businesslike Government" (2001) 50 *American University Law Review* 627; J. Schwartz, "Regulation and Deregulation in Public Procurement Law Reform in the United States", Chap. 8 in G. Piga and K. Thai (eds.), *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing* (Boca Rato: PRAcademics Press 2007); P. Trepte, *Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Public Procurement* (2005) (paper to OECD Expert Group meeting on Integrity in Public Procurement); C. Vacketta, "Lessons from the Commercial Marketplace" (2002) 11 *Public Procurement Law Review* 126; W. Wittig, "A Framework for Balancing Business and Accountability within a Public Procurement System: Approaches and Practices of the United States" (2001) 10 *Public Procurement Law Review* 139.

<sup>43</sup> On the subject of late tenders see further chapter 3, section 1.8.

## 1.5.2 Transparency

The concept of transparency is important in many public procurement regimes and is mentioned as one of the goals of the Model Law (see the preamble to the Model Law, item (f)). Broadly speaking the concept refers to the idea of openness – but it has rarely been precisely defined. Arrowsmith, Linarelli and Wallace have suggested that the concept can in fact be broken down into four distinct aspects, as follows<sup>44</sup>.

1. **Publicity for contract opportunities.** This is reflected in the UNCITRAL Model Law on procurement in, for example, requirements for a public advertisement of contract opportunities under many procurement methods, including the general method of tendering for goods and works: see chapter 3, section 3.1.3.
2. **Publicity for the rules governing each procedure.** This involves both publicity for the general regulatory rules of the system and disclosure to suppliers of the specific rules laid down for a particular procurement. The former is reflected in the requirement under the UNCITRAL Model Law to make procurement laws and administrative regulations publicly accessible (Article 5); the latter is reflected in, for example, a general requirement to disclose the award criteria for each procurement (see chapter 3, section 3.1.10 below).
3. **A principle of rule-based decision-making that limits the discretion of procuring entities or officers.** Requirements to formulate and publish the rules of the particular award procedure – such as the award criteria to be used – also relate to this aspect, as they not only ensure publicity but also constrain discretion. Rigid limits on discretion are a particular aspect of public sector award procedures and can be seen to have several purposes. One is to safeguard against poor decision-making – laying down rules about how the process should be conducted rather than relying on individuals to make decisions on the facts of each case can help ensure that procuring officers make appropriate decisions – on when to use tendering and when to use other methods – that are based on the accumulated wisdom of experience, as embedded in the regulatory rules. Another is to safeguard against abuse – rule-based decision-making and limited discretion ensures that decisions can be better monitored to prevent decisions being made on the basis of corrupt motives or (where this is prohibited by the system) to favour national or local suppliers. Thus, for example, if the criteria for awarding contracts are formulated, it is not possible for the procuring officer to state retrospectively criteria that would work in favour of its own favoured bidder in order to ensure that bidder is successful.
4. **The possibility for verification of the fact that the rules have been followed and for enforcement where they have not.** The former is assisted of course by rule-based decision-making. It can also be supported by further requirements such as obligations to provide specific tenderers with reasons why they have been rejected or requirements to keep a record of and/or publicise the reasons for certain decisions, such as a decision to dispense with open tendering (which, as we will see in chapter 3, is generally required under the Model Law).

Each of these aspects may fulfil one or more of the objectives referred to in section 4 above. For example:

- Publicity for contract opportunities obviously supports value for money by ensuring that the best suppliers know about an opportunity, and helps open up contracts to trade when publicity is required in a form accessible to foreign supplies.

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<sup>44</sup> S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (London: Kluwer Law International 2000), pp.72-73.

- Publicity for the rules of each procedure, such as the award criteria, helps ensure that tenderers submit tenders that best match the procuring entity's priorities, thus ensuring better value tenders.
- Limits on discretion help prevent decisions based on illegitimate considerations, such as decisions based on corrupt motives (thus supporting the objective of integrity) or decisions that favour national suppliers (thus such limits are often found in agreements concerned with opening up procurement to trade such as the EU and WTO regimes). Eliminating the possibility for decisions based on these motives will also enhance value for money. Such limits also help maintain the confidence of contractors in the system, encouraging participation and thus better value for money. The combination of publicity for the applicable rules and the existence of substantive limits on discretion also promote the objective of accountability. (Accountability as an objective and transparency as a tool are closely linked but it is important to separate the end and the means here, since transparency is also a means to promote many other objectives).

However, whilst transparency is a very important value in public procurement, it is important to realise that it can also have costs and can in certain ways detract from, as well as support, public procurement objectives. One important aspect of this issue has been neatly put by Kelman as follows<sup>45</sup>:

*"As a strategy of organizational design, rules have a cautious character. When we design organizations based on rules, we guard against disaster, but at the cost of stifling excellence.....Government officials deprived of discretion which could produce misbehaviour are at the same time deprived of discretion that could call forth outstanding achievement".*

Examples of ways in which transparency rules may hinder the attainment of procurement objectives have been highlighted by Arrowsmith, for example, in the context of the EU procurement system (footnotes omitted)<sup>46</sup>:

*"Thus, for example, requirements for a competition may help ensure that decisions are not influenced by corrupt or discriminatory motives or based on poor market information. However, they may also preclude a better deal than could be had, for example, from snapping up an exceptional bargain through a liquidation sale or promotional offer. Competition requirements also preclude "partnering" relationships extending over more than one contract, a strategy which may produce long term benefits such as an incentive to excellent performance and co-operation in developing new products. Strict competition requirements with only limited exceptions based on verifiable criteria, as found in the directives and many national laws, may lead to more commercial procurement for those cases in which corruption, discrimination or bad judgement would otherwise have led to an abusive or unwise choice - the "disaster" Kelman refers to. However, they may produce a less commercial result when, without the requirement, the particular (honest and competent) purchaser would have obtained a more advantageous deal through other means - the "excellent" result.*

*..... Transparency can also affect commercial objectives by increasing costs. An example is the greater preparation and evaluation costs of using open procedures. Requiring complete tenders that can be accepted or rejected without discussion also adds greatly to participation and assessment costs, especially in complex projects. (A recent United Kingdom study found that bidding costs on public projects were typically 10-50% higher than on comparable private sector projects). The bureaucracy of transparency rules can also deter competitive firms .....*".

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<sup>45</sup> S. Kelman, *Procurement and Public Management* (1990), p.28.

<sup>46</sup> S. Arrowsmith, "The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach" (2002) 27 *European Law Review* 3

One of most difficult issues for procurement policy – in both public and private sectors - is to determine the appropriate balance between using rules to control the behaviour of individual agents of the procurement system (the procuring officers) and allowing them discretion. This issue will reoccur throughout this text as we consider the kind of specific rules that are laid down to govern procurement award procedures, the choices that must be made in deciding how to regulate public procurement, and the choices that have been made in the context of the UNCITRAL Model Law on procurement<sup>47</sup>.

As a generalisation, procuring officers in the private sector tend to be given more discretion than procuring officers in the public sector, whose behaviour is closely controlled by regulatory provisions laid down by others. (Note that the question of the degree of discretion given is a different question from that of the nature of the rules that set the boundaries of the discretion – where there is also a difference between the public and private sectors in that the boundaries for the former are generally set by law). Trepte considers that the main reason for this difference is the difference between the organisational character of the public and private sectors – this he explains as follows<sup>48</sup>:

*"Procurement regulation does not seek to impose private practices on public authorities but to address the organisational character of those authorities through the imposition of competitive bidding. The availability of direct contracting in the hands of an unmonitored agent with a large amount of discretion may not achieve the same result as the use of that procedure by an employee of a private company whose achievement may be carefully and accurately monitored by a commercial yardstick. Private companies generally have a much more direct influence on their employees, greater control over employment conditions and greater flexibility in the incentive mechanisms they may use to ensure that employees work in the best interests of the company."*

There may also, however, be a number of other explanations for why there is often more limited discretion in public procurement than private procurement – for example, the greater importance public procurement systems place on the value of reducing corruption as an independent objective and on accountability for decision-making.

### 1.5.3 Competition

A second principle followed in many procurement systems as a key means to achieve various objectives of the system is competition<sup>49</sup>.

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<sup>47</sup> On the way in which this balance is struck under the UNCITRAL Model Law on procurement see M. Dischendorfer, "The UNCITRAL Model Law on Procurement: How Does it Reconcile the Theoretical Goal of Total Objectivity with the Practical Requirement for Some Degree of Subjectivity?" (2003) 12 *Public Procurement Law Review* 100. In addition to the works already mentioned, see on this subject also S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (London: Kluwer Law International 2000), Ch. 2, section III ("Regulatory Strategy"); P. Bajari and S. Tadelis, "Incentives and award procedures: competitive tendering versus negotiations in procurement", Ch. 5 in N. Dimitri, G. Piga and G. Spagnolo (eds.), *Handbook of Procurement* (Cambridge: CUP 2006); S. Kelman, "Remaking Federal Procurement" (2002) 31 *Public Contract Law Journal* 581; J. Pagnato, "Assessing Federal Procurement Reform: has the Pendulum Stopped Swinging?" (2003) 3 *Journal of Public Procurement* 145; S. Schooner, "Commercial Purchasing: the Chasm between the United States Government's Evolving Policy and Practice", Ch. 8 in S. Arrowsmith and M. Trybus (eds.), *Public Procurement: the Continuing Revolution* (London: Kluwer Law International 2002); S. Schooner, "Fear of Oversight: the Fundamental Failure of Businesslike Government" (2001) 50 *American University Law Review* 627; S. Schooner and C. Yukins, "Model Behaviour? Anecdotal Evidence of Evolving Commercial Public Procurement Practices and Trade Policy" (2003) 9 *International Trade Law and Regulation* 4; J. Schwartz, "Regulation and Deregulation in Public Procurement Law Reform in the United States", Chap. 8 in G. Piga and K. Thai (eds.), *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing* (Boca Rato: PRAcademics Press 2007).

<sup>48</sup> Trepte, note 3 above, p.81.

<sup>49</sup> The role of competition, and of different types of competition in public procurement, is considered in detail by Trepte, note 3 above, pp.85-89.

Awarding contracts through some kind of competition between suppliers to both choose the supplier and establish key terms of the contract is a principle used, first, to ensure that the government obtains the best terms that it can for the contract – relating both to the goods, works and services themselves and to any horizontal objectives of the procurement. This is in essence because the pressure of competition from other firms induces each bidder to put forward the best offer that it can, in order to win the contract. From the perspective of international trade, competition in public procurement can also contribute to the proper functioning of the international market.

Secondly, holding a specific competition between suppliers for procurement is also an approach that can inject a significant degree of transparency (in all its aspects) into the procurement process – thus supporting the various objectives that are promoted by the transparency principle, as we discussed in the previous section.

Competition does, however, sometimes come with costs – for example, the costs of evaluating a large number of tenders in an open competition, or the time involved. Whether to hold a competition and what kind of competition to hold thus involves balancing a number of different considerations. These issues are considered further in the remaining chapters of this book, including in chapter 2 on procurement methods where we consider, *inter alia*, when it may be justified to dispense with competitive procedures altogether, even for major contracts.

## **1.6 The purpose and nature of regulatory rules in the public sector**

As a general principle, the approach to controlling public procurement is rather different from the approach to private-sector procurement in a number of ways.

First, the conduct of public procurement is generally governed by controls that take the form of formal regulatory rules (for example, those requiring competitive tendering).

Often these are legally binding on procuring entities and procuring officers to whom they are addressed, and are also often legally enforceable by interested persons - which often include other suppliers.

Secondly, the means used to achieve the objectives of private sector procurement, and hence the content of any rules governing the behaviour of procuring officers (which in the private sector may be set by the procuring organisation to control its agents), are often different from those of the public sector. The principles of transparency and competition that play such a prominent role in public procurement are not given so much emphasis in the private sector. Thus, often procuring officers in the public sector are given more limited discretion in many situations than their private sector counterparts. In general – although obviously there are exceptions and qualifications – it is widely agreed that formal open competitive tendering is used less in the private sector than the public sector, with the private sector relying more than the public sector, for example, on more flexible competitive procedures that leave room for negotiation (when a competition is held) and on developing close relationships with specific known suppliers (“partnering”). (In the public sector this is generally precluded by the fact that formal competitive procedures are the norm to choose a supplier and direct contracting with a known supplier is allowed only in very exceptional cases – see chapter 2 below). Limiting discretion, as we have seen, both i) guards against poor decision-making by ensuring that procuring officers follow a strategy based on the collective wisdom of the organisation (as embodied in the rules) and ii) prevents abuse to favour specific suppliers – and thus ensures that the interests of the principal (the government) are implemented by the agent (the procuring officer).

These points are connected in that the more formal the award process and the less the discretion afforded to procurement officers the more appropriate it is to adopt an approach based on rules.

The use of legal rules that impose tight limits on discretion in public sector procurement is often “explained” by reference to the need to ensure proper spending of taxpayers’ money or the integrity of the procurement system. This merely asserts, however, that value for money and integrity are objectives of the system and does not fully explain why regulation is used as a tool to achieve those objectives, nor the form that regulation takes (with its emphasis on transparency and competition). Further factors are needed to explain why public sector procurement is different from private sector procurement which – like public sector procurement – has the attainment of value for money, for example, as one of its objectives. Some reasons why this might be the case perhaps include: the organisational differences between public and private sector<sup>50</sup> and the impact of commercial pressures in the private sector as a means to ensure efficient purchasing; political pressures on government that may require formal rules to eliminate pressure to use procurement for party political gain or national preference; and the different goals, or emphasis given to those goals in the public sector (the importance of objective such as integrity and accountability make a high level of transparency a more suitable instrument for achieving the optimum balance between different objectives than in a system where value for money is given primary emphasis).

Whilst often procurement in the public sector is regulated by legal rules, this is not the case in all countries, and for many it has been a recent development.

For example, in the United Kingdom, particularly in central government, controls over procurement policy – such as requirements for competition – have been applied predominantly through administrative directions and guidelines from the Treasury, which are neither enforceable by aggrieved providers nor even legally binding. These are supplemented by internal rules and policies adopted by the procuring entities themselves. A substantial system of legal rules has been adopted in the United Kingdom only from the 1990s as a result of the requirements of European Union procurement law. Even now legal and enforceable rules are very largely confined in the UK to those required by the EU: other matters continue to be outside the scope of legal rules.

This is an approach that has been followed in many other common law countries and remains in some - although procurement in the United States, for example, has been subject to substantial legal regulation for a long time, and other common law countries have changed their approach as a result of accession to trade agreements or pressure for reform from the World Banks and other development banks.

The UNCITRAL Model Law on procurement that will be studied in this text assumes that states will regulate procurement through legally binding rules (and also suggests that there should be some form of supplier review to ensure compliance with those rules: see chapter 8). However, even countries that do not adopt legal and enforceable rules on public procurement will make use of rules of some kind to govern the discretion of their procuring officers, whether set at central level – for example, guidelines laid down centrally for all government departments – or at the level of the procuring entity itself. Even if the form of regulation contemplated by the Model Law – legally binding (and generally enforceable) provisions - is not followed, the content of the rules in the Model Law (on matters such as when a competition should be held, how to treat late tenders etc) can provide valuable guidance in the development of the state/entity’s procurement policy.

## **1.7 The diversity of public procurement systems**

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<sup>50</sup> See, for example, Trepte, note 3 above.

There is some debate over the extent to which harmonisation of regulatory rules on public procurement is possible or desirable. This is a particularly important issue in practice in the context of international trade agreements, which as we have seen often lay down a system of common transparency rules for a number of different states. A question that arises is how detailed these rules should be and how much discretion should be left to individual states.

Perhaps the predominant view, espoused in Arrowsmith, Linarelli and Wallace, and also by Trepte, is that different rules are necessary to some degree. As stated by Trepte, "Procurement systems are not to be analysed or criticised by reference to some universally acceptable and perfect procurement law; they are to be analysed in their context"<sup>51</sup>. That there is no "single appropriate model" is a central thesis of his book (at p.58). The acceptance of the necessity of divergence is also recognised in the UNCITRAL Model Law, which is discussed in section 8 below – despite the fact that it is through the very fact of harmonisation of procurement procedures between states (and not merely the creation of transparent regimes) that UNCITRAL seeks to promote international trade. Factors that may be considered to justify differences in approach include:

- Different values in the system, reflected in the different weight given to various procurement objectives<sup>52</sup> – for example, the importance of accountability or of using procurement to promote horizontal policies;
- Different economic and social conditions, such as different levels of corruption or different levels of competition in the national market;
- Different levels of training and skills of procurement personnel.

In practice there has been to a significant degree a trend towards harmonisation of public procurement systems between different countries, in part a result of the adoption of international trade instruments that impose a level of common procedures on states and of the influence of the UNCITRAL Model Law that provides a model for reform used in many countries<sup>53</sup>. The various development banks that require their own procurement guidelines to be used for aid-funded procurement in developing countries have also made substantial progress in harmonising their guidelines, which supports this tendency towards harmonisation. On the other hand, the World Bank, supported also by some of the other development banks, has recently adopted a policy of moving towards allowing developing countries to rely on use of their own procurement systems rather than World Bank guidelines for such aid-funded procurement, a policy that tends towards divergence between systems, although providing for greater harmonisation of procedures within countries (since the same – national – procurement rules can then be used for aid-funded and for other procurement)<sup>54</sup>.

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<sup>51</sup> Trepte, note 3 above, p.48.

<sup>52</sup> Dekel, on the other hand, note 15 above appears to take a more rigid view, proposing a hierarchy of objectives that he arguably regards as universally valid.

<sup>53</sup> For discussion see E. Nwogwugwu, "Towards the Harmonisation of International Procurement Policies and Practices" (2005) 14 P.P.L.R. 131; S. Schooner and C. Yukins, "Incrementalism: eroding the impediments to a global public procurement market" (2007) 23 *Georgetown Journal of International Law* 529.

<sup>54</sup> See, for example, C. L. Pallas and J. Wood, "The World Bank's Use of Country Systems for Procurement: a Good Idea Gone Bad?" (2009) 27 *Development Policy Review* 215.

## 1.8 Introduction to the UNCITRAL Model Law on Procurement of Goods, Construction and Services

### 1.8.1 The Model Law<sup>55</sup>

This book will consider problems relating to regulation of public procurement by reference to, in particular, the Model Law on Procurement of Goods, Construction and Services adopted by UNCITRAL (the United Nations Commission on International Trade Law). This Model Law provides a template for the design and development of regulatory rules on public procurement, drawing on global experiences in the past and current regulation of procurement practices. In this respect it has two important functions: it both avoids the need for states to reinvent the wheel by designing or reforming procurement regimes "from scratch" and it also helps them to improve the quality of procurement legislation by drawing on the collective global experience of regulation in this field.

UNCITRAL first adopted a Model Law on procurement in 1993. The original version dealt only with goods and construction. However a new Model Law was adopted in 1994 to take in services also, which had been omitted from the original Model Law in order to allow the work on goods and construction to be brought to a rapid conclusion.

The Model is designed to help states reform or develop their public procurement systems. UNCITRAL, as its name suggests, is actually an organisation concerned with promoting trade, and the rationale for adopting the Model Law – as with the adoption of other UNCITRAL instruments – was that trade with governments will be improved if countries move towards a more standardised approach to public procurement. Adopting provisions based on the Model Law can also help states accede to international trade agreements for opening up procurement. However, the main effect of the law has been to help states in achieving their domestic procurement objectives of value for money, efficiency, probity etc.<sup>56</sup>.

The Model Law is purely a model to assist states – it is not a legally binding document in any way – and states are free to accept or reject bits of the Model as they wish. Even if states accept most of the provisions in it, it is envisaged that additional regulations will be needed to fill out the details of the Law and to adapt it to the particular state: for example, to state the thresholds at which informal procedure such as the "request for quotations" (see below) should apply. The Model Law is intended only to provide a framework for regulation of procurement and not a complete and comprehensive code. When the Model Law was adopted it was envisaged that it would be used mainly by developing countries. Its main influence was initially felt in Eastern and Central Europe,

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<sup>55</sup> See further S. Arrowsmith and C. Nicholas, "The UNCITRAL Model Law on Procurement: Past, Present and Future", chapter 1 in Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West); S. Arrowsmith, "Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard" (2004) 53 *International and Comparative Law Quarterly* 17; A. Beviglia-Zampetti, "The UNCITRAL Model Law on Procurement of Goods, Construction and Services", chapter 15 in B. Hoekman and P. Mavroidis (eds.), *Law and Policy in Public Purchasing* (Ann Arbor: University of Michigan Press 1997); R. Hunja, "The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform", Ch. 5 in S. Arrowsmith and A. Davies (eds.), *Public Procurement Global Revolution* (London: Kluwer Law International 1998); J. Myers, "UNCITRAL Model Law on Procurement" (1993) 21 *International Business Lawyer* 179; D. Wallace, "UNCITRAL: Reform of the Model Procurement Law" (2006) 35 *Public Contract Law Journal* 485; D. Wallace, "The UN Model Law on Procurement" (1992) 1 *Public Procurement Law Review* 406; M. Dischendorfer, "The UNCITRAL Model Law on Procurement: How Does it Reconcile the Theoretical Goal of Total Objectivity with the Practical Requirement for Some Degree of Subjectivity?" (2003) 12 *Public Procurement Law Review* 100; G. Westring, "Multilateral and Unilateral Procurement Regimes: to which Camp does the Model Law Belong?" (1994) 3 *Public Procurement Law Review* 142

<sup>56</sup> On the tension that can exist between the international and domestic dimensions see G. Westring, "Multilateral and Unilateral Procurement Regimes: to which Camp does the Model Law Belong?" (1994) 3 *Public Procurement Law Review* 142.

but it is now being used increasingly in other places, including in many African countries and many in Asia.

The Model Law is accompanied by a Guide to Enactment. The Model Law is published in French, Spanish, Chinese, Arabic and Russian as well as in English, and all these versions are available on the UNCITRAL website, [www.uncitral.org](http://www.uncitral.org). This website also contains current documents relating to the ongoing review of the Model Law, including reports of the meetings of the Working Group and background papers prepared by the Secretariat.

## **1.8.2 Review of the Model Law**

At its 6th session in August-September 2004 UNCITRAL's Working Group on procurement commenced work on reviewing and reforming the Model Law<sup>57</sup>. The review was prompted mainly by new practical developments, most notably the use of electronic means in public procurement procedures: it was considered essential to update the Model Law to reflect these changes. In addition, however, the review process has involved consideration of some other matters, in light of the experience of applying the Model Law since it was adopted in 1993. It is expected that the review will be completed in 2011. At the same time, the Guide to Enactment is also being amended and is also being expanded to provide more detailed guidance on the regulation of public procurement.

The initial work of the review focused on three main subjects, namely use of electronic means in public procurement, electronic reverse auctions and framework agreements. These are subjects that are not dealt with at all or are dealt with only in a very limited way in the current Model Law but are likely to be subject to substantial new provisions in any revised version. These topics are considered further below in chapter 5 on supplier lists and framework agreements and in chapter 7 on electronic procurement and electronic reverse auctions.

Another area in which substantial changes are expected in the revisions to the Model Law is in relation to supplier remedies: this topic is considered further in chapter 8 of this book.

Finally, the review is also addressing a number of other topics, including the streamlining of the provisions on procurement of services, alternative methods to tendering for procuring goods and construction, evaluation of bids, abnormally low tenders, legalization of documents, conflicts of interest, defence procurement and use of procurement to promote industrial, social and environmental policies (which is the subject of chapter 9 of this book). The key reforms that are being contemplated on most of these topics will be outlined at the appropriate points in this volume.

## **1.9 Coverage of public procurement rules<sup>58</sup>**

### **1.9.1 Which entities are covered?**

One question that must be addressed by regulatory regimes on public procurement is which procuring entities are to be covered by the public procurement rules.

This, of course, will depend on the purpose of the public procurement rules in question. In the case of domestic rules on public procurement the scope of the rules will depend on which bodies it is considered appropriate to regulate in light of objectives such as the

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<sup>57</sup> See S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West); S. Arrowsmith, "Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard" (2004) 53 *International and Comparative Law Quarterly* 17.

<sup>58</sup> See further Arrowsmith, Linarelli and Wallace, chapter 6 above; Trepte, note 3 above, pp. 288-294.

need to use regulation as a substitute for the market to ensure value for money, which may give rise to debate over issues, such as the treatment of state enterprises in the state concerned – are these entities such that they can suitably be left to more “commercial” methods of control or should they be regulated in the same way as public bodies? In the case of international trade agreements concerned primarily with preventing discrimination, on the other hand, the focus may be on which entities are inclined to adopt discriminatory behaviour – which is the approach of the European Union procurement rules<sup>59</sup>.

The Model Law – which addresses this issue primarily from the perspective of national regulatory objectives – provides that it shall apply in principle to all “procuring entities” (Article 1). These are defined as “Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement” (or, in the case of federal states where procurement is regulated at sub-federal level, those entities of the national government) except for those expressly excluded (Article 2(b)(i)). These provisions are designed to cover traditional state entities, such as government ministries.

The text of the Model Law also suggests that the law might cover other entities, leaving a gap to insert the definition of entities covered (in Article 2(b)(ii)). No further indication of which entities should be included is given but guidance is provided in the Guide to Enactment. In this respect the Guide suggests that the government might wish to include an entity if it has an interest in requiring the entity to conduct procurement in accordance with the Model Law, and that relevant factors might be:

*“(a) whether the Government provides substantial public funds to the entity, provides 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 quasimonopoly 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.”*

## **1.9.2 Which transactions are covered?**

It is also necessary for regulatory regimes to consider what types of transactions should be covered – how procurement should be defined in principle, and whether any transactions falling within the basic definition should be excluded.

So far as the Model law is concerned, Article 1(1) simply states that the Law applies to all “procurement” by procuring entities. Procurement is then defined simply as “the acquisition by any means of goods, construction or services”, with “goods”, “construction” and “services” themselves being further defined in Article 2(c), (d) and (e).

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<sup>59</sup> On coverage under these rules see, for example, S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed. 2005; Sweet & Maxwell), chapter 5; P. A. Trepte, *Public Procurement in the European Union* (2007; OUP), chapter 2 J.

However, whilst most procurement laws will provide for general coverage of this kind, there are a number of issues that need to be considered. These may be addressed through the definition adopted of procurement, which could be expressly defined in the legislation or, if not, left to judicial development. For example, as regards issue 1 below concerning the application of the procurement Law to acquisitions from other public bodies, the limits of the law in this respect might be provided by an interpretation of the concept of "procurement" – some or all acquisitions from other parts of the government might not be considered as "procurement" for this purpose. Alternatively, some of these matters of cover might be dealt with by specific exclusions from the scope of the procurement legislation, rather than through the definition of its concepts.

Some of the major issues arising in defining exclusions/limitations in coverage of procurement laws in the above respect are the following:

1. How should the law treat arrangements to acquire goods, construction or services from other public bodies – in what circumstances should this be treated as procurement covered by the procurement law, requiring public bodies to compete with private bodies in a competition to win the work? Such acquisitions can take many forms for many different purposes. To take just some examples:
  - For organisational reasons, an entity might set up a subsidiary for the specific purpose of supplying particular goods or services to that entity;
  - Groups of entities, such as municipalities or universities, may together set up entities to supply of goods or services to the co-operating entities to take advantages of economies of scale;
  - States may set up central purchasing or supply agencies to provide goods or services to a wide range of public bodies; or
  - Public bodies might wish to purchase some of their requirements from state-owned enterprises.

The UNCITRAL Model Law does not provide any guidance on this question but it is one that states may wish to address specifically when formulating their laws.

2. The treatment of defence procurement. There is a question of principle of whether defence procurement should be subject to ordinary procurement laws or to a special regime (and, if the latter, what the general obligations should be under that regime). To the extent that the law does impose obligations of transparency and competition – whether under the ordinary procurement law or a special regime – there is also a question of what exemptions should apply to protect security and secrecy concerns and how far there should be exemptions from the law in general or merely from specific obligations.

At present the Model Law provides for a very broad exclusion for defence procurement: Article 1(2) states that the Model Law does not apply to "Procurement involving national defence or national security" (Article 1(2)(a)), unless the procuring entity expressly declares to suppliers that the Model Law will apply (Article 1(3)). However, this approach is controversial and currently under review. Even when the Model Law is applied, entities can take advantage of broad exclusions from the usual requirements for open tendering: they may use more informal competitive procedures or even single source procurement. (See chapter 2).

3. Treatment of the procurement of privately-financed infrastructure and/or concession contracts. In some systems these are governed by ordinary procurement laws and in others by a special regime. UNCITRAL itself has a separate system of rules on this type of procurement and these are considered separately in chapter 6 of this book.

4. The need for exemptions for contracts that are subject to special rules imposed externally. In this respect, Article 3 of the UNCITRAL Model law provides that to the extent that its provisions conflict with a state's obligations under a Treaty or other agreement with another state or with an agreement entered into between the enacting state and an intergovernmental international financing institution, the requirements of the Treaty or agreement are to prevail. This provision is of particular significance for developing countries in the context of funding from the international lending banks such as the World Bank, the Asian Development Bank and the African Development Bank, which as a general rule require funded procurements to be awarded using procedures laid down by the relevant banks – Article 3 ensures that those procedures, rather than national procedures will apply. However, the lending banks have recently moved towards a policy of greater reliance on national procurement rules for bank-funded procurement where those national procedures are regarded as adequate. It should be pointed out that it will often not be satisfactory simply to rely on Article 3 when a state enters into a general agreement, such as a trade agreement, that lays down procurement rules for all or a significant part of its procurement. First, it is not clear how this provision will operate if the provisions of the agreement have not been anyway specifically incorporated into domestic law (which is required in some countries – although not all – for provisions contained in international agreements to become binding in national law). Does this provision mean that such agreements on procurement automatically apply without a further act of incorporation? Secondly, users of the regime will need to apply two separate sets of provisions that may be different and/or conflicting in various ways, and this can be very confusing, especially if the conflicts are not very clear. Thirdly, there is room for debate as to what constitutes a “conflict”. In such cases it may be better to adopt a new integrated procurement law that takes account of the agreement in question.

### **1.9.3 Value thresholds<sup>60</sup>**

Finally, so far as coverage of public procurement laws is concerned, we can note that procurement rules will in many cases apply only to procurement above a certain financial threshold.

Most notably, there is often a financial threshold for the use of formal competitive procedures, such as open tendering, with contracts below the threshold requiring only more informal competitive procedures.

Sometimes value thresholds are also used to exclude certain procurement totally from the procurement system or from most of its obligations, at least – for example, this may be the case with very low value procurements.

International procurement instruments, such as the Government Procurement Agreement of the WTO, also often make use of value thresholds to exclude totally certain contracts from their scope, on the basis that they are designed to catch only larger procurements that are of interest to international trade, as discussed further in chapter 7 on procurement and trade.

One of the main problems with the application of financial thresholds for any procurement rules is that procuring entities may seek to split contracts in order to avoid the application of the rules. In response to this many procurement systems include explicit rules that prohibit the splitting of contracts for this reason. This is, however, hard to prove in practice. As a response some systems, notably the European Union procurement system<sup>61</sup>, go further than this, by requiring the “aggregation” of all contracts relating to

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<sup>60</sup> See generally Trepte, note 3 above, pp.288-294.

<sup>61</sup> For details see Arrowsmith, note 58 above.

similar supplies and services over a period of time for the purpose of calculating whether the threshold in the legislation is met. Under such a system a procuring entity might, for example, be required to aggregate all its requirements for stationery in a year and to follow formal tendering rules if the total of its requirements over the year exceeds the threshold for formal tendering – even if the stationery is purchased through a series of separate contracts. In practice, of course, this is likely to lead to the requirements for stationery being awarded through a single large contract, since it will be inconvenient to award a number of smaller contracts using formal tendering. This can in turn have an impact on the ability of smaller firms to participate in the market – and states adopting such aggregation rules might wish to consider measures to counteract this potential effect.

# Chapter 2: Methods of Procurement for Goods and Construction<sup>1</sup>

## 2.1 Introduction

In this chapter we will, first, introduce the different basic methods of procurement for goods and construction – open tendering, request for proposals etc – and their key features; and, secondly, look at the considerations that govern the choice of procurement method and how these are reflected in procurement laws. This will be done by reference, in particular, to the approach to this question that is adopted in the current version of the UNCITRAL Model Law on Procurement. Whilst this chapter is focused on goods and construction, it should be noted that these methods are also available for services in certain cases under the Model Law – in particular, for simple services such as many manual services - even though services are dealt with through separate provisions, as we will see further below.

In looking at these issues we will adopt a three-fold classification of procurement methods, as follows:

1. Formal tendering;
2. Less structured methods of competitive procurement, such as request for proposals and request for quotations; and
3. Single-source procurement.

Arrowsmith, Linarelli and Wallace also use this classification<sup>2</sup>.

The classification method used here does not make any specific distinction between goods, construction and services. The UNCITRAL Model Law, on the other hand, currently makes a general distinction between goods and construction, on the one hand, and services on the other. However, this situation has arisen mainly for historical reasons and is likely to be changed as a result of the current review of the Model Law to provide a single and integrated set of procurement methods.

In the later chapters we will look in more detail at various aspects of the actual procurement process under the main procurement methods for goods and construction. In particular we will look at the conduct of formal tendering in chapter 3. In chapter 4 we will also consider some procedural issues, such as selecting limited numbers of firms for a competition and use of supplier lists (approved lists), that are of special importance for other types of procurement methods.

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<sup>1</sup> See further S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (London: Kluwer Law International 2000), chapter 8; P. Bajari and S. Tadelis, "Incentives and award procedures: competitive tendering versus negotiations in procurement", chapter 5 in N. Dimitri, G. Piga and G. Spagnolo, *Handbook of Procurement* (2006) (CUP); J. Cibinic and R.C. Nash, *Formation of Government Contracts* (3<sup>rd</sup> ed. 1998), pp.690-708; Heijboer and Telgen, "Choosing the Open or Restricted Procedure: a Big Deal or a Big Deal?" (2002) 2 *Journal of Public Procurement* 187; Holmes, "To Tender or to Negotiate? The Buyer's Dilemma" (1995) 1(3) *Journal of Marketing Practice: Applied Marketing Science* 7; Parker and Hartley, "The Economics of Partnership Sourcing versus Adversarial Competition: a critique", (1997) 3 *European Journal of Purchasing and Supply Management* 115.

<sup>2</sup> Arrowsmith, Linarelli and Wallace, note 61 above. However, various classifications are possible: Arrowsmith and Nicholas, for example, adopt a slightly different classification when discussing the methods available under the UNCITRAL Model Law: see S. Arrowsmith and C. Nicholas, "The UNCITRAL Model Law on Procurement: Past, Present and Future », chapter 1 in Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

## 2.2 Formal tendering procedures

### 2.2.1 Open tendering

#### 2.2.1.1 The open tendering procedure and “tendering” under the UNCITRAL Model Law

Open tendering (or bidding, in United States terminology) can be broadly defined as a method of procurement involving formal tendering in which any interested supplier (or at least any interested and qualified supplier) may submit a tender.

A form of open tendering is provided as the main procurement method in many procurement systems, including under UNCITRAL (see below) – although by no means in all systems. The reasons for this<sup>3</sup> are many. In essence, it may be said that for many transactions in a lot of systems open tendering is considered best to promote and support many of the key objectives of the system because it provides for the greatest degree of transparency and the greatest degree of competition out of all procurement procedures. As we explained in chapter 1 these twin principles of transparency and competition lie at the heart of many procurement systems and are considered a suitable way of promoting many procurement objectives both from a national perspective and from the perspective of opening up procurement markets to trade. In addition, open tendering is inherently conducive to the independent objective of equal access for all to the opportunities provided by the government market. In particular, we can note that:

- i) The possibility in open tendering for any qualified person to have a tender considered makes for the maximum possible number of tenderers, which can increase the chances of the procuring entity benefiting from the best supplier operating on the market and hence improve value for money;
- ii) This same feature of open tendering induces suppliers to put forward the best offer they can make because of the need to beat the offers of many other suppliers to win the contract – again enhancing value for money;
- iii) This same feature of open tendering also reduces the risk of collusion between suppliers since collusion is more difficult with a larger number of bidders, once again enhancing value for money;
- iv) This same feature of open tendering also ensures that any interested person has access to government business, an important objective in its own right in some procurement systems;
- v) The absence of a process in which the procuring entity selects which suppliers will and which will not be permitted to submit tenders reduces the possibility of abuse of discretion to favour particular suppliers, to the benefit of both value for money and integrity of the process;
- vi) The formal nature of open tendering in other respects, including limited possibilities for clarification and negotiation, also reduces the possibility for abuse of discretion and improves the monitoring of the system, again to the benefit of both value for money and integrity of the process.

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<sup>3</sup> See S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (London: Kluwer Law International 2000), pp.459-486. For a particular perspective on reasons for using open tendering and, in particular, situations in which it is *not* suitable see Bajari and S. Tadelis. “Incentives and award procedures: competitive tendering versus negotiations in procurement”, chapter 5 in N.Dimitri, G.Piga and G.Spagnolo, *Handbook of Procurement* (2006) (CUP);

These considerations have led to open tendering being the default method in many systems, and are reflected in the fact that open tendering is the type of procurement method which the UNCITRAL Model Law provides as the general default method for procurement of goods and construction – other methods can be used only in defined and limited cases. The Model Law refers to this method simply as “tendering”. This method is also available under the Model Law for services where appropriate.

Notable features of this method under the Model Law, shared by the open tendering methods of many legal systems<sup>4</sup>, include:

1. A public notice advertising the procurement (Article 24);
2. Use of a detailed specification that provides a common basis for tendering and for comparing all tenders;
3. A single stage of tendering with fixed date and time for submission of tenders (Article 30(1));
4. A requirement for tenders to be in writing, signed and in a sealed envelope (Article 30(5)) – or in an electronic form that provides equivalent safeguards of confidentiality etc;
5. A public opening of tenders (Article 33); and
6. A requirement to award the contract to the supplier submitting the best (although not necessarily the lowest-priced) tender, with no possibility of negotiating tenders with suppliers (as stated in Article 35) or of allowing amendments - except to correct certain errors that are not of a substantial nature (Article 34(1) and (2)).

Under tendering in the Model Law a procuring entity may conduct pre-qualification proceedings if it considers this to be appropriate, to limit tenders only from suppliers who meet the conditions for participating in the procurement - such as those who are technically qualified to perform the work.

It can be noted that the position is different here from that applying under the main EU procurement directive for the public sector (directive 2004/18), where under a similar procurement method – called the open procedure – any firm must be allowed to submit a tender (although the procuring entity need not accept a tender from a firm considered unqualified)<sup>5</sup>.

The detailed rules applicable in open tendering and the role that they play in fostering the objectives of public procurement systems are examined in chapter 3 below.

### **2.2.1.2 Derogations from tendering under the UNCITRAL Model Law**

As highlighted above, open tendering methods are often considered presumptively superior to others by some procurement systems because of characteristics which make them most suited to fulfil certain basic objectives of the procurement process – such as equal access to opportunities – and/or to implement the principles of competition and transparency which generally serve as the means for furthering the objectives of the system. However, there are cases in which these advantages of open tendering are outweighed by other considerations, even when a competitive form of procedure is still appropriate. These include, for example, the fact that the cost entailed in evaluating tenders from all interested persons can sometimes outweigh any savings that will result from a higher number of tenders in terms of better suppliers or more competition (particularly relevant when the number of tenders is high or tenders are costly to evaluate). The formal nature of competitive tendering as well as the “open” nature of that

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<sup>4</sup> The key characteristics of tendering under the Model Law are outlined in Arrowsmith and Nicholas, above, in section 1.9.

<sup>5</sup> See, for example, S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2<sup>nd</sup> ed. 2005), chapter 7; and the companion text *EU Public Procurement Law* (2010), chapter 6.

procurement method may also be problematic, where there is a need for ongoing discussion of needs and approaches with participating suppliers, which may often arise in complex procurement<sup>6</sup>. There are also cases in which there are problems in holding a competition at all as, for example, where the timescales involved in any kind of competitive procedure are precluded by extreme urgency.

Thus even for the very common case in which open tendering is the default method of procurement exceptions are generally made to the prima facie requirement to use open tendering. However, to ensure that the advantages of open tendering are lost only when necessary for other reasons, in many systems the use of methods other than open tendering is often allowed only in limited and defined circumstances and subject to certain safeguards. This is the case under the UNCITRAL Model law on procurement.

First, as we will explain in the following sections below in considering the various procurement methods other than (open) tendering, the Model Law specifies the precise situations in which these other methods may be used for the procurement of goods or works.

In addition, the use of methods other than open tendering in all cases under the Model Law is subject to certain safeguards, namely:

- i) The approval of some additional organ of the administration; and
- ii) Inclusion in the record required for all procurements under Article 11 a statement of the grounds and circumstances which was relied on for justifying the use of the method in question.

These measures help safeguard against both deliberate abuse of the procedures and against errors of commercial judgment in use of the procedure, and also allow the choice of procedure to be monitored.

Despite its importance the choice of procurement method is not, on the other hand, currently subject to review by suppliers under the provisions of the Model Law. This position is, however, widely regarded as unsatisfactory and is likely to be changed in the current review of the Model Law<sup>7</sup>.

It may be noted that in some systems the considerations above have led regulators to conclude that it is not appropriate even to designate open tendering as the preferred general method for procurement or at least for all types of procurement, although this is perhaps the exception rather than the rule.

Of course, taking account of the considerations for open tendering and those that militate against it, as discussed above, the suitability of open tendering as the "default" procurement method in any procurement system, or for any particular entities or types of procurement will depend, as with many aspects of public procurement rules, on the particular features of that system. These include, amongst others, the values placed on the different objectives of the system (the greater the weight given to integrity or equal access to government business, for example, the more likely it is that open tendering will be emphasized); the importance attached to transparency (in particular, limited discretion) and competition for achieving those goals; the extent to which abuse of discretion is a problem in the particular procurement system; the level of training and skills of procurement personnel; and the nature of the supply market – in particular, the higher the number of tenders likely to be received the more likely it is that departing from

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<sup>6</sup> Bajari and Tadelis, above, consider various reasons why formal open tendering may not be suitable for complex procurement. As we will see below, many of the exceptions to the requirement for formal open tendering under the Model Law relate to complex procurement and to a limited extent refer directly to some of the factors identified by these authors as making projects unsuitable for formal open tendering, notably the advantage of involving suppliers in discussing the project specifications in advance. However, the conditions for derogating from open tendering for complex procurement do not generally refer directly to those specified by the authors (such as the existence of contractual incompleteness and suitability of cost-plus pricing).

<sup>7</sup> See Arrowsmith and Nicholas, above, section 1.25.

open tendering will result in less competitive tenders, and the higher the costs will be of evaluating all the tenders received in an open procedure

### 2.2.2 Two-Stage Tendering

Two-stage tendering is a two-stage method of formal tendering commonly used in procurement systems in particular when it is not possible to set detailed specifications for a contract at the outset of the procedure.

The UNCITRAL Model Law includes a procurement method called two-stage tendering which is fairly typical. The special rules that govern this method are set out in Article 46 of the Model Law.

The procedure is similar to formal tendering except that it involves, in addition, a first tendering stage in which firms submit tenders on any relevant aspects of the contract (which may include the contract terms as well as technical features), without any price. This is followed by negotiations with firms submitting tenders on any aspects of the tenders (which could include their responsiveness and their suitability to meet the entity's needs).

Based on the results of the first tendering stage (including the various possible solutions suggested by firms and the outcome of the negotiations), under the UNCITRAL version of the procedure the procuring entity then sets a common specification - as in tendering. This may involve deleting or modifying some aspects of the original solicitation (which might happen in practice if, for example, some of the requirements originally envisaged turn out to be unrealistically expensive or technically impossible).

Participants then submit further, complete tenders in a second tendering stage against this specification, following the rules of the procedure called tendering, as discussed in chapter 3 below.

In general the rules that govern tendering also generally apply unless otherwise specified (Article 46(1)), including the rules requiring a public advertisement, as discussed above, and the possibility of participation from all interested suppliers.

<b>Steps of the two-stage tendering procedure under the UNCITRAL Model Law</b>
1. Public advertisement of the contract (no exceptions)
2. Submission of tenders without a price (open to any interested tenderer)
3. Discussions on tenders
4. Preparation of single specification
5. Submission of revised tenders in accordance with usual rules on (open) tendering (open to all qualified suppliers submitting responsive tenders in first stage)

The precise grounds for using two-stage tendering under the Model Law are as follows:

1. When it is not feasible for the procuring entity to formulate detailed specifications, and either i) to obtain the most satisfactory solution to its needs, it seeks offers to various possible means of meeting those needs or ii) because of the technical character of the requirement it is necessary to negotiate with suppliers (Article 19(1)(a));
2. For contracts for the purpose of research, experiment, study or development (Article 19(1)(b));

3. For contracts involving national defence or national security (where the Model Law applies to such procurement: see chapter 2 above), whenever the procuring entity determines that one of these procedures is the most appropriate procurement method (Article 19(1)(c));
4. Tendering procedures have been conducted but failed (where no tenders were submitted or they have all been rejected on various grounds), and the procuring entity considers that new tendering procedures would not be successful (Article 19(1)(d)). This might apply because the procuring entity has been unable to draft a specification that is attractive or feasible - two-stage tendering can then be used as a method to establish how to draft the specification.

The Guide to Enactment makes the following comment concerning the first ground for using two-stage tendering:

*"A situation in which it is not feasible for the procuring entity to formulate precise or final specifications may arise in two types of cases. The first is when the procuring entity has not determined the exact manner in which to meet a particular need and therefore seeks proposals as to various possible solutions (e.g. it has not decided upon the type of material to be used for building a bridge). The second case is the procurement of high technology items such as large passenger aircraft or sophisticated computer equipment. In the latter type of exceptional case, because of the technical sophistication and complexity of the goods, it might be considered undesirable, from the standpoint of obtaining best value, for the procuring entity to proceed on the basis of the specifications it has drawn up in the absence of negotiations with suppliers and contractors as to the exact capabilities and possible variations of what is being offered".*

Two-stage tendering is commonly used in relation to goods and construction for turnkey design-and-build contracts, and for supply and installation in sectors such as power, water, telecommunications (for example, hydropower dams, waste treatment installations, pumping stations, power generators and sewerage works).

Under UNCITRAL two-stage tendering is one of three procedures available on the four grounds listed above, the others being the less formal request for proposals and competitive negotiations, outlined further below. It is not envisaged that states will include all these methods - they represent different approaches to the problems of complex procurement with varying degrees of competition and transparency.

An important difference between two-stage tendering in the form it appears in the Model Law and Request for Proposals/Competitive Negotiation as procedures in the Model Law, is the need for a common specification in two-stage tendering, with no possibility for each tenderer to tender on the basis of its own solution; this allows for a more objective comparison of tenders that can be more easily monitored. Other transparency safeguards are also built into two-stage tendering as it appears in UNCITRAL (such as the fact that there are no exceptions to the requirement for a public advertisement in two-stage tendering; the fact that it is not possible to limit the number of participants, other than to remove unqualified tenderers or those who do not submit responsive tenders). However, there may be problems in some cases in using a procedure that requires development of a common specification:

- It restricts consideration and comparison of different solutions, which may be important for value for money where very different solutions exist;
- There may be insufficient competition if some tenderers do not wish to, or are not capable to tender against the specifications that are finally chosen; and
- Tenderers may regard elements of their proposals as confidential, creating a dilemma in using their proposals as the basis for tenders from other firms – at least without payment. (It can be noted that more informal procedures generally contain provisions to safeguard against the disclosure of confidential information contained in firms' proposals).

Thus, states may want to consider either:

- Some kind of hybrid which provides for tenders against different specifications or proposals in the final stage but with greater transparency and competition than provided by the Request for Proposals/Competitive Negotiation procedures in the form they appear in the Model Law – the United States two-stage procedure noted below is perhaps an example that can be considered as such a hybrid; or
- Making both two-stage tendering and a request for proposals-type procedure available with the former being used where there are no problems of the kind mentioned above and the latter in cases where a single specification is not a suitable approach.

### 2.2.3 Restricted tendering

A final type of formal tendering method contemplated in the Model Law is restricted tendering, the rules of which are set out in Article 47. Again, the Model Law's general rules on tendering apply to this procedure unless there are specific rules in Article 47(3) to the contrary.

There are two very important differences between this procedure and the open form of tendering, which make it much less transparent:

- There is no requirement for a public advertisement of the procedure; and,
- The procuring entity can limit participation to selected qualified suppliers, rather than opening up participation to all interested parties.

The grounds for using restricted tendering under the current provisions of the Model Law are as follows:

1. When the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the procurement (Article 20(b)).
2. When the requirements are, by reason of their highly complex or specialized nature, available only from a limited number of suppliers (Article 20(a)). Here the procuring entity must solicit tenders from all suppliers from whom the requirement is available (Article 47(1)(a)).

The second ground above has been criticised<sup>8</sup>. Without advertising it will often be impossible to know the size of the supply market, and value for money could be prejudiced by making an incorrect judgment. Further, significant opportunities for deliberate abuse exist because of the discretion involved in such a decision. This latter problem arises due to the limited opportunity for monitoring/enforcement by suppliers because of the absence of advertising and the fact that there is also currently no supplier review of the choice of procurement method (although, as we have mentioned, the possibility of such supplier review may be introduced following the current review of the Model Law). There has been some discussion in the current review of the Model Law of removing this second ground for using restricted tendering. No change to this provision has yet been included in the latest published draft prepared for the eighteenth session of the Working Group on the review<sup>9</sup>. However, this issue still remains on the agenda for discussion.

It should be mentioned that there is often confusion between the restricted tendering of the Model Law and the "restricted procedure" which exists under the European Union procurement directives<sup>10</sup>. The names of the procedures are similar but they are actually

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<sup>8</sup> See, for example, S. Arrowsmith, "Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard" (2004) 53 *International and Comparative Law Quarterly* 17.

<sup>9</sup> See A.CN/9/WG.1/WP.73/Add.1 to A.CN/9/WG.1/WP.73/Add.8 at [www.uncitral.org/pdf/english/workinggroups/wg\\_1/73add8E.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_1/73add8E.pdf).

<sup>10</sup> As to which see S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2<sup>nd</sup> ed. 2005), chapter 7; and the companion text *EU Public Procurement Law* (2010), chapter 6.

quite different procedures in terms of the degree of transparency and competition involved. Two crucial differences are:

1. Unlike the UNCITRAL restricted tendering method, the EU restricted procedure requires a public advertisement to solicit interest in the contract;
2. Under the EU procedure the entity must consider for an invitation to tender on an equal basis all those who respond the notice. Whilst it does not need to invite all of the qualified suppliers, it must choose which of them to invite to tender using objective rules and criteria, thus providing for much less unfettered discretion and potential for abuse of the decision on whom to select to tender than exists under the Model Law.

This EU procedure to some extent provides a hybrid between the Model Law's (open) tendering method and its restricted tendering method. The EU's restricted procedure is available to Member States without restrictions under EU law, both for simple and more complex procurement. To some extent it also overlaps with the Model Law's (open) tendering procedure, as a tendering procedure with pre-qualification under the UNCITRAL Model Law would be considered a restricted procedure in the EU – the EU's restricted procedure covers both: i) cases in which pre-qualification is conducted before inviting tenders and all qualified suppliers are invited; and ii) cases in which pre-qualification is conducted before inviting tenders and only some of the qualified suppliers are invited.

## **2.3 Informal procurement**

### **2.3.1 Request for proposals**

As we have already seen above, UNCITRAL makes provision for three methods of procurement for goods and construction for certain cases in which it is not feasible to formulate specifications and also for cases of failed tendering procedures, certain defence and security procurement, and for research and development contracts, as set out in Article 19 of the Model Law. One of these is the request for proposals method, the main steps of which are summarized in the table below.

The rules for conducting the request for proposals are set out in Article 48.

As with two-stage tendering there is a general requirement for publication of a notice, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation. However, in contrast with two-stage tendering, with this procedure it is possible to dispense with the notice when the procuring entity considers it desirable to do so for reasons of economy or efficiency (Article 48(2)). Potentially this can result in less transparency and competition than in both tendering and two-stage tendering but may allow the procuring entity and suppliers and procuring entities to avoid disproportionate costs in preparing and evaluating proposals (which may be complex and hence costly for both sides). The notice or solicitation will request proposals on how bidders can meet the procuring entity's requirements, plus information on their competence and their proposed price. The procuring entity must solicit proposals from "as many suppliers or contractors as practicable, but from at least three, if possible" (Article 48(1)). Again, whilst this envisages that participation should be as broad as possible it does allow the procuring entity to control the number of participants when this is considered justified e.g. again to avoid disproportionate procedural costs.

The procuring entity may then negotiate with suppliers on the content of their proposals, and seek revisions. The process must conclude with the submission of "best and final offers" covering all aspects of proposals from all suppliers remaining in the process (Article 48(8)). In contrast with tendering and two-stage tendering, which involve a single specification for all suppliers, the procuring entity will allow each supplier to submit an

offer based on its own proposal. This can make the comparison of offers more difficult and subjective, but allows the procuring entity to obtain better for value money by comparing a broad range of options.

#### **Steps of the request for proposals procedure under the UNCITRAL Model Law**

1. Public advertisement of the contract (but exception where considered undesirable)
2. Selection of at least 3 suppliers
3. Submission of proposals
4. Evaluation (based on price and effectiveness of proposals)
5. Discussion of proposals
6. Submission of Best and Final Offers covering all aspects of proposals

We have already noted above some key differences between this procedure and two-stage tendering, namely:

1. A common specification is required at the final tendering stage in two-stage tendering, with no possibility for each tenderer to tender on the basis of its own solution;
2. There are no exceptions to the requirement for a public advertisement in two-stage tendering;
3. It is not possible to limit the number of participants, other than to remove unqualified tenderers or those who do not submit responsive tenders – whereas we have just seen in request for proposals there is a possibility of limiting the number of invitees.

We also suggested above that difficulties of using two-stage tendering for some cases, arising from the requirement for a single specification, may mean that it is helpful; to provide some kind of request for proposal procedure (although possibly with more safeguards for competition and transparency, along the lines of those applied in two-stage tendering) where considered appropriate – a kind of hybrid between request for proposals and two-stage tendering.

Some general issues relevant to request for proposals-type procedures and to certain other procedures, are considered later in chapter 4 of this book, namely: choosing which firms to select to participate, use of supplier lists; and evaluation of offers in complex procurements.

### **2.3.2 Competitive negotiation**

As we have seen, along with two-stage tendering and request for proposals, competitive negotiation is a form of procedure for certain cases in which it is not feasible to formulate specifications and also for cases of failed tendering procedures, certain defence and security procurement, and for research and development contracts: this, as we have seen, is set out in Article 19 of the Model Law.

The competitive negotiation method of procurement is dealt with only very briefly in the Model Law. As Arrowsmith and Nicholas have explained<sup>11</sup>:

*"The procedure for competitive negotiation is set out in Article 49 and simply involves the procuring entity negotiating with "a sufficient number of [firms] to ensure effective competition" (Article 49(1)). In contrast with the other procedures outlined above, for competitive negotiation the Model Law does not require a public notice as a general rule. It does not set any formal structure for the negotiations, except to provide – as with the request for proposals procedure – that the process is to conclude with a best and final offer from suppliers with respect to all aspects of their proposals (Article 49(4)). There are no detailed rules on evaluation: it is merely stated that the procuring entity shall select the successful offer on the basis of the best and final offers (Article 49(4))."*

#### **Steps of the competitive negotiation procedure under the UNCITRAL Model Law**

(No public advertisement required)

1. Selection of sufficient number of firms to negotiate
2. Negotiations
3. Submission of Best and Final Offers

As well as being an alternative to the more transparent two-stage tendering or request for proposals on the grounds outlined above, competitive negotiation is also available on two other grounds (Article 19(2) of the Model Law):

1. For circumstances of urgency where tendering would be impracticable (provided that the emergency was not foreseen by the entity or was not due to its dilatory conduct); and
2. Where because of a "catastrophic event" there is urgency and other methods are impracticable.

In these cases it can be seen as an alternative to single source procuring, making it a more transparent and competitive option than other realistic alternatives.

### **2.3.3 Request for quotations**

It is widely accepted that for smaller procurements the benefits of tendering are often outweighed by the costs of using a formal tendering procedure, both in terms of use of resources in the procedure and the time taken to complete it. UNCITRAL therefore provides a more informal method, the request for quotations, to be used in low-value, simple procurements.

Article 21 of the Model Law states that this procedure may be used for purchasing "readily available goods or services that are not specially produced or provided to the particular specifications of the procuring entity and for which there is an established market" where the estimated value of the procurement contract is less than certain value thresholds set out in the procurement regulations (Article 21(1)).

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<sup>11</sup> S. Arrowsmith and C. Nicholas, "The UNCITRAL Model Law on Procurement: Past, Present and Future », chapter 1 in Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

The exact thresholds below where entities may have recourse to this informal method of procurement will generally depend on the balance that is sought between transparency and competition, on the one hand, and procedural costs on the other. As with the choice of procurement method more generally this will in turn be affected (as in other cases in which this balance is in issue) by factors such as the extent of training and skills of personnel and the extent of corruption as well as the values of the particular procurement system. Different thresholds might be set for different types of procurement and different procuring entities. Since the value of the procurement is the key factor in determining the use of this informal procedure as opposed to formal tendering, the applicable rules on value thresholds are very important as a determinant of the degree of transparency and competition in the system.

Also important from this perspective, as discussed already in chapter 2, is the question of what controls exist to prevent abuse through splitting up contracts to allow use of the more informal procurement method rather than formal methods. Article 21(2) of the Model law prohibits the procuring entity from dividing its procurement into separate contracts for the purpose of invoking the request for quotations procedure. The provision is, however, limited to the case of bad faith, which may be hard to prove - although a review body might possibly presume bad faith from an inappropriate outcome. There is nothing to require entities to aggregate requirements when it is appropriate to do, comparable to the aggregation rules that exist in the EU procurement directives as discussed in chapter 2.

It is also important to note at this point that a potential alternative to using the request for quotations procedure for recurring procurement or for urgent procurement is to set up a framework agreement, either with one supplier or with several suppliers. If operated in an appropriate manner, framework agreements can provide an approach that is potentially more open, competitive and transparent than the request for quotations method. The Model Law currently does not mention framework agreements expressly. However, the UNCITRAL Working Group on procurement is intending to recommend the addition of extensive provisions on frameworks as an outcome of the current review. This subject is examined in chapter 5 below.

The Guide to Enactment to the Model Law suggests that use of request for quotations rather than tendering should not be made compulsory for low-value procurements. This is because tendering might sometimes still be the most suitable procurement method despite the low value: an example given in the Guide is when the purchase could commit the procuring entity to particular technology for future purchases<sup>12</sup>.

The details of the request for quotations method is set out in Article 50 of the Model Law. It does not require an advertisement of the contract but merely requires the procuring entity to request quotations from as many suppliers as practicable, but from at least three, if possible (Article 51(1)). As with other procurement methods involving invitations to limited suppliers, such as the request for proposals method, there are no detailed provisions on how invited suppliers should be selected. The procuring entity must simply award the contract to the supplier offering the lowest-priced quotation that meets the entity's needs (Article 51(3)). Each supplier is permitted to give only one price quotation and cannot change its quotation, and negotiations over quotations are prohibited (Article 51(2)). The steps of this procurement method are summarised in the box below.

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<sup>12</sup> Guide to Enactment, commentary on Article 21, para.1.

### **Steps of the request for quotations procedure under the UNCITRAL Model Law**

(No public advertisement required)

1. Quotes from as many suppliers as possible (at least 3)
2. Submission of price quotes (no discussions or amendments); award based on price only

### **2.3.4 Single-source procurement**

A third type of procurement method found in procurement regulations is one that does not require any kind of competition, formal or informal, to choose the contracting partner. The Model Law includes such a procurement method, referred to as single-source procurement. This type of procedure is sometimes referred to also as direct contracting.

Obviously this procedure even more so than the other procedures discussed above involves a significant departure from any concept of equal treatment and also from the principles of transparency and competition which most procurement systems rely on to implement the main objectives in the procurement process. The grounds for using single-source procurement reflect a number of different reasons for overriding these usual principles. They include, for example, avoiding disproportionate cost and delay of a competition when it can be objectively predicted who will win the contract without a competition, when delay will prejudice the government's ability to meet its needs (urgency), and implementation of horizontal policies (for example, to deal with economic emergencies).

The grounds for using single-source procurement under the UNCITRAL Model Law are set out in Article 22(1). They are as follows:

*"(a) The goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, and no reasonable alternative or substitute exists;*

*(b) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;*

*(c) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods;*

*(d) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;*

*(e) The procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or*

*(f) The procuring entity applies this Law, pursuant to article 1(3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.”*

The fact that single-source procurement is particularly non-competitive and non-transparent means that it is particularly important to monitor the use of this method to prevent abuse. As we have already mentioned, the Model Law currently does not allow suppliers to challenge the misuse of the procedure, but this position has been much criticized and is likely to be changed as a result of the current review of the Model Law. Some legal systems have also developed other mechanisms or special supplementary rules to control the abuse of single-source tendering methods. A good example is provided by the case of EU law<sup>13</sup>.

First, the Court of Justice of the European Union has developed strict rules on interpretation of the grounds for using the single source method (in the EU, referred to as the negotiated procedure without a contract notice) and the burden of proof.

Secondly, EU legislation provides for contracts that have been awarded in violation of the requirement for a contract notice to be published advertising the contract to be ineffective as a general rule<sup>14</sup>. However, Member States may allow their procuring entities to avoid this risk by publishing a notice in the Official Journal of their intention to award a contract which explains the grounds for not holding an advertised competition; and respecting a ten-day standstill (delay) period before concluding the contract, to give time for suppliers to challenge the decision not to advertise. Member States can also provide for a 30-day time limit for challenges to the contract following publication of a notice. This may be a useful compromise between the need for publicity and the delay and expense of formal tendering procedures – if other suppliers do emerge a formal tender will be needed but if not it will not. This approach facilitates effective policing of the use of the single-source procedure which might otherwise be problematic because of the difficulty of detecting single-source awards in practice.

These approaches may be worth considering for states looking to provide significant controls to prevent abuse of single source procurement.

## **2.4 Review of the Model Law’s rules on choice of procurement methods**

The current review of the Model Law is considering some reforms to the current rules governing choice and use of procurement methods, as well as providing more extensive guidance on choice of methods. Essentially, the current formal distinction between procurement of goods and construction, on the one hand, and procurement of services, on the other, has arisen mainly for historical reasons. As we have mentioned, many of the methods provided for goods and construction procurement are in fact suitable for many types of services and may be used for those services instead of the bespoke services methods. On the other hand, as we will see in chapter 4 on methods for procurement of services, some of the bespoke services methods are very similar to some of the methods for procuring complex goods and services.

The current position of distinguishing between goods/construction and services for the purpose of the rules on procurement methods is very likely to be changed following completion of the current review of the Model Law. Thus it is proposed in the current

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<sup>13</sup> The companion text *EU Public Procurement Law* (2010), chapter 6, section 6.12, on the negotiated procedure without a notice.

<sup>14</sup> *Ibid.*

revised draft text to provide for a single and integrated set of procurement methods, all of which will apply to goods, construction and services<sup>15</sup>.

The extent to which some of the methods are considered more suitable for one type of procurement than others will be addressed in detail in the Guide to Enactment. However, none of the methods will be restricted in the Model Law to goods, construction or services only (on this see further chapter 4 on procurement methods for services). This new approach of providing a series of methods available in principle for all three types of procurement is referred to in the UNCITRAL discussions as the “toolbox” approach. One good reason for adopting such an approach is that it eliminates the need to classify contracts as being for goods, construction and services, which can lead to arbitrary consequences – in particular, some contracts involve a mix of goods, construction and services, and it may be inappropriate to make procurement methods dependent on an overall classification of the contract as belonging to one category or another.

As we have already noted, another proposed reform that is likely to be very important in this area is to the provision of the possibility for suppliers to review the choice of procurement method when this has been made unlawfully – something that is not possible under the present provisions of the Model Law on supplier review.

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<sup>15</sup> The latest published draft text on this at the time of writing can be found in A.CN/9/WG.1/WP.73/Add.3 ([www.uncitral.org/pdf/english/workinggroups/wg\\_1/73add3E.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_1/73add3E.pdf)), which was developed for the eighteenth session of the Working Group in April 2010 and endorsed with small changes.

# Chapter 3: The conduct of open tendering procedures<sup>1</sup>

## 3.1 Introduction

As we have seen, the general rule in the UNCITRAL Model Law, though subject to exceptions, is that entities should use the tendering method – a form of open tendering – for procuring goods and construction. This chapter examines the way in which conduct of such open tendering methods is regulated by law.

Many of the rules and principles discussed below are relevant also for other procurement methods – and the Model Law itself in fact provides generally that they are to be applied in certain other methods, such as restricted tendering and two-stage tendering, except where there are specific derogations (Article 46(1)) on two-stage tendering and Article 47(3) on restricted tendering).

## 3.2 Specifications and other solicitation documents

### 3.2.1 The solicitation documents in general

The term solicitation documents is used to refer to the documents issued to tenderers that contain all the relevant information on the contract and contract award procedure. Issues relating to these documents are addressed in Articles 26-28 of the UNCITRAL Model Law.

Article 27 sets out a list of matters that should be included in the solicitation documents for tendering, as set out below.

Another important provision, which is found in Article 26, is a requirement that any fee charged for the documents must be limited to the cost of printing them and providing them. Increasingly, provision is being made for suppliers to obtain documentation through the Internet or through other electronic forms (in which case the supplier will generally bear any printing costs).

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<sup>1</sup> See, in general, S.Arrowsmith, J.Linarelli and D.Wallace, *Regulating Public Procurement: National and International Perspectives* (2000), chapters 7-11; P.Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (2004) chapter 5; Beviglia-Zampetti, "The UNCITRAL Model Law on Procurement of Goods, Construction and Services", chapter 15 in Hoekman and Mavroidis (eds.), *Law and Policy in Public Purchasing* (1997); S. Arrowsmith and C. Nicholas, "The UNCITRAL Model Law on Procurement: Past, Present and Future », chapter 1 in Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West), section 1.11. For illustrations of open tendering-type methods in particular systems see, for example, the Asia Link companion textbook *EU Public Procurement Law*, chapter 6; and J. Cibinic and R.C. Nash, *Formation of Government Contracts* (3rd ed. 1998), passim and in particular chapter 5, on sealed bidding in the United States federal system.

### **Contents of the solicitation documents (Article 27 of the Model Law)**

- (a) Instructions for preparing tenders;
- (b) The criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 34 (6);
- (c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (d) The nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;
- (e) The criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 34 (4) (b), (c) or (d) and the relative weight of such criteria;
- (f) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
- (g) If alternatives to the characteristics of the goods, construction, services, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that... effect, and a description of the manner in which alternative tenders are to be evaluated and compared;
- (h) If suppliers or contractors are permitted to submit tenders for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which tenders may be submitted;
- (i) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods, construction or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes;
- (j) The currency or currencies in which the tender price is to be formulated and expressed;
- (k) The language or languages, in conformity with article 29, in which tenders are to be prepared;
- (l) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;
- (m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;
- (n) The manner, place and deadline for the submission of tenders, in conformity with article 30;

### **Contents of the solicitation documents (Article 27 of the Model Law)**

(o) The means by which, pursuant to article 28, suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) The period of time during which tenders shall be in effect, in conformity with article 31;

(q) The place, date and time for the opening of tenders, in conformity with article 33;

(r) The procedures to be followed for opening and examining tenders;

(s) The currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 34 (5) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity;

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) Notice of the right provided under article 52 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) If the procuring entity reserves the right to reject all tenders pursuant to article 12, a statement to that effect;

(y) Any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 36, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(z) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

### **3.2.2 Modifications and clarifications to the solicitation documents**

Article 28 deals with clarifications and modifications to the documents. The key rules in this respect are:

#### **Clarification**

- A requirement for the procuring entity to respond within a reasonable time to requests for clarification submitted within a reasonable time prior to the tender deadline (Article 28(1));
- A requirement to communicate the clarification to all those who have been provided with the documents (Article 28(1));
- A requirement to provide to all those who have been provided with the documents the minutes of any meeting held for clarification (Article 28(3)).

#### **Modification**

- A right for the procuring entity to modify the documents through an addendum communicated promptly to all those provided with the documents (Article 28(2)).

Article 30(2) of the Model Law requires the procuring entity to extend the tender deadline if necessary to enable suppliers to take account of any modifications or clarifications.

### **3.2.3 Legal rules on drafting specifications<sup>2</sup>**

#### **3.2.3.1 Introduction**

The concept of specifications is generally used to refer to the description of the goods, construction or services that is the subject-matter of the procurement. In this section we will consider the way in which regulatory rules sometimes impose controls over the drafting of specifications for specific contracts.

Regulatory rules in legislation are generally concerned to ensure:

1. That the content of the specifications is such as to provide access to the competition for all products or works that can meet the government's needs. This ensures wide competition that can induce suppliers to offer their best terms and the possibility of considering all available products etc that might offer value for money.
2. To ensure that the specifications describes those requirements in an accessible and clear manner, to encourage participation and to ensure that tenderers are able to draw up suitable tenders.
3. At the same time the rules need to ensure that entities are not required to spend disproportionate time and effort in drafting the specifications – that is, the above considerations need to be balanced against the need for an efficient procedure.

It is also important that the specification is clear to avoid future legal problems such as the problem of non-conforming tenders, the need to retender because of ambiguities discovered later, or ambiguity in the final contract (where ambiguities were not discovered during the tendering procedure). These issues are considered in more detail later below.

#### **3.2.3.2 The rules on specifications in UNCITRAL and other approaches**

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<sup>2</sup> See further Arrowsmith, Linarelli and Wallace, above, pp.407-440.

The rules on specification in the UNCITRAL Model Law are set out in Article 16. The key rules are as follows.

First, "to the extent possible" any specifications and relevant descriptions etc must be based on "relevant objective technical and quality characteristics" and must not require or refer to a particular trade mark, name, patent, design, type, specific origin or producer (Article 16(2)). There is an exception when there is no other "sufficiently precise or intelligible way" of describing the requirement. However, whilst in this exceptional case the procuring entity is permitted to describe the requirement by – for example - reference to patents or particular designs etc, it must also accept any equivalent products put forward by suppliers, and must indicate that it will do this by adding "or equivalent" or similar to the description.

This rule is aimed at ensuring wide competition for any requirement.

There are, however, some ambiguities in the drafting of the above provision. In particular, it is not clear whether it leaves any room at all for a procuring entity to specify a particular material or process, for example, to be used in a product supplied, and to insist on that material and reject functional equivalents, or whether it requires the procuring entity to always open up the procurement to any product or service that meets its actual performance or functional requirements. Could specification of a particular material be considered a relevant objective technical characteristic? Or should it be considered not to be an objective technical characteristic - but perhaps a particular "design" - which is not generally allowed (specific designs etc may not generally be used to describe the product and in the exceptional cases where they are, equivalents must always be admitted)?

States adopting this provision may wish to consider whether to clarify this further: if it is the intention that procuring entities should always be required to specify for, and accept, functional equivalents to any product or work described in the specifications, this should be clearly spelt out in the legislation. It may also be appropriate to deal with the burden of proof in showing that a product is equivalent to that specified. Since the relevant information is within the control of the supplier and since also the issue needs to be dealt with in the context of the timescale of specific procurements it may generally be appropriate to place on the supplier the burden of showing equivalence.

An example of a specific procurement system that has a general requirement for entities to specify for, and accept, any product capable of meeting its functional requirements, is the EU system.

This rule was established clearly in the UNIX case, Case C-359/93, *Commission v Netherlands* ("UNIX")<sup>3</sup>. This rule is based on Article 34 of the Treaty on the Functioning of the European Union (TFEU) (formerly Article 28 of the European Community Treaty). This Treaty provision basically prohibits measures that hinder trade between Member States, including restrictions on access to the public procurement market. This case concerned proceedings brought by the European Commission in the Court of Justice of the European Union, relating to a contract awarded by an authority in the Netherlands for the supply and maintenance of a weather station. Prior to the UNIX case it was already established that it prohibits specifications in public procurement which discriminate, directly or indirectly, against imported products in favour of domestic products. In UNIX the court held that the reference to UNIX was also a restriction on trade under Article 34. This was because it excluded suitable products from being tendered on the contract: some systems which did not use UNIX were still able to fulfil the functions required under the contract. This applied although the specification did not discriminate in favour of domestic products against imported products. The case implies a general principle that specifications must

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<sup>3</sup> [1995] E.C.R. I-157. For analysis see further the Asia Link companion textbook *EU Public Procurement Law*, chapter 5.

not be drawn up in such a way as to exclude products which meet the authority's performance requirements.

The second rule on specifications stated in the Model Law is that the procuring entity must use standardized features, terminology etc in setting out the technical and quality characteristics of its requirements and have due regard for standardized trade terms in formulating the contract terms and drafting the procurement documents (Article 16(3)). This requirement is aimed at the objective of making specifications as easily understood as possible to potential suppliers.

The Model Law also states a general principle that entities must not use specifications, or requirements concerning testing and test methods, packaging, marking or labelling or conformity certifications, or symbols and terminology that create obstacles to participation, including obstacles based on nationality (Article 16(1)). This specific reference to obstacles based on nationality reflects the origins of the Model Law as an instrument for opening up procurement to international trade.

This provision in Article 16(1) is a rather vague provision and it is not clear what it adds to the substance of earlier provisions so far as the substantive content of specifications is concerned, especially if under Article 16(2) procuring entities must always leave scope for products that meet their functional requirements. However, in relation to other matters such as testing and proof of conformity the provision seems to embody a kind of proportionality principle, requiring that requirements on these matters should not be unduly onerous in light of their objectives. This might mean, for example, that the procuring entity must accept evidence of conformity from certification programmes in a supplier's home state where it is reasonable to do so, rather than insisting on national certification. The particular reference to obstacles based on nationality suggests that reference to requirements to use purely national procedures should be subject to particularly close scrutiny. However, in practice it is rather difficult to apply such a rule on the facts of individual cases, as there may be a lot of uncertainty over the extent to which foreign procedures can really be regarded as equivalent.

This provision might also require entities to justify the content of their specifications – especially when these are defined by reference to national standards. An example of how this might apply can be seen by considering the Dundalk case<sup>4</sup> – a case of the Court of Justice which, like the UNIX case concerned the impact of Article 34 TFEU on specifications in public contracts. In the Dundalk case a requirement for pipes used in a construction project to be manufactured in accordance with an Irish national standard was held to contravene Article 34 TFEU. As in the UNIX case the requirement was unlawful because it excluded from the procurement even products that were equivalent in all respects (health standards etc) and thus met the entity's functional requirements just as well as the specified product.

What, however, if the Irish standard stipulated a particularly high level of health protection that was generally considered excessive and not included in the national standards of other countries? It might be argued that a provision such as that in Article 16(1) of the Model Law at least requires the procuring entity to justify its choice of standards for the procurement i.e. to justify why this particularly high level of health protection is needed.

### **3.2.3.3 The relationship between specifications and choice of award procedure**

As we have seen in chapter 2 one ground for using single-source procurement under the Model Law is that the requirement is available only from a particular supplier. If

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<sup>4</sup> Case 45/87, *Commission v Ireland* [1988] ECR 4929 ("Dundalk" case).

specifications are very narrowly drafted – intentionally or otherwise - it may be that only one supplier is able to meet them and the procuring entity may then seek to resort to the use of single source procurement under the above provision. Clearly it is appropriate to allow use of the single source procurement method only when the specifications in question are legal in accordance with the rules set out above and no doubt any court would adopt this interpretation.

It is also worth reiterating here that single-source procurement under this provision is permitted only when there is no “reasonable” alternative or substitute. Thus even if the desired specifications are legal, when there is only one supplier available who can meet them it is probably necessary to draft a broader specification to enable a competition to be held. This may involve admitting products or services that do not quite meet the entity’s preferred requirements. It will then be necessary to assess the “added value” of tenders that do meet those requirements and compare them with the reasonable alternatives or substitutes in evaluating tenders. As reading Arrowsmith and Nicholas state: “This will at least ensure that the merits of the different products, construction or services are carefully compared in a process that is subject to external scrutiny, rather than one type being preferred a priori.”<sup>5</sup>

We have also seen in chapter 2 above that where the procuring entity recognises at the outset of a procurement that it is unable to draft its own detailed specifications, the Model Law provides that the entity may then use two-stage tendering, request for proposals or competitive negotiation (according to national preference) in order to establish the specifications or obtain various proposals from suppliers. If the procuring entity attempts to draft a specification itself but the specification does not prove appropriate and results in no tenders or in tenders that are not responsive, we have seen that the Model Law contemplates that the entity may use two-stage tendering, request for proposals or competitive negotiation to develop an appropriate specification in a subsequent procedure. (This applies when the procuring entity considers that new tendering procedures would not be successful) (Article 19(1)(d)).

### **3.2.3.4 What are the likely practical consequences of not complying with legally binding rules on specifications or of ambiguous specifications?**

It is important for procuring entities to comply with the above rules on drafting specifications, since failure to do so could have significant practical consequences and delay the procurement. Of course, this largely depends on the nature of the remedies provided by different legal systems, and these vary widely. However, certain general observations can be made on the way in which these issues are likely to be addressed based on the principles underlying the Model Law and many other procurement systems.

The issue may arise in practice in different ways.

In particular it may, first, be raised by a tenderer that challenges the specification as being unlawful. In this case the procuring entity may be able simply to issue a modification to the specification to make it lawful. The rules on modifications that are applied under the UNCITRAL Model Law were outlined above. It will be recalled, in particular, that the modification needs to be sent promptly to anyone who received the original specifications. Further, Article 30(2) of the UNCITRAL Model Law requires an extension to the tender deadline where necessary to give suppliers a reasonable time to respond to any modification.

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<sup>5</sup> Further S. Arrowsmith and C. Nicholas, “The UNCITRAL Model Law on Procurement: Past, Present and Future », chapter 1 in Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West), p.42.

Problems may arise, however, if a proposed modification affects some aspect of the project that was referred to in the advertisement – for example, where the contract advertisement itself refers to a particular patented product and it then transpires that this reference was unlawful. In this case there may be firms who saw the notice but did not ask for the solicitation documents because they could not supply the product referred to – but who might be interested in the procurement with the modified (lawful) specification. As a matter of good practice and/or law it might be considered necessary to re-advertise the procurement to allow those firms a chance to participate. Whether this is always required by law may depend on the weight given to the equal treatment principle as either an independent objective of the procurement process or a means to ensure compliance with other objectives.

The issue of the impact of unlawful specifications may also arise because a tenderer submits a tender that does not actually comply with the specification, but would comply if the specification had been lawfully drafted. This was the case in the UNIX case discussed above. As is discussed in the section on non-conforming tenders below, many systems would not allow the procuring entity simply to accept such a tender that does not comply with requirements laid down in the documents. If the procuring entity does so, any challenge is most likely to come from a rival tenderer. However, that tenderer will not generally be able to require the procuring entity to continue with the same evaluation process minus the non-compliant tender - since the specification is unlawful - but only to go back and modify the specification. Thus rival tenderers will often not have an interest in challenging the decision. (If there is no likelihood of challenge, and especially if significant remedies are not significant once the contract has been concluded, a procuring entity may in practice be tempted to consider accepting such a tender, especially if there are time pressures and it is considered unlikely that there will be any new tenderers joining the process with a modified specification).

In some systems inclusion of an ambiguous specification (often defined as one that has two or more possible meanings) is considered to make the specification legally defective. In this situation similar consequences to the above will generally arise. In the context of United States federal procurement law Cibinic and Nash have observed that legal challenges based on the ambiguity of specifications most often arise as a practical matter in formal tendering procedures<sup>6</sup>. In these procedures there is often little involvement of tenderers, if any, in ensuring that the documentation is adequate in the first place (although we have seen above that UNCITRAL provides for modifications including those based on input by suppliers). There is generally very limited scope for modifying tenders once submitted, but problems often come to light after tender submission.

### **3.3 Advertising the contract**

As chapter 1 emphasised, one important facet of transparency is ensuring adequate publicity for contract opportunities. This helps to ensure wider competition and hence better value for money, and to provide for more effective monitoring and accountability of procurement activity.

In general, open tendering procurement laws require a public notice for each individual procurement.

This is provided for in Article 24 of the UNCITRAL Model Law. This requires publication of a notice advertising the procurement and soliciting responses from interested suppliers in the country's official gazette or other publication (Article 24(1)). Reflecting UNCITRAL's origin as a trade instrument and the consequent emphasis on opening up procurement to trade, there is a general requirement to publish "in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade

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<sup>6</sup> J. Cibinic and R.C. Nash, *Formation of Government Contracts* (3rd ed. 1998) , p.361.

publication or technical or professional journal of wide international circulation” (Article 24(2)), except (as stated in Article 23) where i) participation has been limited to domestic suppliers or ii) when the procuring entity considers that only domestic suppliers are likely to be interested because of the low value.

Article 25 of the Model Law lists the contents of the advertisement, which differ according to whether or not pre-qualification procedures will be held.

For some procurements, however, some procurement systems provide for more flexible approaches to advertising – for example, by advertising lists of suppliers from which tenderers will be chosen, advertising framework agreements which will be used to let contracts over a period of time without further notices or advertising groups of procurement contracts together. Some of these issues are dealt with in chapter 4 of this book. However, for one-off procurement using open procedures in which anyone can tender, individual advertising is the usual approach – although the procurement may be divided into lots.

## **3.4 Qualification and pre-qualification proceedings<sup>7</sup>**

### **3.4.1 Introduction**

The term qualification can be used to describe the process of deciding which firms meet the minimum requirements to be considered for government contracts of particular types.

Qualification conditions are generally one of three types:

1. Financial conditions (relating to whether the firm has sufficient financial resources to perform the contract, and to meet any legal liabilities it may incur);
2. Technical conditions (relating to whether the firm has sufficient qualified staff, tools equipment etc. to carry out the contract); and
3. Social, industrial or environmental (“horizontal”) conditions unrelated to the performance of the contract (for example, a requirement that all government contractors should offer adequate opportunities to disadvantaged ethnic minorities).

This terminology of “qualification” is used in the UNCITRAL Model Law and in many English-language common law systems. (In the United States the issues covered by this section are referred to as responsibility – which broadly refers to the ability to carry out the contract and reliability to do so - and eligibility – which broadly refers to whether the supplier meets other conditions such as social conditions).

Pre-qualification is used to describe qualification procedures undertaken at the start of an award procedure, before tenders are submitted.

This section will consider the issues relating to pre-qualification in tendering procedures, and also issues relating to qualification in general, including issues relating to the criteria and evidence used. Issues relating specifically to the last type of conditions – what we call “horizontal” conditions – are considered in a separate chapter. Use of supplier lists (also referred to as qualification lists or approved lists) is not generally considered relevant for open forms of tendering and is considered later in chapter 4.

It can be noted that the provisions on qualification and pre-qualification proceedings in the UNCITRAL Model Law are in principle directed at all procurement methods, not just tendering, and are set out in the general part Chapter I, at the start of the Model Law.

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<sup>7</sup> See further Arrowsmith, Linarelli and Wallace, above, chapter 10.

### 3.4.2 Criteria for exclusion

Article 6 of the Model Law lists a number of criteria that procuring entities may require suppliers to meet as a condition of participation, indicating that the qualification criteria are at the discretion of the procuring entity. Article 6 also provides that other criteria should not be imposed. In addition, in certain cases, legislation or policy may wish to prescribe that certain criteria must be applied.

The discretionary criteria listed in the Model Law are as follows (listed in Article 6(1)(b)):

*"(i) That [suppliers or contractors] possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;*

*(ii) That they have legal capacity to enter into the procurement contract;*

*(iii) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;*

*(iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;*

*(v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ...years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings."*

We can see that, inter alia, the Model Law envisages that suppliers may be excluded if they have not fulfilled their obligations to pay taxes and social security contributions; or if they or their directors or officers have been convicted of a criminal offence related to their professional conduct or of the making of false statements or misrepresentations as to their qualifications for a contract (within a specified period prior to the contract): Article 6(1)(b)(i).

These provisions set out in the previous paragraph are apparently straightforward but raise a number of important issues which may need to be regulated in more detail than is provided for in the Model Law<sup>8</sup>.

First, it is not always clear when states adopt such provisions what is their purpose<sup>9</sup>. Is it considered that suppliers falling within these provisions are not reliably able to perform the contract, or the exclusions are employed for other purposes such as:

<sup>8</sup> In the EU context see for example, E. Piselli, "The Scope for Excluding Providers who have Committed Criminal Offences under the EU Procurement Directives" (2000) 9 *Public Procurement Law Review* 267; S Williams, "The Mandatory Exclusions for Corruption in the new EC Procurement Directives" (2006) 31 *European Law Review* 711; and the companion textbook *EU Public Procurement Law*, chapter 6, section 6.4.2.5.; and in other contexts, for example, S. Williams, "The Debarment of Corrupt Contractors from World Bank Financed Contracts" (2007) 36 *Public Contracts Law Journal* 277; Anechiarico and Jacobs, "Purging Corruption from Public Contracting: the Solutions are Now Part of the Problem" (1995) 40 *New York Law School Law Review* 143.

<sup>9</sup> See further, for example, S. Arrowsmith, "Horizontal Policies in Public Procurement: a Taxonomy" (2010) 10 *Journal of Public Procurement* 149; S. Arrowsmith, H-J Prieß and P. Friton, "Self-Cleaning as a Defence to Exclusions for Misconduct – An Emerging Concept in EC Public Procurement Law?" (2009) 18 *Public Procurement Law Review* 257.

- To avoid associating the government with unlawful behaviour, both to set an example and to avoid public criticism;
- To provide an additional enforcement tool for securing compliance with the general law and/or sanctioning violations;
- To ensure a level playing field; or
- To ensure that government funds are not used to support enterprises that engage in illegal activity.

This may be important for determining the scope of the provisions – for example, availability of defences such as a defence of “self-cleaning” (see further below).

Secondly, the question arises as to how far the above purposes are adequately fulfilled by giving discretion on these issues to individual procuring entities rather than adopting a government-wide approach on when exclusions should operate. Even if the issue is purely one of reliability, is this better judged on a case by case basis by each procuring entity – or might this lead to excessive inconsistency and/or potential abuse of discretion?

Thirdly, a broad discretion on procuring entities to exclude on the above basis is clearly open to abuse to favour particular suppliers. The possibility for abuse can be greatly reduced by the addition of transparency requirements – but at present the Model Law itself provides little guidance on the subject of transparency in the context of exclusions of this kind.

In an increasingly international market difficulties may also arise in applying these provisions to foreign suppliers – or in obtaining evidence of convictions by home suppliers obtained in other countries.

In addition, considerable difficulties arise in deciding how to deal with the position of company directors and other officers, associated companies (parent, subsidiary or “sister” companies) or sub-contractors<sup>10</sup>. In what circumstances, if any, should the conviction of a director or other person in a position of responsibility in the company affect the status of that company? In some countries it is only individual persons and not the company itself that may be convicted of criminal offences, or of certain offences. (In this case UNCITRAL does deal with the matter, providing that the convictions of directors or officers are relevant). What about the convictions of associated companies, however? Applying disqualification beyond the individual company may involve considerable investigation costs and the red-tape involved can potentially deter good suppliers from participating – but failure to do so can render a policy ineffective. Policy-makers should consider whether these issues should be dealt with in the procurement legislation. If that is not done, it may be that review bodies themselves will develop rules to deal with cases of this kind – to determine when a subsidiary company can be considered to be the same company as its parent company for the purposes of exclusion, for example. From an administrative perspective centralisation of this kind of exclusion decision in an agency that maintains a register of excluded companies and persons can be useful. This can ensure appropriate procedural safeguards for suppliers, limit opportunities for abuse of discretion by procuring entities, and ensure better use of government resources and more effective policy-implementation.

Another issue is what defences should be available to suppliers, if any, and what limitations should be placed on exclusions. In particular, should suppliers have a right not to be excluded if they can demonstrate that they have gone through a “self-cleaning” process whereby they have introduced reforms to prevent the reoccurrence of any similar criminal conduct?<sup>11</sup> The purpose of the rules may be important here. When the purpose of the exclusion is to prevent and deter such conduct, or to ensure reliability, it could be

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<sup>10</sup> Anechiarico and Jacobs, above.

<sup>11</sup> For a comparative review see generally H. Puender, H-J. Priess and S. Arrowsmith, *Self-Cleaning in Public Procurement Law* (Carl Heymanns; 2009).

argued that firms that have gone through a self-cleaning process may be considered less of a risk in this respect than other firms (even those never convicted of an offence).

Should exclusions ever be allowed of suppliers considered to have committed criminal offences without any conviction being obtained and under what circumstances? It can be observed that the policy of the World Bank procurement guidelines now provides for exclusion of those considered guilty of corruption in certain circumstances even without a conviction<sup>12</sup>.

In addition to providing for exclusions for criminal offences or failure to pay tax and social security contributions some procurement systems also provide for the exclusion of suppliers for other types of misconduct.

Thus, for example, Directive 2004/18 which governs the award of most major procurement contracts for works, supplies or services in the EU, contains a list of grounds for excluding suppliers similar in many respects to the list in UNCITRAL, but which includes in addition, in Article 45(2), the possibility of excluding any supplier that:

*"(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate".*

This allows for the possibility of excluding firms guilty of violation of recognised norms that are not, however, matters of criminal law. This could include, for example, violations of codes of professional ethics established by professional tribunals, or violations of competition law (anti-trust law) provisions (including collusion in procurement) or legislation on gender or ethnic discrimination (which in some countries involve sanctions of an administrative or civil rather than criminal nature), which have been established by relevant tribunals. Under this provision it is for each Member State of the EU to decide whether and under what conditions to allow its own entities to exclude on these grounds.

Whether the above provision also covers past misconduct that is not subject to a judicial-type determination, but determined only by investigations by the procuring entity itself is not entirely clear. If it covers only the former then it can be considered simply as extending in a limited respect the exclusion for criminal convictions.

### **3.4.3 Providing incomplete or incorrect information**

Article 6(6) of the Model Law deals specifically with excluding suppliers that provide incorrect or incomplete information for specific procurements. The considerations that apply in deciding whether to exclude a supplier from a procurement in this case are in many ways similar to those that arise in deciding whether to exclude, or allow correction of an incomplete or otherwise non-responsive tender. However, the arguments in favour of exclusion are not so strong in the case of provision of qualification information as in the case of submission of tenders, and the rules thus tend to be more lenient.

In this respect Article 6(6) provides that entities must exclude suppliers if they find that the information provided on qualification was false (which appears to refer to deliberate inaccuracy (Article 6(6)(a))).

It also provides that the entity may exclude them where the information was materially inaccurate or incomplete (Article 6(6)(b)). This means that the procuring entity can exclude the supplier if admitting the supplier to the procedure would be inconvenient– for example, because of the delay that would be involved to the procurement or if, for

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<sup>12</sup> World Bank, *Guidelines for Procurement under IBRD Loans and IDA Credits*, available at [www.worldbank.org](http://www.worldbank.org), section 1.15.

example, the procuring entity considers that the supplier has gained an unfair advantage by having more time to supply information. On the other hand, the procuring entity will be able to accept the supplier if the procuring entity considers that the advantages – in particular, of greater competition – will outweigh any problems.

Similar considerations will arise in deciding whether to exclude a supplier who provides information after any deadline for submissions.

On the other hand, it is provided that the entity may not be excluded where the information was inaccurate or incomplete in a non-material respect (unless it fails to remedy defects promptly on request) (Article 6(6)(c)). This limits the possibility of abusing discretion to favour particular suppliers by ensuring that the procuring entity cannot seize upon minor errors to exclude some suppliers; expands competition; and provides fair treatment for suppliers and thus encourages participation. A rule that suppliers should not be excluded for a mere technicality of this kind can be justified by reference to a principle of proportionality.

### **3.4.4 Administrative suspension or debarment**

As we have seen, Article 6(1)(b)(v) of the UNCITRAL Model Law also provides for exclusion of suppliers if they have been disqualified pursuant to administrative suspension or disbarment proceedings. This refers to the fact that in some procurement systems an authority external to particular procuring entities has a power to make a determination that suppliers be excluded from some or all government procurements for a certain period because of certain conduct by the supplier. Such an authority could have the power to decide whether the conduct in question has occurred and/or to determine the precise nature of the exclusion “sanction”.

For example, such a body could be set up to decide whether and for how long suppliers convicted of corruption should be excluded from government procurements. Here whether the conduct has occurred in the first place is determined by a court, but the administrative authority decides what the consequence should be, perhaps taking into account matters such as the existence of self-cleaning measures. Administrative bodies are also sometimes established when the government uses government procurement as a tool to encourage compliance with government policies on matters such as employment equity, to judge both compliance with the policy and the scope of exclusion for non-compliance. An example of a centralised approach is the work of the United States Office of Federal Contract Compliance Programs (part of the US Department of Labor’s Employment Standards Administration) which has responsibility for federal programmes on affirmative action in the workplace, including decisions on non-compliance by contractors.<sup>13</sup>

As already mentioned, setting up an authority external to the procuring entity to deal with certain types of exclusions can have many advantages. These include limiting opportunities for abuse of discretion by procuring entities themselves, ensuring more efficient application of the relevant government policy and providing for better procedural safeguards for suppliers.

### **3.4.5 Disclosure of qualification criteria and required evidence**

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<sup>13</sup> See [www.dol.gov/OFCCP](http://www.dol.gov/OFCCP); J. Cibinic and R.C. Nash, *Formation of Government Contracts* (3rd ed. 1998), chapter 10; and for a recent review C. McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP; 2007), chapter 6, and the literature cited there. For further illustrations see Arrowsmith, “Horizontal Policies in Public Procurement: a Taxonomy”, above.

In accordance with general principles of transparency, Article 6(3) of the Model law provides that any requirements under Article 6 (which deal both with substantive requirements for qualification and evidence required to prove qualification) shall be set out in the solicitation documents or the pre-qualification documents.

This provision of the Model Law is not clear on the precise degree of information that must be given to suppliers. It seems appropriate that procuring entities should disclose any specific minimum requirements on technical and financial qualification (such as any required number of years of experience).

It is unclear, in particular, however, what information needs to be given about disqualification for criminal convictions. For a procuring entity to have a general discretion on this and to state merely that it reserves the right to exclude entities with convictions may be considered to be insufficiently transparent, creating wide scope for abuse and inconsistency. Thus it might be argued that it is desirable to develop and disclose a more precise policy on this – either through legislation or (if policy on this is left to individual procuring entities as envisaged generally in the Model Law) by requiring procuring entities to develop and publicise their own policy to suppliers.

### **3.4.6 Evidence and legalisation of documents**

Article 6(2) of the Model Law states that (subject to suppliers' right to protect intellectual property and trade secrets) the procuring entity may require suppliers to provide appropriate documentary evidence or other information to show that they are qualified.

Procuring entities need to consider carefully what detailed evidence of qualification suppliers should have to provide at each stage of the procurement. Providing evidence of qualification can be expensive and time consuming and deter participation, especially for small and medium-sized enterprises, as well as increasing supplier overheads which may be passed on through higher prices. Entities may encourage wider participation by limiting the burden to what is strictly necessary at each stage. In particular, it is useful to consider whether particular evidence needs to be provided by every supplier participating in the procurement (either tendering or participating in pre-qualification proceedings) or whether it is adequate to call for that evidence only from the supplier winning the contract.

One area in which this has often caused problems is in relation to the legalisation of documents - the official confirmation that a signature, seal or stamp on a document is genuine. Article 10 of the Model Law provides that if the procuring entity requires the legalization of documents, it shall not impose any requirements other than those provided by the general law for the type of documents in question. However, the Model Law imposes no restrictions on the power of procuring entities to call for legalization of documents from suppliers before they are awarded a contract. In the current review of the Model Law the Working Group has agreed to recommend that procuring entities should be able to require legalization of documentation only from successful tenderers<sup>14</sup>.

### **3.4.7 Pre-qualification proceedings**

As we have seen, the concept of pre-qualification refers to qualification procedures undertaken at the start of an award procedure, before tenders are submitted.

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<sup>14</sup> See Article 9(7) of the draft text found in document A.CN/9/WG.1/WP.73/Add.1 (available at [www.uncitral.org](http://www.uncitral.org)), which was developed for the eighteenth session of the Working Group in April 2010.

The reasons for using pre-qualification procedures and relevant considerations in deciding when to use them are explained in the Guide to Enactment on the UNCITRAL Model Law, in the commentary on Article 7 of the Model Law, as follows:

*"Prequalification proceedings are intended to eliminate, early in the procurement proceedings, suppliers or contractors that are not 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 involve a very specialized nature. The reason for this is that the evaluation and comparison of tenders, proposals and offers in those cases is much more complicated, costly and time consuming. The use of prequalification proceedings may narrow down the number of tenders, proposals or offers that the procuring entity must evaluate and compare. In addition, competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high value contracts, where the cost of preparing the tender, proposal or offer may be high, if the competitive field is too large and where they run the risk of having to compete with unrealistic tenders, proposals or offers submitted by unqualified or disreputable suppliers or contractors".*

Article 7 of the Model Law sets out various rules for conducting pre-qualification proceedings that apply to procurement methods in general under the Model Law. This includes tendering, in which we have already noted that the Model Law allows for the possibility of pre-qualification, where appropriate. These provisions aim to secure equal treatment of suppliers and transparency in the process.

The main rules are:

1. The general rules in Article 6 governing criteria and evidence for qualification etc are to apply: Article 7(1).
2. Pre-qualification documents must be provided to suppliers on request and suppliers may not be charged more than printing costs (Article 7(2)) – a rule which we saw at earlier also applies to other documentation.
3. Pre-qualification documents must include specified information including on the contract itself, on how pre-qualification procedures will be run, and on evidence of qualifications that is required (Article 7(3)).
4. Rules on clarification of the documents which are similar to those on clarification of the specifications etc (Article 7(4)).
5. A requirement to notify suppliers promptly of decisions and to make available to anyone (not just suppliers) on request a list of qualified persons (Article 7(6)), and to provide suppliers with the grounds for any rejection – although it is expressly stated that the procuring entity need not give the evidence or reasons on which the finding was based (Article 7(7)). This provision is included so that suppliers may more easily exercise their right to challenge a decision.

Article 7(8) provides that suppliers may be required to demonstrate their requirements later according to the same criteria. This is included since the position may be affected by new circumstances occurring before the contract is awarded, such as reduced financial resources of the supplier.

### **3.5 Modification and withdrawal of tenders and tender securities**

It is common to provide that tenders that have been submitted may be withdrawn or modified prior to the tender deadline but not afterwards. In this respect Article 31 of the UNCITRAL Model Law provides the following rules:

1. Tenders are to be in effect for the period stated in the solicitation documents;
2. A supplier may modify or withdraw its tender prior to the deadline for submission without forfeiting its tender security (Article 31(3)). However, it is also stated that this is subject to any contrary stipulation in the tender documents (Article 31(3));
3. The modification or withdrawal by a tenderer is effective if it is received prior to the tender deadline.

A procuring entity may suffer losses if a tenderer withdraws its tender before the date of expiry – for example, costs of delay to the project or of running a new tendering process, or paying a higher price for the work. In some cases procuring entities may seek a tender security – in the form of deposit of cash or some other form - to allow it to safeguard against this loss and to discourage tenderers from withdrawing.

Article 32 of the Model Law contains rules to govern tender securities when the procuring entity decides to require such a security. It does not require procuring entities to require such securities, however, they are often sought in the case of high-risk and/or high value procurement and are not generally required in all cases.

The main rules are as follows.

First, if any requirement for a security is imposed it must be imposed on all suppliers.

Secondly, the procuring entity must specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security (Article 32(1)(f)).

Thirdly, any requirement that refers directly or indirectly to conduct by the supplier must relate only to: withdrawal or modification of the tender after the deadline therefor (or before the deadline if so stipulated in the solicitation documents); failure to sign the procurement contract; or failure to provide a required security for the performance of the contract after the tender has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents security (Article 32(1)(f)).

The solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity (Article 32(1)(b)). However, reflecting – like so many of UNCITRAL's provisions – the Model Law's concern over opening up markets to trade, a procuring entity is forbidden from rejecting a tender security purely on the grounds that it is not issued by an issuer in the awarding state (unless the acceptance by the procuring entity of such a tender security would be in violation of the national law).

The procuring entity must make no claim to the amount of the tender security, and shall promptly return, or procure the return of the tender security documents on the expiry of the tender security, entry into force of a procurement contract (and the provision of a security for performance if required), termination of the award procedure or the withdrawal of the tender prior to the deadline (if permitted).

Before tendering, a supplier may request the procuring entity to confirm the acceptability of a proposed issuer or confirmer of a tender security (if acceptance is required) and the procuring entity must respond promptly (Article 32(1)(d)). However, confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness (Article 32(1)(e)).

On this last point the Guide to Enactment of the Model Law states that reference to confirmation of the tender security is intended to take account of the practice in some States of requiring local confirmation of a tender security issued abroad – but emphasises that it is not intended to encourage such a practice.

## **3.6 The form of tenders and tender opening**

### **3.6.1 Form of tenders**

As is common in many public procurement laws, the UNCITRAL Model Law on procurement provides, in Article 30(5)(a), that in general tenders are to be submitted in writing, signed and in a sealed envelope.

These requirements serve several purposes, namely:

- To provide a record of the tender;
- To secure authenticity (to establish the identity of the sender);
- To provide security – to ensure that the tender cannot be tampered with prior to opening; and
- To provide confidentiality – to ensure that the contents of the tender cannot be accessed by unauthorised persons prior to opening.

This rule on the form of tenders is subject to a qualification in Article 30(5)(b) which is designed, in particular, to allow for submission in electronic form where this is equivalent to the traditional written signed and sealed tender. This allows a tender to be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality. The scope of this possibility for written tenders under the current rules and reforms to the Model Law that are being considered in the area of electronic procurement are considered later in chapter 7 on electronic procurement.

### **3.6.2 Tender opening**

In open tendering procedures it is common to provide for public opening of tenders – or at least opening of tenders in the presence of all participants. This enables interested parties to verify to a degree that there have been no abuses to award the contract to a supplier who is not the best bidder.

The UNCITRAL Model Law provides for the following rules on tender opening:

*"Article 33. Opening of tenders*

*(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.*

*(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders.*

*(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11."*

Some countries provide for more extensive information on tenders to be made available. Often there are also detailed procedural rules on opening of tenders laid down in regulations<sup>15</sup>.

## **3.7 Non-conforming tenders**

### **3.7.1 Introduction: policy considerations<sup>16</sup>**

An important issue in open tendering is the treatment of tenders that do not conform in all details with the requirements set out in the solicitation documents. These we will call "non-conforming" tenders. A failure to conform may relate to substantive requirements – such as the product specifications – or to procedural matters, such as the language of tenders.

Such tenders are sometimes called "non-responsive" or "non-compliant" tenders. These terms "non-responsive" and "non-compliant" are sometimes used in the same sense as our term "non-conforming" to refer to all tenders that do not conform to the requirements laid down. However, the terms "non-responsive" and "non-compliant" also sometimes carry a narrower connotation in legal instruments – including in the UNCITRAL Model Law – referring not to all tenders that exhibit some degree of non-conformity but only to tenders that exhibit a type of non-conformity that is not or cannot be waived or corrected. The term non-conforming is used here, instead of non-responsive or non-compliant, to refer generally to all tenders that show some degree of non-conformity.

In this section we identify some general considerations relating to this problem, before moving on in the next section to consider the approach of regulatory rules to the issue of non-conforming tenders.

There are several possible responses to a non-conforming tender:

- Option 1: To consider the tender as it stands (possibly taking into account any non-conformity when comparing the tenders);
- Option 2: To consider the tender once it has been corrected to conform (this could involve a correction by the procuring entity or a correction by the tenderer itself);
- Option 3: To reject the tender;
- Option 4: To treat the tender as one that must be rejected but conduct a new tendering or other procurement exercise e.g. with amended specifications.

Sometimes a non-conforming tender provides the best value for money for a procuring entity, and to reject it means either by-passing the best-value purchase or (if allowed by the system) going to the expense and trouble of a new tender. Another argument in favour of accepting a non-conforming tender in certain cases is that it is unfair to a tenderer to attach the significant consequence of rejection to a minor violation of the rules, especially given the complexity of the procurement process and the fact that the tenderer might have incurred significant expense in participating. To reject a tender for a very minor defect could, indeed, be considered actually to contravene the principle of fair treatment of those dealing with the administration, including the administrative law principle of proportionality that is considered part of that concept, and of equal treatment – it can be argued that in case of violations that are wholly insignificant the violating tenderer is, materially, in the same position as a conforming tenderer. Automatically rejecting tenders with minor defects can also undermine the government's ability obtain

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<sup>15</sup> On the approach of the United States federal procurement system on these matters, which provides an interesting illustration, see J. Cibinic and R.C. Nash, *Formation of Government Contracts* (3rd ed. 1998), pp.522-525.

<sup>16</sup> See also O. Dekel, "The Legal Theory of Competitive Bidding for Government Contracts" (2008) 37 P.C.L.J. 237; Cibinic and Nash, above, pp.537-592.

value for money in the longer term in that good tenderers might be reluctant to compete in a system that presents such risks of wasted effort.

However, there are a number of arguments against accepting non-conforming tenders or allowing their correction, either in general or in particular cases:

1. **To accept a non-conforming tender or allow it to be corrected** may mean that the entity has not complied with the rules laid down for the procedure, which is an important aspect of transparency and equal treatment (in the latter case possibly both as an objective of the procurement process and a means to achieve other objectives). From the perspective of equal treatment, not to follow those rules involves unequal and unfair treatment of other tenderers. This is especially so if other tenderers have acted on the rules in preparing their own tenders and especially if these tenderers have been caused prejudice in doing so - for example, if their tenders are less attractive as a result of complying, or they have incurred expenses in complying. Not following the stated rules also damages confidence in the system for the longer term, to the detriment of value for money;
2. Rejecting non-conforming tenders encourages tenderers generally to take better care to comply with the requirements of the documents, to the general benefit of the procurement process as a whole;
3. Any possibility of correction is open to abuse by suppliers in certain cases. Suppliers can deliberately plant errors or ambiguities, and then use the opportunity for correction to advance their own interests. For example, to take an extreme case, they could deliberately omit a particular price figure from the tender and after hearing other tender prices at tender opening (or from a procuring officer with whom they are colluding) could insert an appropriate figure to win the contract at the highest price they can get away with. Even if errors or ambiguities that involve conformity are not planted deliberately their existence might be open to a tenderer to exploit in this way.
4. The possibility of accepting non-conforming tenders will often require that discretion is given to procuring entities to judge whether or not to waive or allow correction of the particular non-conformity, and such discretion can be abused to favour certain suppliers.

A decision on how to treat a non-conforming tender thus involves resolution of certain conflicts between:

- Different objectives of the procurement system, namely value for money, on the one hand, and equal treatment, on the other (although we have seen that in some cases accepting non-conforming tenders might actually be considered to support equal treatment); and
- Immediate value for money, on the one hand, and, on the other, the general principles of transparency and equal treatment as a means to promote both value for money in the system as a whole (as well as for the specific procurement) and integrity.

The way in which these conflicts are resolved and the solution reached for the problem of non-conforming tenders may possibly vary according to the emphasis that the system places on particular objectives and means, and the environment in which the regulatory rules operate.

A regulator can potentially entrust the decision on how to treat non-conforming tenders to various levels of decision-making. Thus, a regulatory system could confer a full discretion on the procuring entity and/or procuring officer in the choice of solution. Alternatively, the system can specifically regulate that choice to a greater or less degree - for example, to allow the entity to accept non-conforming tenders only under certain conditions and/or require the entity to accept (or reject) in certain cases. In making the decision on how much discretion to confer it is relevant that - as with any discretion - broad discretion over whether to accept non-conforming tenders could be used to favour certain suppliers contrary to the rules of the system (for example, for corrupt motives, or to favour

national suppliers where this is prohibited), to the detriment of value for money and integrity. The discretion that exists could be abused to admit the tenders of certain suppliers and exclude those of others. Since in many procurements there are numerous instances of minor non-conformity this discretion could be quite significant. It may be for this reason that some procurement systems have adopted a very strict approach to non-conformity, requiring all non-conforming tenders to be rejected. Under this approach, the regulatory system removes all discretion in this matter from the procuring officer. This issue is discussed further below.

Dekel<sup>17</sup>, writing in the context of the United States federal procurement system, suggests that where some discretion is given to procuring officers, control over the discretion of the procuring officer is needed because individual officers are naturally inclined to favour value for money in the immediate procurement over other objectives and principles more than is appropriate – not for abusive motives but because of a natural tendency to focus on immediate financial savings rather than the overarching principles of the system. Thus he proposes a presumption of rejection – albeit a rebuttable one.

From a procuring entity's perspective, the importance of careful drafting of specifications to help reduce the problem of non-conforming tenders cannot be overemphasised<sup>18</sup>, since many (although far from all) of the problems that arise result from lack of care and precision. Common problems include failing to make considered decisions on which requirements are mandatory, and which are not; failing to make it clear to suppliers which requirements are mandatory, and which are not mandatory; failing to distinguish with sufficient care and precision between specific aspects of the specification that involve a "pass-fail" test (where a certain requirement must be met by all tenderers) and issues that merely relate to the comparison of tenders (for example, where tenderers receive a score depending on how well they perform on the criterion in question; and specifications which are unduly prescriptive or are not realistic for tenderers to meet. These may lead to the submission of non-conforming tenders that meet functional or performance requirements but do not conform to the tender documents. If there is doubt about the procuring entity's ability to draft realistic specifications, consideration should be given to dealing with this issue in some other way – for example, consulting the market or using a procurement method other than open tendering that is available when it is not possible easily to draft specifications. The fact that procuring entities in the public sector are generally operating under quite rigid rules concerning acceptance/rejection of non-conforming tenders make these issues more important to value for money than they are in the private sector.

## **3.7.2 The regulatory treatment of non-conforming tenders**

### **3.7.2.1 Introduction**

The issue of non-conforming tenders under the UNCITRAL Model Law is addressed in the following provisions.

"Article 34. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted;

<sup>17</sup> Dekel, above.

<sup>18</sup> A point also emphasised in K. Krueger, "The Scope for Post-tender Negotiations in International Tendering Procedures", Ch.10 in Arrowsmith and Davies (eds), *Public Procurement: Global Revolution* (Kluwer Law International, 1998).

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents;

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(3) The procuring entity shall not accept a tender:

(a).....

(b) If the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) If the tender is not responsive.....”

As noted above, some public procurement systems have adopted a strict rule prohibiting acceptance of non-conforming tenders, with no or very limited exceptions. This may be to eliminate any discretion that might possibly be abused. However, anecdotal evidence suggests that this very formal and rigid approach is becoming less common. As an alternative it is common to balance the various policy considerations outlined in the previous section by an approach which:

- Makes a distinction between tenders that involve material non-conformity, which generally must be rejected, and tenders that involve immaterial non-conformity, that must or may be accepted – and (in some cases) acknowledges quite a wide scope for the category of immaterial non-conformity; and
- Allows scope for correcting non-conformity in certain cases when this is a result of an error by the tenderer.

This is the approach of the Model Law in Article 34 as set out above. This is achieved through the following provisions:

- Article 34(3)(c), which requires the procuring entity to reject non-responsive tenders;
- Article 34(2)(a), which states that a tender is responsive only if it conforms to all requirements in the tender solicitation documents; but
- Article 34(2)(b), which makes an exception to 2 above – it provides that the procuring entity may regard a tender as responsive “if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender”.

We will consider first the general rule of the Model Law that non-conforming tenders may not be accepted and will then consider the exceptions and qualifications to this general rule, namely:

- The possibility for correction of non-conformity arising from certain errors to bring the tender into conformity - so that it will be considered along with other tenders; and
- The possibility for the procuring entity to waive certain minor deviations i.e. to consider the tender despite its non-conformity.

We will then note another option, namely the possibility to hold a new tendering procedure under the Model Law.

### **3.7.2.2 General obligation not to accept non-conforming tenders**

The UNCITRAL provisions outlined above embody a rule common to many procurement systems, namely a rule that a procuring entity may not accept a tender that does not conform to the requirements set by the procuring entity.

A typical type of non-conformity is one in which the tender does not comply with important aspects of the specifications or with important terms of the contract – for example, when it offers products which do not meet certain mandatory performance requirements or declines to accept mandatory contract conditions on payment terms. An example of this from the EU is Case C-243/89, *Commission v Denmark* ("Storebaelt")<sup>19</sup>. In that case the Court of Justice of the European Union concluded that the procuring entity could not accept a tender that did not comply with "fundamental" conditions. That case concerned proceedings brought against Denmark by the European Commission, in relation to a contract for the construction of a bridge across the Great Belt. The contract had been awarded by a restricted procedure under Directive 71/305 on public works, a predecessor to the current Public Sector Directive 2004/18. The specifications had proposed three possible construction methods and also stated that contractors could propose alternative methods. This was, however, subject to certain conditions, one of which was that the contractor would assume responsibility for the details of the alternative design. The authority accepted a tender which involved an alternative proposal but did not meet this condition. The Court ruled that this infringed the Directive, since any tender accepted must meet the conditions in the specifications. The Court noted (in para.42 of the judgment) that the non-compliance was with a "fundamental" condition.

The Court reached this conclusion even though the applicable legislation did not expressly regulate non-conforming tenders – the Court based its conclusion on a general "equal treatment" principle. It can be considered contrary to the equal treatment principle to accept such a tender since by departing from the rules that it has laid down the procuring entity has given one tenderer an opportunity that others do not have (that is, to tender using different terms and conditions from those stipulated). Obviously this could affect the result of the competition, giving the non-conforming tender a competitive advantage that others do not have. Thus procuring entities may not accept such a tender – even if it is the best tender in the competition.

This type of non-conformity could arise where enterprises have misunderstood the requirements or simply made an error in putting the documents together. Sometimes, however, it arises because of poor solicitation documents. For example, where specifications are unduly prescriptive, tenderers might in practice submit products that are "equivalent" in functionality to those specified but are made to different technical specifications or proffer solutions or conditions which differ from those in the documents, but which the tenderer believes can offer better value. (In a case like *Storebaelt*, for example, the tenderer might depart from the stipulated conditions because it thinks its offer will still offer better value overall, and the procuring entity may agree with that view, showing that the procuring entity has made a mistake by being too prescriptive in the solicitation documents). It can also arise where the procuring entity has devised a specification which is not realistic for tenderers to meet.

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<sup>19</sup> [1993] ECR I-3353

### **3.7.2.3 The possibility for correction: non-conformity that arises from certain kinds of errors in the tender**

If a procuring entity cannot accept a non-conforming tender as it stands – option 1 in the list set out earlier – the question that next arises is whether the entity can correct the tender or allow correction of the tender to bring it into conformity (option 2). This can allow the procuring entity to accept the best available offer (since the corrected tender might offer better value than the other tenders) but at the same time avoids the non-conforming tenderer tendering on a different basis from others and potentially gaining an unfair competitive advantage from that fact.

However, as we have seen above there are many potential problems with allowing corrections. First, the tenderer concerned could use the opportunity to formulate its “revised” tender in light of what it knows (either legally or illicitly through the procuring entity) about other tenders submitted. Further, the tenderer could even plant the non-conformity in the first place in order to gain an opportunity for correction. In cases of substantial non-conformity there is generally likely to be significant scope for flexibility in correcting the tender in this way since it will often not be clear what the tender would have been had it been in conformity in the first place (for example, in a case like Storebaelt, what the price would have been of a conforming tender). Further, any discretion to allow such major corrections could be abused by the procuring entity to favour particular suppliers. Even if there is no abuse or collusion, it may be argued that to give such an opportunity of correcting the substance of the tender provides an additional opportunity (and time) to amend to one firm that others do not have. The supplier could also plant non-conforming elements deliberately in order to provide itself with the flexibility of removing itself from the tender process (by declining to accept correction) without any adverse effects.

For these reasons correction of tenders to bring them into conformity often is not allowed as a general rule.

This is the approach of the UNCITRAL Model Law: Article 34(1) provides that (subject to limited exceptions for correcting errors, discussed later below):

*“No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted”*

(emphasis added).

However, even under systems, like the UNCITRAL system, with a general principle that prohibits acceptance or correction of non-conforming tenders, exceptions to the general principle are often made to allow or require correction of non-conforming tenders when the non-conformity arises from certain types of errors, especially where the various policy considerations above against correction have only very limited application to the particular facts in question.

The UNCITRAL Model Law provides for correction of errors in two cases, namely:

i) Arithmetical errors (when the entity itself must correct the tender). These will often not be errors that affect conformity of the tender, but they may be – for example, where without correction such an error renders the legally tender ambiguous because of inconsistency. In such a case, Article 34(1)(b) applies, requiring the procuring entity to correct the error. This is considered in section 9.9, which deals more generally with errors in tenders.

ii) Errors or oversights capable of being corrected without touching on the substance of the tender – when the procuring entity may allow correction at its discretion (but is not required to do so). This is also provided for in Article 34(2).

Examples of an error or oversight capable of being corrected without touching on the substance of the tender might be failure to complete sections of the tender giving certain contact details for the tenderer or procedural errors such as supplying an insufficient number of copies of the tender.

It is also arguable that the above provision contemplates the possibility of correcting an error - as not touching on the substance of the tender - even when the error affects the subject matter of the contract in a significant way, provided that the correction does not improve the tenderer's position in applying the award criteria.

Suppose, for example, the solicitation documents in a tender for machinery require a processing speed of 60 item units per hour. The only award criterion for awarding the contract is lowest price. Suppose that the tender of tenderer A states that the machine offers a processing speed of "0" units per hour. This is clearly an error. The procuring entity alerts the tenderer to the error and seeks clarification of the intended figure under Article 34(1) of the Model Law. Tenderer A states that the processing speed of the machines that it is offering is actually 70 units per hour. Arguably the procuring entity may allow Tenderer A to correct the tender in this case to insert the figure of 70 units per hour.

Suppose, however, that in the above scenario the award criteria for the contract are both price and the processing speed of the machines. In this case it appears that no correction can be permitted since the substance of the tender (the speed of processing, which is one of the award criteria) will be affected by any correction, potentially giving the tenderer the opportunity to manipulate its price after the deadline.

This approach would give quite a wide scope for correction of errors that lead to non-conformity. The policy considerations behind such an approach would be that in this particular situation there is no scope for the tenderer to abuse the possibility of correction to improve its tender after the tender deadline; and that it secures the various advantages of corrections that we referred to earlier (wider competition, fair and equal treatment of tenderers and encouraging long term participation by suppliers).

It should be emphasised that, as with the arithmetical error provision, since this provision refers to errors or oversights it cannot be applied when the tenderer has deliberately planted an error or omission. This is a difficult factual question. The difficulty of this question means that there is still some scope to plant what appear to be errors that give a tenderer flexibility to withdraw. The possibility for abuse of the provision is, however, reduced by the fact that it is in the procuring entity's discretion whether to allow correction.

On the wording of Article 34(2)(b) it might alternatively be argued, however, that any correction that brings a tender into conformity is a change that touches on the substance of the tender – and hence that even in situation A above the correction is not allowed. Since the wording of the UNCITRAL provision is not entirely clear, it might be useful for enacting states to elaborate further in their own procurement laws on whether or not corrections are permitted in this kind of case.

The question can also be asked as to whether in the second scenario above the tenderer should be permitted to correct the units-per-hour figure in its tender when it is clear on the face of the tender or from other clear evidence what the correct figure should be, even when the application of the award criteria is affected by the correction. It might be argued that in this case there is no or very limited scope for the power of correction to be abused – whilst the advantages of correction referred to above would still apply. Of

course, there can be much debate about the clarity of evidence that would be needed. The Model Law appears to provide for (and indeed to require) correction in such a case when the error is an arithmetical one, as is discussed below – but there is no clear provision dealing with this scenario when the error is not an arithmetical one.

However, it could be argued that where the correct figure is clear from another part of the tender itself no correction under Article 34(2)(b) would even be needed, but that filling in the correct figure would merely be a “clarification” – and that this possibility is envisaged under the separate provision in Article 34(1) of the Model Law which allows the procuring entity to seek clarifications. What, however, of the case in which there is an obvious error that leads to non-conformity but there is no clear evidence from the tender itself as to what the correct figure should be? It appears that the Model Law does not envisage any possibility of correction in this case.

Again, these are both points that enacting states may possibly wish to clarify further in their own procurement laws.

Finally, it is important to emphasise the point that the Model Law does not require the procuring entity to allow corrections here but merely permits it do so. This is different from the case of the “arithmetical errors” provision, where correction is required (see below).

The Model Law and Guide to Enactment do not give any further guidance on how any discretion to correct should be exercised and this discretion could potentially be exercised quite differently by different entities/officers. For example, a procuring entity – or even individual officer – might offer a presumption of allowing correction whilst another entity – or officer - might approach the subject in the opposite manner by applying a presumption against correction, even for very minor and unimportant procedural errors. In exercising the discretion whether or not to allow correction it is quite common in some systems, where weight is placed on transparency, not to allow correction for substantial non-conformity – at least where the result of the correction would be that the tenderer in question will become the winning tenderer when that would not otherwise be the case. It may be useful for implementing states or entities to provide further guidance on this in some way – both to guide those exercising discretion on the policy to be applied and to limit the opportunities for abuse of discretion by the procuring entity.

#### **3.7.2.4 The possibility for the procuring entity to waive certain minor deviations**

A further exception to the general principle requiring rejection of non-conforming tenders is that the UNCITRAL Model Law gives discretion to procuring officers to waive conformity for certain defects – that is, to consider and accept the tender in spite of the defect.

This does not, however, mean that the defect is ignored: Article 34(2)(b) requires that any deviations that are waived in accordance with this provision shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders. In some cases, of course, this will not be relevant (for example, procedural defects that have no impact on the value of the tender).

In this respect, Article 34(2)(b) provides that the procuring entity may regard a non-conforming tender as responsive in the case of minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents.

These could be defects accepting either the content of the goods or construction or contract terms – such as a minor deviation from the required minimum thickness of a

product or failing to accept certain contract conditions - or defects in procedural matters (such as the number of copies of the tender submitted).

Obviously what is material in the case of either substantive or procedural matters is a matter of degree. At one end of the spectrum it is clear that some defects, such as failing to meet important functional requirements of the specification (such as speed of vehicles supplied for emergency purposes) will generally be treated as material. A non-conformity such as that in the Storebaelt case when the tenderer declined to accept liability for its own design as required in the documents will also no doubt generally be treated as material. Others will be no doubt generally treated as immaterial – for example, supplying 11 copies of a tender instead of 12.

However, there is a significant grey area in between. The UNCITRAL Model Law provisions set out above do not indicate in any way what exactly constitutes a material departure from the requirements of the solicitation or what is the general definition of “material”<sup>20</sup>.

Given the policy issues involved, factors that might potentially be regarded as relevant in approaching this question include:

1. The significance for competition of the non-conformity in an objective sense – is it the type of non-conformity generally likely to have a bearing on the outcome of the competition? Obviously minor procedural irregularities do not usually do so; and nor will deviations whose impact is very small in relation to the overall value of the contract.
2. Whether the tenderer has gained a significant advantage by not complying e.g. by lower costs in making the non-compliant product; and whether this could affect the outcome of the competition (e.g. by allowing the tenderer to submit a lower price);
3. Whether, if uncorrected, the defect would affect the outcome in this case – in particular, should the tender be capable of acceptance if it would have won in any circumstances?<sup>21</sup>
4. The extent to which the impact of the non-conformity on the value of the contract can be objectively quantified (potentially important in the context of UNCITRAL’s approach which requires quantification of the non-conformity as discussed below);
5. The potential for the tenderer gaining an advantage when correcting the non-conformity (relevant if and when the tenderer itself is allowed to make a correction and adjust the rest of the tender accordingly. This is not, however, the case under UNCITRAL – see below).
6. The extent to which the tender documents themselves designate certain types of non-conformity as material or immaterial, and spell out their consequences. It might be considered that this should be conclusive in order to promote legal certainty. On the other hand, it can be argued that policy objectives affecting non-conformity should not permit procuring entities to impose their own rules in every case – for example, it might be argued that the principles of proportionality and equal treatment, the value of considering the largest possible number of tenders and the need to encourage participation in public procurement should preclude procuring entities from imposing any rule that tenders that do not comply with minor requirements must be rejected in every case.

These various factors could also or instead be considered as relevant to the exercise of any discretion to waive the requirement or allow correction of the tender, rather than

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<sup>20</sup> The distinction between material and non-material non-conformity in the context of the US federal procurement system is discussed by Cibinic and Nash, pp.538-544. (Note that in that system the consequence of a non-conformity being considered material is that it must normally be rejected, whilst the consequence of a non-conformity being considered not to be material is that the procuring officer may waive it or allow correction, according to what is in the government’s best interests). In that system departure from the details of the product specification (dimensions, material of manufacture etc) is generally treated as material, even if there is no impact on function.

<sup>21</sup> On the United States approach see Cibinic and Nash, above, pp.544-545.

going to the definition of material/immaterial (see further below on this). The latter approach, however, offers less discretion to the procuring officer, since the possibility of allowing correction is limited by the legal definition of what is material rather than depending solely on the officer's discretion.

As is explained in the Guide to Enactment commentary on Article 34, para.2, of the UNCITRAL Model Law, the possibility of waiving non-conformity in the above cases promotes participation and competition – which as we have noted means the possibility of accepting a better value tender. As the Guide to Enactment also explains there, para. 2, requiring quantification of the discrepancy ensures that non-conforming tenders are compared objectively with tenders that fully conform.

As we have seen, the approach of UNCITRAL is to allow waiver subject to the procuring entity's quantification of the impact of the non-conformity, rather than to allow correction of the tender itself. This is because correction of the tender in many cases may require consequential adjustment of other terms in the tender itself that would give the tenderer an opportunity to manipulate the terms of the tender – quantification of the impact remains within the control of the procuring entity.

A different approach is to allow the tenderer to correct the tender – but this presents the dangers just mentioned. For a system which allows for wide correction of material errors or takes a very liberal approach to the definition of "immaterial" errors this may, however, be necessary, on the basis that it is not satisfactory to the procuring entity to accept a tender that does not meet its requirements (for example, fails to accept a significant risk) – financial compensation may not be appropriate (the procuring entity may simply not wish to accept the risk in question). However, this is not envisaged by UNCITRAL apparently because it is contemplated that only quite minor matters will be regarded as immaterial.

As with correction of errors not touching on the substance of the tender, the Model Law and Guide to Enactment do not give any further guidance on how any discretion to waive non-conformity should be exercised by the procuring entity. As with other types of errors discretion could potentially be exercised quite differently by different entities/officers. For example, a procuring entity – or even an individual officer – might offer a presumption of acceptance whilst another entity – or officer - might approach the subject in the opposite manner by applying a presumption against waiver, and waiving non-compliance only in exceptional cases such as where there has been some degree of fault on the part of the procuring entity in contributing to the situation. As with errors not touching the substance of the tender it may thus again be useful for implementing states or entities to provide further guidance on this in some way, both to guide those exercising discretion on the policy to be applied and to limit the opportunities for abuse of discretion by the procuring entity.

In the absence of such explicit guidance it is possible that such discretionary decision-making may be controlled through the development of case law. We have noted earlier a number of factors that might be used to define the concept of an immaterial non-conformity that is subject to waiver, such as objective impact, whether the non-conformity affects the outcome of the competition and whether it is capable of reasonably objective quantification that allows objective adjustment of the tender. These factors could also, or instead, be made relevant at the level of the exercise of discretion to waive rather than provided for in the definition of the scope of the possibility of waiver (i.e. definition of what is an immaterial non-conformity). Whether the non-conformity is deliberate could also be a factor here.

Another approach, differing only slightly from a presumption in favour of waiver, might even be to require in law the acceptance of non-conforming tenders when the non-conformity is not material – or at least to require this subject to limited exceptions, that provide for a right of rejection when deliberate abuse is suspected, for example. Such an

approach might be contemplated in a system that places limited weight on transparency and experiences a high degree of integrity in its procuring personnel and on the part of tenderers, or where the principles of fair treatment of suppliers and proportionality have significant influence.

We have seen above that Article 6(6) of the Model Law deals expressly with the situation in which non-conformity consists in the fact that the supplier fails to supply required evidence of its qualifications. This provides that (apart from false information where rejection is required) the procuring entity may disqualify a supplier where it finds that the information submitted is materially inaccurate or materially incomplete (Article 6(6)(b)). (Article 6(6)(c)) provides, on the other hand, that the procuring entity may not disqualify the supplier where the information is incomplete in a non-material respect, unless the supplier fails promptly to correct the deficiency.

### **3.7.2.5 Possibility of a new tendering exercise to enable the procuring entity to consider tenderers whose initial tenders did not conform**

For some of the cases involving non-conformity the procuring entity may decide that it does not actually want to go ahead and award the contract based on the tender procedure in question, because of problems in the solicitation revealed by the non-conforming tender or tenders.

For example, in a case like Storebaelt the procuring entity may realize that it has been too prescriptive in the specification. The entity may decide that it can get better value for money by seeking tenders based on a more flexible approach by providing for the requirement for tenderers to accept the risk of their designs to be optional only, and the willingness to so do being set as an award criterion in comparing tenders rather than as a mandatory requirements for all tenderers. Such situations are not uncommon in practice (and we advised above that it is important to consider carefully before issuing the specification which requirements should be made mandatory, in order to avoid this sort of situation).

The position here will depend on the law governing the termination of procurement procedures - but often a new procedure will be allowed in a procurement law (see further below). However, it may be relevant also to consider how the competition may be affected by the fact that the previous procedure has revealed certain information about the tenders.

It is also possible in a procedure that all the tenderers submit non-conforming tenders because of problems with the specifications, such as setting unrealistic specifications that tenderers cannot meet. We have seen above that when all tenders are rejected in tendering proceedings because of non-conformity and/or certain other reasons, an option available to a procuring entity under the Model Law when it considers that new tendering proceedings will not be productive is to recommence the procedure using other procurement methods, such as two-stage tendering or request for proposals. These procurement methods can help the procuring entity set adequate specifications or avoid the need for setting the kind of specifications required in tendering procedures.

It can be noted that Article 6(6) of the Model Law deals expressly with the situation in which the supplier fails to supply required evidence of its qualifications. This provides that the procuring entity may disqualify a supplier where it finds that the information submitted is materially inaccurate or materially incomplete (Article 6(6)(b)). The provision does not, however, require disqualification for a material omission. There is an exception where the supplier submits false information (Article 6(6)(b)), in which case the supplier must be disqualified (Article 6(6)(a)).

## **3.8 The deadline for tenders, including extending the tender deadline and late tenders**

### **3.8.1 The tender deadline**

It is generally required to set a firm deadline for tenders. Article 30(1) of the Model Law provides that the procuring entity shall fix the place for, and a specific date and time as the deadline for the submission of tenders.

As the Guide to Enactment comments (commentary on Article 30) "An important element in fostering participation and competition is the granting to suppliers and contractors of a sufficient period of time to prepare their tenders". As the Guide explains:

*"Article 30 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 tenders. Thus, it is left up to the procuring entity to fix the deadline by which tenders must be submitted, 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 for the submission of tenders."*

Such minimum time periods could, of course, differ according to the nature of the procurement.

One possible approach in legislation is to fix a specific minimum time period (number of days) and then in addition provide that the time period set must in addition be adequate to allow time to prepare tenders.

The Model Law also provides in Article 35(5)(c) that the procuring entity shall, on request, provide a receipt showing the date and time when its tender was received.

### **3.8.2 Extensions to the deadline**

It is widely accepted that extensions to the deadline are sometimes appropriate.

First, extensions often will be required by law if there is a change to requirements or some other reason why the original deadline cannot be considered sufficient. In this respect the Model Law provides in Article 30(2) that the procuring entity must, if it issues a clarification or modification of the solicitation documents or holds a suppliers' meeting, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

Even when this is not provided for specifically by law, general provisions of the law – such as requirements to allow adequate or specific time periods for tendering, or general equal treatment principles – are quite likely to be interpreted as requiring extensions in this kind of case.

In addition, procurement laws may sometimes give procuring entities a discretion to extend the deadline for good reasons. In this respect the Model Law states in Article 30:

Article 30(3): The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more

suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

Article 30(4): Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

As with any discretion there is a potential danger for abuse by exercising the discretion in favour of some firms but not others even in the same situation. The commentary on Article 30 in the Guide to Enactment states that an extension under paragraph (3), since it is in the entity's "absolute discretion", is not subject to review under the supplier review mechanism. However, as with other restrictions on supplier review, enacting states might want to consider whether this is really an appropriate restriction – whilst it may not be appropriate to review some aspects of the extension decision (whether it was appropriate to extend the deadline balancing the interests in considering more tenders against the resulting delay) a basic right of review for, for example, bad faith, might be considered advisable.

### **3.8.3 Review of the Model Law's provisions on deadlines**

It can be noted that in the latest published draft of the revisions to the Model Law a new Article 13 is proposed, which will consolidate in one article provisions found throughout the Model Law on deadlines and their extension and apply them to all procurement methods. (Currently deadlines and their extension are addressed in the Model Law only in the context of the pre-qualification and the (open) tendering method of procurement).

### **3.8.4 Late tenders**

A tender that is submitted after the deadline is one type of non-conforming tender. The issue of non-conforming tenders was considered in general above and the general policy considerations discussed there apply. Whilst many failures to conform to procedural as opposed to substantive requirements of the procurement procedure might be considered immaterial rather than material, this is not normally the case with late tenders. Compliance with the tender deadline is considered of fundamental importance to the principle of equal treatment - and acceptance of late tenders is regarded as creating significant scope for abuse and for competitive advantage for the late tenderer (who may find out about other tenders and, even if that is not the case, will benefit from more time to prepare the tender).

Thus most systems will adopt a general rule that late tenders must be rejected – even if the procuring entity considers that in the particular case any benefit to competition would outweigh the administrative inconvenience from the delay to the award.

Such a rule is stated in the UNCITRAL Model Law Article 30(6):

*"A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it".*

Many systems do, however, make some exceptions to this rule<sup>22</sup> – in particular, to require the procuring entity to consider late tenders in certain cases where there are arguments in favour of doing so, and where the only arguments against are based on administrative convenience (in particular where there is no danger of the late tender having been drawn up or modified after a public opening of tenders – which will be the case, for example,

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<sup>22</sup> See, for example, Cibinic and Nash, at pp.525-529 which explains the rules applied in the United States federal procurement legislation as developed in the cases.

where the late arrival is due to postal delay). Such exceptions are made most commonly when there is some delay in delivery or some kind of fault on the part of the government.

## **3.9 Amendments and corrections to tenders and post-tender negotiations**

### **3.9.1 Introduction and basic principles**

Open tendering procedures are generally characterized by a single stage of tendering, with no possibility of negotiating tenders with suppliers or of allowing suppliers to amend their tenders after the tender deadline. This is the basic principle followed in the UNCITRAL tendering procedure, as discussed below. This approach is taken because of the emphasis placed in these procedures on transparency and equal treatment – allowing amendments gives rise to various objections based on these principles as is discussed further below.

There may, of course, be significant advantages to allowing amendments or negotiations in particular procurements, as we also discuss below: for example, in particular procurements it may be clear that allowing a supplier to amend its tender after the deadline could lead to a significant price saving, or that all the suppliers have misunderstood the requirement and that allowing them to resubmit their tenders after discussions with the procuring entity would allow for a better competition without the expense and time of a new procedure. However, negotiations and amendments are still generally prohibited in these cases, in order to uphold the principles of equal treatment and transparency – both to prevent abuse in specific cases and/or because of the importance given to these principles as fostering value for money and other objectives in the system as a whole.

As we have seen, procurement systems generally provide for more flexible procurement methods than open tendering in some cases in which negotiations after submitting offers are particularly valuable, or where submission of formal tenders to a detailed specification is not appropriate at all. Negotiations may be seen as particularly useful, for example, where value for money can only be obtained by negotiating the details of offers to adapt them better to the procuring entity's priorities, rather than setting out a single specification in advance of the procurement; or where the complexity of the project is such that it is not easy to set a suitable specification that covers all aspects of the contract and a specification could be incomplete or give rise to misunderstandings. As we have seen, the UNCITRAL Model Law provides for the competitive procedures of two-stage tendering, request for proposals and competitive negotiation to be available in some of these situations.

There is a close relationship between the availability of flexible procurement methods, on the one hand, and the issue of post-tender amendments and negotiations in open tendering, on the other. Thus the greater the availability and use of such flexible methods, the less likely is there to be the need for post-tender negotiations and amendments in open tendering procedures – and the more justified it may be to adopt a strict approach on this matter. In deciding which rules to adopt for tendering the availability of alternative procedures to tendering is relevant. Similarly, in studying the approach of any particular legal instrument to post-tender amendments and negotiations it is necessary to understand the general context in which tendering operates. It can be noted that the fact that public procurement systems generally contain strict rules or policies on the use of flexible procurement methods may lead to greater problems at the post-tender stage when using tendering methods that apply in private tendering – where more flexible methods will be more often used for procurements with the potential to give rise to problems at this stage. Another point to make here is that as with other aspects of tendering – such as controls over award criteria (see the discussion at 9.10 below) – strict

rules for open tendering may even have the effect of reducing transparency, since they may push entities towards use of more flexible methods instead.

## **3.9.2 Correction of errors**

### **3.9.2.1 Introduction**

One reason that procuring entities or tenderers may wish to amend tenders after the deadline is to deal with errors in tenders. One type of error is an error that results in the tender failing to conform to the requirements of the contract documents. Many other types of error are also found in tenders, however. These include, for example, errors based on a misreading of the documentation on quantities that lead the tenderer to quote a much lower price than it would have quoted had it correctly understood the scope of the work; or clerical errors that lead to inclusion of a higher or lower price than intended (for example because the wrong figure is copied over from the draft or because an earlier draft of the tender is copied over by mistake)<sup>23</sup>.

In considering whether correction to a tender should be either required or allowed many of the same policy considerations that were outlined earlier in our discussion on non-conforming tenderers will apply: most of these considerations are relevant both to errors that make a non-responsive tender responsive and to other kinds of errors. Thus against corrections it can be argued that:

- Allowing corrections is open to abuse by suppliers, who can deliberately create what looks like an error, and then use the opportunity for correction to advance their own interests – for example, to insert a “corrected” price that allows them to win the contract. This could be done in some cases in collusion with a corrupt procuring entity, to provide an opportunity for adjusting the tender once the other tenders are known. The creation of apparent errors can also be used, as we mentioned, to provide the tenderer with flexibility to withdraw from the competition should it later decide to do so. The fact that it is difficult to know whether or not a problem with a tender is an error or was planted deliberately makes it difficult to control such abuse if the procurement law recognises a broad possibility for correcting errors;
- Even if apparent errors are not planted deliberately their existence might be open to a tenderer to exploit in this way;
- Refusing to allow corrections encourages tenderers generally to take better care to comply with the requirements of the documents, to the general benefit of the procurement process as a whole;
- The possibility of corrections will often require that discretion is given to procuring entities to judge whether or not to waive or allow correction of the particular non-conformity, and such discretion can be abused to favour certain suppliers.

Both with errors that render a tender a non-conforming tender, and with other types of error there may, however, be cases in which limited opportunity for abuse exists. This can apply, for example, where both the existence of the error and the intended content of the tender are clear.

There are also arguments on the other side, in favour of allowing correction in many cases. Thus correction may allow the procuring entity to benefit from a better tender (if the alternative is to reject the tender); avoid problems that may arise for the procuring entity (e.g. abnormally low tenders) if low tenders are accepted; and provide for fairer treatment to suppliers who make technical errors.

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<sup>23</sup> Some of the issues raised in this latter situation are discussed by Krueger, above.

These considerations mean that public procurement laws generally allow some possibility for the correction of errors. However, the scope for this does vary between systems.

If correction is not provided for as a matter of public procurement law then difficulties may arise at the contractual stage, over whether in contract law the contract is rendered void or voidable or whether some other relief (e.g. price variation) is required because of the mistake. States need to ensure a coherent approach between public procurement law and contract law in dealing with mistakes in tenders, as discussed below.

We will consider below the scope for correction of errors in tenders and the consequences that can arise for a contract if a mistaken bid is not corrected.

Sometimes errors are identified by suppliers themselves - but in other cases these might be identified by the government. Apart from the scope for correcting errors and the consequences of non-correction, a related issue that arises for consideration is whether the government is under any duty to examine for mistakes in tenders and/or to query with tenderers any mistakes of which the government is aware or even should have been aware, so that correction or other consequences may be addressed by the parties. Imposing such a duty can help to avoid the undesirable consequences that may arise if errors are discovered only after the contract has been signed and hence promote value for money in procurement. Some countries place on the government a duty to consider whether there are errors in tenders and a duty to draw them to suppliers' attention and to seek explanations. If this is not done it may be relevant to the contractual consequences of the error mentioned above – for example, whether the contract is rendered void or voidable or whether price variation is possible. The culpability of the supplier in making the error and culpability of the government in failing to spot and address it might both be relevant in such a case. Different countries may have different approaches to this and again an integrated approach between contract law and public procurement law may be required, which may be especially difficult to achieve when these are regarded as distinct bodies of law.

### **3.9.2.2 The rules on errors in tenders under the UNCITRAL Model Law**

We have already set out in the context of non-conforming tenders above the main rules of UNCITRAL dealing with correction of errors.

As we have seen, there are two provisions dealing specifically with errors. One allows the procuring entity to regard a non-conforming tender as responsive – and thus to consider it - when the non-conformity results from an error or oversight not touching on the substance of the tender. We have already considered this provision above in examining the subject of non-conforming tenders in general.

The other provision on errors in Article 34 is one that requires the procuring entity to correct arithmetical errors - whether leading to non-conformity or otherwise.

In this respect, Article 34(1)(b) of the Model Law requires that the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The entity must give prompt notice of any such correction to the supplier or contractor that submitted the tender.

As mentioned, such errors could be errors that make the tender non-conforming (e.g. because they are regarded as creating an ambiguity which results in the tenderer not having stated a clear price in accordance with the requirements of the tender documents). In this case the effect of the correction is that the tender becomes responsive and the procuring entity must consider the tender along with other tenders (if the tender were not

corrected the procuring entity would be obliged to reject it under the general rule that non-responsive tenders must be rejected).

Such errors can also, however, be errors that do not affect conformity but affect other matters – e.g. the error could be one that makes the stated price incorrect (lower than intended or higher than intended).

In not only allowing correction of tenders but in requiring the procuring entity to admit correction, the rule on arithmetical errors reflects the need to admit as many offers as possible for wide competition and fairness to the tenderer who has made a technical error. It is also relevant that the scope for abuse by tenderers in this situation is limited, particularly if the concept of an arithmetical error is narrowly interpreted, as discussed further below.

Another possible approach to this issue – different from the one adopted by UNCITRAL – could be not to require correction but merely to allow the procuring officer to admit correction in its discretion – for example, taking account of whether the officer thinks the error was planted deliberately. However, this would increase the possibilities for abuse of discretion by the procuring entity in the award procedure.

### **3.9.2.3 What types of errors are covered by the provision on arithmetical errors?**

The Guide to Enactment to the Model Law, commentary on Article 34, in para.1, states that this provision is not concerned with errors that are not apparent on the face of the tender (including abnormally low tenders). Thus this provision is concerned merely with technical corrections where it is clear from the face of the tender that there is an error. This might be considered to be the case, for example, where various figures for items that are set out in the tender are set out in the same form together at the end of the tender but are added up incorrectly to give a wrong total.

The point of such a narrow definition of an arithmetical error is to prevent abuse by suppliers – if it is clear from the tender itself that an error exists there is less scope for seeking correction when no real error in fact exists (e.g. when the tenderer simply claims a pricing error has been made in the tender submitted, even though there are no discrepancies shown in the tender itself).

The UNCITRAL provision does not, on the other hand, make it clear whether it also must be clear what the correct figure should be. The provision arguably should be taken in this way – and perhaps clarified in this way in any national implementation of the Model Law. This is because, first, it does not seem possible for the procuring entity itself to make any correction in the first place (as envisaged by the provision) when the correct figure is not clear. Secondly, the arguments against allowing correction are much weaker when it is clear how the tender should be corrected, since there is no scope to use the correction to effectively change the intended content of the tender after the deadline (which could potentially be done by the procuring entity and tenderer in collusion with each other if the correct reading were not clear). (As seen earlier, Article 34(2) of the Model Law allowing corrections that do not affect the substance of the tender does not appear to allow correction when this could give an opportunity to decide the content of the tender after the deadline in a manner that could affect the tenderer's ranking – and arguably the same approach should apply with the provision on arithmetical errors, for the same reasons).

It can be noted that when this provision was considered by the UNCITRAL Working Group in 1990 it was discussed whether to make a distinction in this provision between "simple" errors that the procuring entity itself would correct (as under the current provisions) and "significant" errors which the procuring entity should bring to the supplier's attention and

allow the supplier itself to correct<sup>24</sup>. This indicates that some delegates, at least, felt that the above provision could cover some cases in which the correct figure was not actually clear. The discussion concluded with an agreement that the issue should be considered at a later point – but that was never done, helping to explain the ambiguity that perhaps exists on this point, and reinforcing the need for national implementing legislation to address this point more precisely.

However the rules on arithmetical errors are formulated, it should be noted that there is often room for debate over, first, whether it can be said to be clear that a mistake exists and, secondly, whether it is in fact clear what the intended tender should be. For example, as regards the latter, if the figures for individual items and the figure for total tender price do not match, how is it possible to be sure which gives the correct price? Should the procuring entity make the correction to make the price so that it is closest to other tenders? Or can this perhaps be done only if one of the two figures is very far different from that of other tenders/market price, and the other is not? These are difficult questions for any legal system to determine<sup>25</sup>.

### **3.9.2.4 The rule that the supplier must accept the correction for the tender to be considered**

Note that the tender can only be accepted if the correction is made - Article 34(3)(b) provides that the procuring entity shall not accept a tender if the supplier or contractor that submitted the tender does not accept the correction. This envisages the possibility that the tenderer does not have to accept the correction even if the correct figure is clear and the correction is purely technical – giving the tenderer flexibility to withdraw, which other tenderers do not possess.

This leaves the theoretical possibility that a tenderer might insert discrepancies in order to preserve such flexibility. It can be noted that UNCITRAL does not make it completely clear whether the tender security should be forfeited in such a case - but it would seem that that is not the case given that the Model Law requires the procuring entity to reject the tender. It might be useful for states enacting the provision in their own laws to clarify this point. The possibility of abuse by the supplier could be avoided by removing any option to refuse a correction – though this would certainly be acceptable only if the correction gave effect to a very clear indication of how the tender should read. Whether such a solution is suitable clearly depends on whether or not abuse by the tenderer is considered a real risk or problem.

### **3.9.2.5 A duty towards suppliers?**

We can finally note that an argument could be made that the duty of the procuring entity to correct arithmetical errors under the UNCITRAL provision might be read as imposing an obligation towards suppliers that could be the subject of a review action leading, for example, to an award of damages because the supplier fails to win the contract as a result of non-correction of its error on the face of the tender.

This might be considered inappropriate, given that the supplier is the original source of the error. It may create considerable problems for procuring entities, especially if the

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<sup>24</sup> UNCITRAL, Report of the Working Group on the New International Economic Order on the work of its eleventh session (New York, 5-16 February 1990), A/CN.9/331, available at [www.uncitral.org](http://www.uncitral.org).

<sup>25</sup> Again for an example from the United States Federal system see Cibinic and Nash, pp.677-680. This reading examines a discretion (not duty) that is possessed by officers in the US federal procurement system to allow correction of a tender that would become the lowest tender on correction, which applies only when both the mistake and the intended bid are clear on the face of the invitation and the tender.

provision is extended beyond very obvious errors of calculation. Review bodies may develop appropriate rules to deal with such situations (for example, denying damages on the basis that the conduct of the supplier itself is the "cause" of the damage). However, states may want to deal explicitly with this issue in their procurement laws.

As noted above, failure to deal with arithmetical errors might also lead to contractual problems, such as voidability of the contract or claims for extra payment, where the supplier wins the contract but the terms are affected by an error. Again, these issues need to be addressed by any state enacting the Model Law against the background of that state's applicable law of contract and supplier review system.

### **3.9.2.6 The position when an error remains uncorrected**

There are some cases in which an error may be made but no correction is made to the tender.

This may apply because the procurement law does not allow a correction. Suppose, for example, a tenderer submits a price that is lower or higher than intended because the wrong figure is inserted into the tender by mistake (for example, a figure from an earlier draft that has then been changed internally). Under the provisions of the Model Law it is not generally possible for the procuring entity to allow correction of this error – it is not an arithmetical error under the provision of the Model Law, and nor can it be corrected under the provision on correction of errors not touching on the substance of the tender, since it clearly does affect the substance of the tender.

A tender may also contain an uncorrected error where, whilst the law allows the procuring entity to permit correction, the procuring entity decides not to do so.

One possibility is that where a mistake is identified both the supplier and procuring entity agree that the tender should either be accepted, or not accepted, as it stands, without correction where the mistake is apparent, without adverse consequences to either party. In other words, if it is not accepted there will be, for example, no forfeit of the tender security; whilst if it is accepted the tenderer, for its part, will not have any claim to challenge the contract or seek variations based on the mistake. In this case of agreement no difficulties should arise.

It might be advisable for procurement law to make specific provision for such cases. For example, it might be advisable to include specific provisions for a procuring entity to accept withdrawal of a tender without sanction if a tenderer can prove a mistake – or even to require the procuring entity to accept such a withdrawal, if the mistake is adequately proven, since (as mentioned above) contractual problems may arise later from accepting a tender known to be affected by a mistake.

However, in practice the parties might not be in agreement on a solution.

First, one possibility is that the bidder might want to maintain its erroneous tender even with the mistake against the wishes of the procuring entity. In this case should the procuring entity be allowed to reject the tender against the tenderer's will? There may be reasons for doing this. For example, if the tenderer has bid lower than intended the procuring entity may feel that the tender is not sustainable. The procurement law may want to provide specifically for the possibility of rejecting a tender that the procuring entity considers is affected by a significant mistake, where this is not otherwise provided for by other specific reasons for rejecting tenders (in particular, by allowing rejection on the ground that the tender is unsustainably low).

Another possibility is that the tenderer wants to withdraw its tender, but the procuring entity wishes to accept it – for example, because it does not consider that there is a genuine mistake.

The UNCITRAL Model Law does not deal clearly with the position in the case where the mistake is not corrected. The Model Law provides for the possibility in Article 34(1) of clarifications to the tender that could be used to identify a mistake, that might be used to confirm the content of a tender in certain cases (see later below) or to identify mistakes for the purpose of applying the correction provisions discussed above. However, the Model Law does not deal explicitly with the power of the procuring entity to accept or reject a tender affected by a mistake that is identified before the contract is concluded and is not covered by the above provisions on correction e.g. a price that is lower than intended.

### **3.9.3 Clarifications**

As already noted above, Article 34(1)(a) of the Model Law allows procuring entities to seek clarifications of tenders “in order to assist in the examination, evaluation and comparison of tenders”.

We have already mentioned above that this power to seek clarifications can be used to obtain confirmation that apparent errors are indeed errors. We have also seen that in certain cases the Model Law makes provision for the correction of these errors and that in other cases an error might be dealt with by an agreed solution e.g. for the supplier to withdraw the tender without penalty when the price tendered is lower than the tenderer really intended (see above). We also noted, however, that in some cases there may be no possibility for correcting errors that are revealed following clarifications of the tender – for example, if the tenderer’s price is higher than intended because of a clerical error in inserting the price, or where it is lower than intended but the tenderer refuses to withdraw it.

It was also suggested above when considering non-conforming tenders that clarifications could be used for another purpose, namely to confirm the true intention of the tenderer when there is a clear error and the intended content of the erroneous part of the tender is clear from some other part of the document. In this case it might be argued that there is no “correction” to the tender but merely a clarification of what the tender actually means. For example, if the tenderer has failed to complete a box giving the final tender price, but this is clear from various unit prices stated in the tender, the procuring entity could seek clarification that the intended price is the total of the relevant units.

Clarifications might also be sought, for example, when the information provided on a particular matter in the tender conforms to the requirements of the document but is perhaps not detailed enough for the procuring entity to know whether the tender meets its requirements.

### **3.9.4 Negotiations to seek improvements to tenders**

As we have mentioned, formal tendering is generally characterised by the use of a single tendering phase based on a complete specification, without any possibility for negotiating with tenderers for amendments or for otherwise allowing tenderers to improve their tenders after the deadline for submission – whether at the request of the procuring entity or on their own initiative. This applies even when the possibility of negotiations is notified in advance (so that it cannot be contended that negotiating violates the rules of the game as laid down), and where negotiations are conducted with all competitive suppliers.

There are several reasons why this approach is generally maintained in formal tendering:

- The fact that the possibility of negotiations and amendments may discourage bidders from offering their best price in the first round of tendering, reducing the general value of the formal tendering approach;
- The fact that pressurising tenderers to improve the terms offered could result in unsustainable tenders, leading to unacceptable performance levels, pressure for variation to improve the terms of the contract in favour of the supplier, or even contract failure;
- Negotiations provide opportunities for corruption. Procuring entities can abuse their discretion to favour certain suppliers in the negotiations – in particular, by providing information on other tenders that will allow the supplier to amend its own tender to win the contract. This is a very important argument for limiting negotiations and amendments in systems that place significant emphasis on transparency. It is the same argument that is relevant to the question of amending tenders to correct errors, as was discussed

The merits of these arguments may depend on the way in which negotiations are used. The arguments lose their force if negotiations are used in limited and appropriate cases, where possibilities of savings without other problems can be identified.

On the other hand there may be good reasons for allowing negotiations in specific procurements even after submission of a tender. Thus:

1. Negotiations leading to possible amendments to tenders allow the procuring entity to seek improvements to the offer where there are genuine possibilities for improvement identified that are not likely to lead to unsustainable tendering.
2. They can also allow the tenderer to adapt its offer to best meet the procurement entity's priorities.
3. Further, they enable a procuring entity to address misunderstandings and other errors – as discussed above – and, with complex projects, allow the parties to deal with the uncertainties that make it difficult to establish a fully detailed specification and conditions in advance.
4. Negotiation or the possibility of this may also be suitable in procurements where there are few suppliers and there is a danger of collusion in formal tendering procedures.

However, as noted above, public procurement systems often impose a general ban on negotiations and amendments in formal tendering. They address these arguments in favour of negotiation by providing for special, flexible procedures as an alternative to tendering in defined cases, rather than providing for negotiations and amendments as a general possibility in competitive procedures.

Reflecting this common approach, this is the approach of the UNCITRAL Model Law on procurement. First, this provides in Article 35:

*"No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor".*

However, under other procedures, such as the request for proposals or two-stage tendering, there is scope for discussions after submission of a first round of bids. Transparency is secured to some extent by requiring bidders to submit a second lot of formal bids to form the basis for the final decision. The more unstructured competitive negotiation procedure allows authorities to obtain tenders, discuss them with bidders, and then award the contract after discussions without a further bidding process.

The extensive use of formal tendering in public procurement without any possibility of negotiations, combined with limited possibility for recourse to other procurement methods, has sometimes been criticised as providing for insufficient access to negotiation

in suitable cases. How far it is appropriate to allow such negotiation depends significantly, of course, as with many other matters in public procurement, on the values of the procurement systems and factual circumstances such as prevalence of corruption and the training and skills of officers.

### **3.9.5 Negotiations with the winning tenderer**

The issue of negotiations often arises before the winning tender has been chosen. However, it is also possible that the procuring entity may seek to negotiate after selecting the winner of the competition to improve the terms of the contract in its favour (for example, to obtain a better price) before signing the contract.

In this case arguments 1 and 2 above against allowing negotiations are still relevant. However, argument 3 has much less significance. Whilst changes to the contract that lead to less favourable terms for the procuring entity will generally be ruled out, since they would undermine the result of the competition, there is perhaps a stronger case for allowing negotiations that improve the terms in the procuring entity's favour. However, such a rule may be difficult to police if there is some change in the obligations of both parties (for example, a later delivery date to offset an agreed price reduction) rather than solely a change that clearly favours the procuring entity (such as a price reduction alone). The same problem of enforcement arises here as in policing changes to a contract once the contract has been concluded.

If negotiations before signing the contract are allowed but fail, generally the only possibility will be to re-tender the contract in hope of obtaining better terms.

## **3.10 Award of the contract**

### **3.10.1 Introduction**

We here use the term contract award to refer to the stage of the award procedure in which the procuring entity decides which of the qualified and responsive tenderers has submitted the best tender. The award may be based on simply the lowest price or may also involve consideration of other factors such as quality.

Legal rules regulating this award process in tendering procedures may have a number of purposes.

1. To prevent abuse of discretion in the process – in particular, to prevent abuse of discretion for corrupt motives or (where this is prohibited) to favour national suppliers or products. In this respect the rules focus on two distinct aspects of transparency, namely: limiting the discretion that procurement officers enjoy; and ensuring that the applicable rules can be monitored and enforced by suppliers (in particular, through advance disclosure of the award criteria);
2. To safeguard against poor judgment by procuring entities that could adversely affect value for money. For example, using award criteria that cannot be carefully applied because limited information may be prohibited for this reason as well as reasons of transparency.
3. To ensure that suppliers can submit the best possible tenders to meet the entity's needs and priorities. This consideration, as well as the need for monitoring and enforcement of the rules, requires disclosure to suppliers - prior to tendering - of information about how the award will be made.

In considering various procurement regimes as a model to follow on award criteria, it is important to consider the rules on award criteria in the context of the system as a whole, including the nature and availability of different procurement methods - the overall place

of tendering in the system may have an important impact on the approach to award criteria in tendering.

Thus some procurement systems adopt a very strict approach to the award criteria in open tendering, in which all discretion is eliminated (in some cases even limiting the award to the lowest price only). This might be because that system seeks generally to reduce discretion as far as possible in procurement – and in that case tight limits on award criteria in tendering might also go hand in hand with tight restrictions on the availability of alternative procedures to tendering. However, the fact that a system has tight limits on award criteria in tendering is not necessarily a system that seeks in general to limit discretion. Rather, tight limits on award criteria in open tendering might reflect the fact that other procurement methods are available in a wide range of circumstances and that tendering itself is only used for a limited number of simple procurements requiring only limited award criteria<sup>26</sup>.

Other systems might provide for a flexible approach to award criteria because of the wide range of procurements that are covered by tendering, to ensure that flexible criteria are available for those procurements for which they are needed. Thus, for example, EU Directive 2004/18, which governs most public sector procurement in the EU seems to envisage quite a flexible approach<sup>27</sup>. However, it needs to be kept in mind, first, that this is a system intended for a variety of different states which are free to a degree to implement open tendering in various different ways and, secondly, that it provides a single system of criteria that covers not only relatively simple procurement but also – for example - much services procurement for which flexible criteria may be needed.

The relationship between the rules of tendering and the choice of procurement methods also needs to be kept in mind in designing any system. Thus the stricter the rules on award criteria, the greater may be the need to provide for – and use in practice – methods other than tendering. By leading entities to reject tendering altogether, strict rules on award criteria in open tendering could actually have the overall effect of reducing the degree of competition and transparency in certain procurements.

### **3.10.2 Basic principles: lowest price or lowest evaluated tender?**

There are typically two bases for procurement awards used in open tendering procedures:

1. Lowest price; and
2. Best combination of price and other factors (referred to by various terms such as “lowest evaluated tender” in the UNCITRAL Model Law, “most economically advantageous tender” in the EU procurement rules<sup>28</sup> and “most advantageous” tender under the WTO’s Government Procurement Agreement<sup>29</sup>).

Making an award to the lowest price tender can ensure the best value for money for the government when there is no difference between the features (performance quality, length of life etc) of the products or construction offered by different tenderers, and no significant life-cycle costs (such as maintenance or running costs) which may apply, in

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<sup>26</sup> This is arguably the case, for example, with the United States system. As is explained by Cibinic and Nash, above, the sealed bidding procedure in United States law, which is intended to be a highly objective process, refers to price and other “price related factors” as possible award criteria, takes quite a strict approach to the award criteria that can be used in such a procurement, focusing on reducing discretion: see pp. 615-621 of that work on some of the criteria applied in the United States system and how those criteria work in practice, including the use of whole life cycle costing, and the administrative costs of dealing with the award of more than one contract .

<sup>27</sup> See the companion text *EU Public Procurement Law*, chapter 6, section 6.7.

<sup>28</sup> See the companion text *EU Public Procurement Law*, chapter 6, section 6.7.

<sup>29</sup> See S. Arrowsmith, *Government Procurement in the World Trade Organisation* (2003), chapter 10, section 10.3.

particular, in the case of some simple off-the-shelf procurement (purchases of many kinds of paper, for example).

However, in many procurements there are differences in what can be offered by different tenderers. In these cases better value for money might be obtained in particular procurements by taking these differences into account, using the second basis for the award – the best combination of price and other factors. Thus it may be better to pay slightly more for a machine that works much more quickly than a cheaper model, as fewer machines will be needed for the same output; just like it will be better to pay more for a machine that does not require as much maintenance over its lifetime as a cheaper product, where the additional price paid for the former is lower than the extra maintenance costs of the latter.

On the other hand, even if the second basis can produce better value for money in those cases in which it is applied by skilled, conscientious and honest procurement officers, public sector procurement rules may still limit its use, because it may involve discretion on the part of the procuring officer. This discretion could relate to: i) choosing the non-price criteria to apply and ii) the way in which non-price criteria are applied (for example, the judgements made about the quality of different products, or the value attached to quality as compared with price). As we have noted above, such discretion may be regarded as undesirable for two reasons, namely i) that it may be deliberately abused; and ii) that it may be exercised inappropriately because of lack of judgement, care or skill on the part of procuring entities. These factors may lead to a decision to either prohibit the use of non-price criteria in the system altogether, or to impose controls on the type of non-price criteria and the way in which they are applied (that is, to control the amount and type of discretion given) – even if such controls prevent the potential realisation of best possible value for money in specific procurements.

For these reasons, some procurement systems may adopt a very strict approach according to which only lowest price is allowed as an award criterion for tendering procedures. Another approach is to require lowest price merely for some types of procurement done by tendering.

A more flexible approach to award criteria, used by many procurement systems and found in the UNCITRAL Model Law, is to leave the choice of the basis for the award between lowest price and price-plus-other-factors – referred to in the Model Law as the lowest evaluated tender - to the procuring entity for each procurement. This is provided for in Article 34(4) as set out below. In particular, the basic rule is stated in Article 34(4)(b):

Article 34(4)

(4)(a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

(b) The successful tender shall be:

(i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or

(ii) If the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of criteria specified in the solicitation documents, which criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable;

(c) In determining the lowest evaluated tender in accordance with subparagraph (b) (ii) of this paragraph, the procuring entity may consider only the following:

(i) The tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;

(ii) The cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services;

(iii) The effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials in goods, construction or services being offered by suppliers or contractors, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand subparagraph (iii) by including additional criteria)]; and

(iv) National defence and security considerations;

(d) If authorized by the procurement regulations, (and subject to approval by ... (the enacting State designates an organ to issue the approval),) in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings."

As with so many procurement rules, the actual degree of discretion given to procuring officers - both in choosing the basis for the award and in the degree of discretion in choosing and applying the criteria - is likely to depend on factors such as the objectives of the system (such as the importance of integrity); the means used to achieve them (the degree of importance attached to transparency as a mechanism for achieving value for example); the skills and training of procurement officers; and the extent of corruption experienced in the system.

### **3.10.3 Limiting discretion in choosing and applying non-price criteria: objective and quantifiable criteria under the Model Law**

As we have noted, systems that allow use of non-price criteria give a greater or less degree of discretion both in the range of criteria that may be chosen and in the way in which those criteria are applied.

The UNCITRAL Model Law, whilst allowing non-price criteria for procurements in principle, imposes some significant limitations in these respects.

First, it sets out an exhaustive list of the type of criteria that may be used, in Article 34(4)(c): as we can see from the text above these are limited to "The cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services"; various criteria relating to the balance of payments; and national industrial development (such as local content and technology transfer); national defence and security considerations; and certain margins of preference for national suppliers.

This approach of using a limited and exhaustive list reduces any discretion in choosing which criteria to use in the first place, as well as limiting the permitted criteria to those that involve no or limited discretion in their application.

Some systems, however, may prefer to give more discretion over the choice of criteria, at least for some types of procurement – provided that the criteria meet the strict requirements of objectivity and quantifiability set out below.

Secondly, as can be seen above, the Model Law also requires that the criteria used shall, to the extent practicable be:

- Objective. This seems to indicate that the criteria should (to the extent practicable) be identified and measured without subjective input. This would not be the case with, for example, aesthetic criteria, since the aesthetics of a product cannot be identified and measured.
- Quantifiable. This seems to indicate that once identified and measured the relevant feature of the product can be assigned a value without any such subjective input. An award criterion concerned with the extent of pollution from vehicles would not appear to meet this condition: whilst it might meet the first condition since pollution levels can be measured, the financial value to be placed on the absence or presence of different pollution levels can only be made on a subjective basis.

On the other hand, operating costs, maintenance or repair costs (which are specifically mentioned in the exhaustive list of criteria in Article 34 of the Model Law) – for example, of vehicles or equipment – appear to satisfy both conditions as a general rule. Thus they can be measured (they are objective) and they can normally be ascribed a monetary value with only a limited range of potential disagreement (thus they are quantifiable criteria).

Criteria that are objective and quantifiable in the sense above:

- Limit opportunities for abuse since they can easily be monitored;
- Help safeguard against poor decisions on value for money that may arise from unsound exercise of discretionary judgements; and
- Can help suppliers prepare better tenders (provided, of course, that the criteria in question are disclosed to suppliers in advance in accordance with the principles discussed later below).

The fact that the criteria need only be objective and quantifiable to the extent practicable, combined with the possibility of using weightings instead of monetary equivalents in applying the criteria (see below), indicates, however that these conditions are not required to be met in every case but only when it is possible to meet them given the nature of the criteria chosen.

It should be noted that words such as “objective” and “specific” are sometimes used in case law and legislation without any very clear conception of their meaning. Policy makers, legislators or judges may want to provide more precise definitions of these concepts if they are to be used in procurement laws.

It is also provided in the Model Law that the criteria must be given a relative weight in the evaluation procedure or be expressed in monetary terms “wherever practicable” (Article 34(4)(b)(ii)). When criteria are both objective and quantifiable, they can always be expressed in monetary terms and this is generally appropriate.

### **3.10.4 More flexible criteria**

Even with relatively simple procurements value for money considerations – both related to the acquisition of the goods, works or services themselves and to the social or environmental benefits of the procurement (where applicable) - may suggest use of criteria that do not meet the above conditions of being objective and quantifiable. Consideration of pollution in the purchase of vehicles is an example of this. The use of such criteria may be contemplated in the Model Law, since it requires the use of objective

and quantifiable criteria only to the extent practicable and also contemplates use of points systems which are used for these kinds of criteria (they are not needed where criteria are fully quantifiable in monetary terms).

Policy makers may wish to consider whether all criteria should be required to meet the conditions above or whether there should be more flexibility in the criteria used in tendering procedures, and also to spell out more clearly than the Model Law what is the scope for exceptions, if any. For example, if criteria are to be permitted relating to environmental features of products or to the national origins of products, detailed legislation might be adopted to spell out how these are to be dealt with – including what values are to be placed on any non-quantifiable criteria such as pollution levels. Dealing with this in legislation can enable such matters to be considered without leaving discretion to the procuring entity. On the other hand, some states may consider that it is appropriate to leave entities with more discretion on some matters.

As noted above, the Model Law requires the criteria to be given a relative weight in the evaluation procedure or be expressed in monetary terms “wherever practicable” (Article 34(4)(b)(ii)). When they are not quantifiable but are objective (identifiable and measurable), it is still possible to allocate a monetary equivalent that eliminates discretion in the application of the criteria simply by placing a financial value on particular features – such as valuing a certain reduction in polluting emissions at a certain amount.

In other cases criteria may be applied by, for example, using a percentage weighting or points allocation. However, as has been convincingly demonstrated by de Boer, Linthorst, Schotanus, and Telgen<sup>30</sup>, when the latter approaches are used there is still scope for abuse of discretion unless other, more detailed, aspects of the award mechanism are also formulated in advance, since the outcome can depend significantly on precisely how the weightings/points approach is implemented (and the information on this given to suppliers: see further the discussion on disclosure below). This is something not taken into account in the current Model Law rules on tendering (as opposed to certain more flexible procurement methods). However, it is being addressed in the current review of the Model Law, as explained further below.

It can be noted also that special approaches such as “two-envelope” procedures are often used when considering non-financial criteria as well as financial criteria. These are considered later in chapter 4 dealing with evaluation in complex procurement.

### **3.10.5 The problem of unbalanced tenders**

An issue not dealt with by the UNCITRAL Model Law but important in practice is what can be referred to (to use the United States terminology) as “unbalanced tenders”. This refers to the situation in which in a tender requiring prices for several items the tenderer prices some items higher than appropriate to reflect its costs and some items lower. There are various reasons for doing this. A common one is because the tenderer considers that the government’s estimates of the likely quantities needed of the different items are incorrect and that it can make a better profit from, for example, quoting higher prices on items underestimated, whilst at the same time appearing to submit a competitive tender. Procuring entities sometimes deal with this danger by applying a “sensitivity analysis” which involves considering how prices for the contract would vary if the estimated quantities varied by certain amounts, and rejecting tenders if they would be excessively priced under certain variation scenarios. Other reasons for this practice of unbalanced pricing are to gain earlier payment by higher pricing of items to be used early in the contract period; to conceal pricing from the competition; and to hedge against losses in case the whole project is not completed.

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<sup>30</sup> L. de Boer, M.M. Linthorst, F. Schotanus, J. Telgen, “An analysis of some mistakes, miracles and myths in supplier selection”, Working Paper, 15<sup>th</sup> IPSERA conference, San Diego, 6-8 April 2006

Procuring entities may wish to reject unbalanced tenders, whether as a result of applying a sensitivity analysis or otherwise. Clearly a decision to do so may, however, involve a certain degree of discretion. States may wish to secure some kind of judicial control over the exercise of that discretion. An example of a regulatory system that does so is the United States federal jurisdiction<sup>31</sup>. The Federal Acquisition Regulation in the United States requires procuring officers to warn bidders against this practice of unbalanced tenders and the system allows rejection (as non-responsive) of tenders which are unbalanced in the sense that they are based on significantly less than cost for some line items and significantly more for others (referred to as mathematically unbalanced tenders) where:

- there is either reasonable doubt that it will result in lowest overall cost; or
- the effect would be to give early payment.

This way these rules apply appear to place an onus on the procuring entity to show that there is clearly a problem with the particular tender – rather than merely a difference of commercial opinion between the procuring entity and tenderer. This kind of approach provides some safeguards against abuse.

States adopting procurement legislation might wish to consider expressly how to deal with this situation, including whether the possibility that a tender will be rejected on such grounds needs to be disclosed in advance, and whether the basis of evaluation will then be classified as “lowest evaluated tender” or similar, rather than simply “lowest price”.

### **3.10.6 Advance formulation and disclosure of the criteria and the methodology for the award**

An important feature of many procurement rules is a requirement to formulate in advance criteria and rules on how the award of the contract will be made prior to the submission of their tenders, and then to disclose this information to tenderers prior to the submission of tenders. In particular, this helps safeguard against the abuse of discretion by placing limits on that discretion and (as a result of disclosure) allowing tenderers and others to monitor and enforce the applicable rules, and helps tenderers to formulate the best possible tender from the procuring entity’s perspective, so as to ensure better value for money.

The UNCITRAL Model Law deals with this issue in Article 34(4), set out in section 3.10.2 above, and in Article 27 listing the contents of the solicitation documents which provides that the document must include, inter alia (Article 27(e)):

*“The criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 34(4)(b), (c) or (d) and the relative weight of such criteria”.*

The provisions on formulation and disclosure as contained in Article 27 and Article 34 require the following:

1. A procuring entity wishing to use “lowest evaluated tender” as the basis for the award rather than lowest price must state this in the solicitation documents;
2. The procuring entity must also state in the solicitation documents the criteria that are to be used in the evaluation of lowest evaluated tender (Article 27(e) and Article 34(4)(b)(ii)) and the relative weight of those criteria must also be disclosed in the solicitation documents (Article 27(e)).

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<sup>31</sup> Cibinic and Nash, above, at pp.596-608, explains how this issue is dealt with in the United States federal procurement system.

It is important to note that these provisions both require the procuring entity to formulate criteria and weightings for assessing the lowest evaluated tender and require these to be disclosed to tenderers.

The above rules may be sufficient for simple procurement.

However, procurement involving criteria that are not both objective and quantifiable raises more difficult problems, as does procurement involving any form of sensitivity analysis. Here the question may be raised as to whether it is sufficient merely for the procuring entity to formulate and disclose broad criteria for the evaluation – should it also be required to i) formulate more detailed sub-criteria and rules for the evaluation and ii) to disclose those sub-criteria and rules – or, if it chooses to use more detailed sub-criteria and rules, at least to disclose those that it does formulate.

The Model Law itself currently does not refer to either. For example, the rules stated above on formulation and disclosure do not seem to require the procuring entity either to develop or disclose a formula governing any sensitivity analysis that will be applied with contracts involving uncertain quantities, sub-criteria of the main criteria, or the precise formula that will be used to apply a points system (relevant in cases in which there is some degree of subjective judgment in applying the award criteria). However, these may be crucial to the evaluation decision. Thus formulating and disclosing them prior to tenders will both reduce the scope for abuse of discretion, and help tenderers to prepare better tenders<sup>32</sup>.

Obviously these issues are more important for complex procurement, such as procurement under the Request for Proposals method that generally involves a greater degree of subjectivity in the award criteria.

Consideration is now being given to general review of evaluation criteria in the Model Law. This is likely to bring together the various provisions on evaluation for different procurement methods and include a more general requirement to provide and disclose the general principles on which the evaluation will be conducted. Both of these things are provided for in the latest published draft of the revised Model Law, in Article 11, which:

- sets out general rules on evaluation for all methods of procurement; and
- requires advance formulation and disclosure of the “manner of application” of the award criteria, as well as the criteria themselves<sup>33</sup>.

The requirement to inform suppliers of the manner of application of the criteria would seem to require the provision of sub-criteria for broad criteria and an explanation of the way in which weightings will be applied, as well as, possibly, any minimum requirements on matters such as affordability. Inevitably applying such a broad provision will involve discretion on the part of any review body to determine what guidance procuring entities should have adopted and disclosed in each case.

### **3.10.7 Abnormally low tenders**

The concept of an abnormally low tender refers to a tender that, because of its very low price or other terms, raises a suspicion that the supplier will not be able to perform the contract in accordance with the terms offered or (depending on the legal definition) where a risk of non-performance is actually present. In such a case the supplier either might not deliver the contract requirement (for example, may provide a reduced quality performance) or might seek extra payment (either for the goods or construction or

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<sup>32</sup> See de Boer et al, above.

<sup>33</sup> See A.CN/9/WG.1/WP.73/Add.1 to A.CN/9/WG.1/WP.73/Add.8 ([www.uncitral.org/pdf/english/workinggroups/wg\\_1/73add8E.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_1/73add8E.pdf))

through excessive remuneration for any variations). Procurement laws may want to make provision requiring procuring entities to reject such tenders, or permitting procurement entities to reject such tenders in their discretion, when it is considered in the government's interest not to accept them. This will generally apply when there is a significant risk of non-performance. However, there may be cases in which this is not the case with a very low tender.

It may be useful to distinguish between various reasons for suspiciously favourable terms:

1. The efficiency of the supplier (low cost base, new methods or products etc) – in which case there is generally no reason to reject the tender;
2. The fact that the supplier is intending to do the work below cost to use up spare capacity and/or retain its workforce, or to build its reputation for winning future business;
3. The fact that the supplier is able to supply at a low cost because it enjoys some kind of subsidy from government – which may be lawful or unlawful under the World Trade Organization rules or rules of regional trade organisations; or
4. The fact that the supplier seeks to drive competitors out of the market.

Procurement regimes may differ in the extent to which they require or permit entities to reject tenders falling into categories 2-4. There is a close relationship here with the rules of competition law (if any) as they apply in the state concerned. In particular, where the conduct referred to violates competition laws in some way, the state may wish to require or allow rejection. On the other hand, to allow or require use of procurement law to support competition law may involve excessive disruption to the procurement process or decision-making by bodies (the procuring entity) unsuited to the decision in question – for example, may involve a need to determine whether a particular tenderer does in fact enjoy an unlawful subsidy. Whilst such questions could be referred to external competition authorities, delay is likely while awaiting a decision before completing a specific procurement.

Procurement laws may wish to lay down procedures for enquiring as to the reasons for low tenders before they are rejected.

The UNCITRAL Model Law on Procurement does not currently contain any explicit provisions on this subject but provisions are likely to be added during the current review of the Model Law. The latest published draft of the Model Law contains the following proposed provision<sup>34</sup>:

#### Article 18. Rejection of abnormally low submissions

*"(1) The procuring entity may reject a submission if the procuring entity has determined that the price in combination with other constituent elements of the submission is abnormally low in relation to the subject matter of the procurement and raise concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:*

*(a) The procuring entity has requested in writing from the supplier or contractor details of the submission that gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;*

*(b) The procuring entity has taken account of any information provided by the supplier or contractor following this request, and the information included in the submission, but continues, on the basis of all such information, to hold concerns; and*

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<sup>34</sup> See A.CN/9/WG.1/WP.73/Add.2 ([www.uncitral.org/pdf/english/workinggroups/wg\\_1/73add2E.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_1/73add2E.pdf))

*(c) The procuring entity has recorded the concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.*

*(2) The decision of the procuring entity to reject a submission in accordance with this article and reasons for the decision shall be [recorded in the record of the procurement proceedings and] promptly communicated to the supplier or contractor concerned."*

### **3.10.8 Cancellation of the procurement**

Procurement rules generally make some provision for cancelling a procurement after it has commenced. This may be because the goods, construction or services are no longer required at all. This situation may also arise because there is some problem with the original award procedure and the procuring entity wishes to commence a new procedure – for example, where the procuring entity has received no tenders at all, because no tenders are responsive (for example, because the specification is not realistic) or because suppliers were colluding. The procuring entity may also be effectively obliged to recommence a procedure – either on its own initiative or as a result of a legal challenge – where it discovers some illegality in the award procedure (for example, where it transpires that the procuring entity has included an unlawful award criterion).

Obviously there are problems in cancelling any procedure, since suppliers may have invested time and resources in the process, and otherwise relied on the procedure coming to fruition (for example, by holding off on tendering for other work). Repeated cancellations could clearly undermine the confidence of suppliers in the process and deter future participation. Thus it is important to cancel a procedure only when there are very good reasons for doing so. Regulatory controls over the cancellation process – such as the need for higher approval or a requirement to give reasons for a cancellation – may help to ensure this. It is also important to plan the procedure in such a way as to avoid the need for cancellations – for example, to secure necessary planning or budgetary approvals before commencing the procurement, as far as possible.

The discretion to cancel a procurement may also, like any other discretion, be abused to favour particular suppliers. For example, a procurement could be cancelled and a new procurement begun because a favoured supplier's tender is not the best tender.

The UNCITRAL Model Law, in Article 12, provides that procuring entities may reject all offers, and provides for the following controls over the decision.

1. There is a requirement for approval from a higher organ (Article 12(1));
2. The right of rejection is available only if the entity reserves such a right in the contract documents;
3. The procuring entity must promptly notify its decision to suppliers who have submitted an offer (Article 12(3)); and
4. The procuring entity must – on request from a supplier – communicate the grounds for the rejection: Article 12(1) (which also specifically states, however, that the procuring entity does not have to justify those grounds).

However, the right of rejection cannot be challenged by suppliers under the Model Law's provision on supplier review – Article 52(2)(d) excludes such decisions from the right of review. This limitation may be removed as a result of the current review of the Model Law as part of a more general decision to remove various limitations on supplier review which has already been referred to above.

Article 12(2) currently specifically provides that the procuring entity should not be liable to suppliers for its decision to reject all offers. Thus the procuring entity need not compensate suppliers for such a decision – the possibility that resources will be expended on a tendering procedure that does not come to fruition is considered in the Model Law

(as in many individual states) as a reasonable business risk that is undertaken by those who take part in a tendering process.

However, various exceptions to this might be considered. For example, if there is a known risk that a project might not go ahead but the government nevertheless wishes to commence the procurement and solicit tenders it might undertake to pay compensation in that particular case. In some jurisdictions compensation may also be payable to suppliers under the law on fraud (under the law of tort or delict which concerns provision of compensation for wrongs) where the government launches a procedure when it has no intention of going ahead with the procurement. Such cases will be rare and hard to prove but an exception for such cases might be considered for inclusion in the procurement regulations. A redraft of the provision on cancellation that has been produced under the current review of the Model Law specifically suggests that there may be liability to suppliers for "irresponsible" or "dilatatory" conduct in cancelling a procurement<sup>35</sup>. According to a note attached to the provision this appears designed to emphasise that liability might attach, inter alia, for advertising a procurement merely to establish market conditions rather than with the actual intention of awarding a contract.

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<sup>35</sup> See Article 17 of the latest draft text in A.CN/9/WG.1/WP.73/Add.2 ([www.uncitral.org/pdf/english/workinggroups/wg\\_1/73add2E.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_1/73add2E.pdf)).

# Chapter 4: Procurement of services and complex procurement<sup>1</sup>

## 4.1 Procurement methods for services

### 4.1.1 Introduction

At present, for services (in the sense of non-construction services) the UNCITRAL Model Law provides a separate procurement method, “the principal method for the procurement of services”. Article 18(3) states that this method is generally to be used for procuring services, whilst the rules for conducting this method are set out in Chapter IV of the Model Law, Articles 37 to 45. As explained further below, this “method” in fact includes many variations, especially in the approach to the evaluation of bids that are considered to render it suitable for various different kinds of services. The choice of variation to be used will depend on the particular kind of services being procured.

### 4.1.2 Use of the principal method for procurement of services and its relationship with the methods for procuring goods and construction

The principal method for the procurement of services is an appropriate one for procuring certain types of services that require a different approach from goods and construction – in particular, for services procurement in which quality issues rather than cost are a primary consideration.

This is, in particular, the case with consultancy services. Indeed, one of the main areas for which UNCITRAL’S special provisions on services are intended and used in practice is the area of consultancy services.<sup>2</sup> Similarly, the Multilateral Development Banks (‘MDBs’), such as the World Bank, as primary users of international consultancy services, have consistently chosen to treat such consultancy services differently from the procurement of goods or works or other more general services which contain little intellectual or creative input.

This is largely based on the idea that the selection of consultants is based on the quality of the services to be provided and on the expertise of the consultants rather than on the price of the services. Though the issue of cost is not irrelevant, much greater emphasis is placed on quality. The Guide to Enactment of the 1994 Model Law, in its commentary on Article 11, confirms that the main differences between the procurement of, on the one hand, goods and construction and, on the other, services, stem from the fact that:

“...unlike the procurement of goods and construction, the procurement of services typically involve the supply of an intangible object which quality and exact content may be difficult to quantify. The precise quality of the services provided may be largely

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<sup>1</sup> See in general, Kovács, *Enhancing Procurement Practices: Comprehensive Approach to Acquiring Complex Facilities and Projects* (2004); S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (2000), Chs. 7-11; P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (2004) Ch. 5, section 5.5; S. Arrowsmith and C. Nicholas, “The UNCITRAL Model Law on Procurement: Past, Present and Future” ; Ch. 1 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West), section 1.11. For illustrations of methods for complex procurement and procurement of services in particular systems see, for example, the Asia Link companion textbook *EU Public Procurement Law*, Ch. 6 (competitive dialogue and negotiated procedure with a notice); J. Cibinic and R.C. Nash, *Formation of Government Contracts* (3rd ed. 1998), passim and in particular Chs. 6 and 7, on methods involving negotiation in the United States federal system.

<sup>2</sup> See, in particular, Trepte, above, Ch. 5, section 5.5.

dependent on the skill and expertise of the suppliers or contractors. Thus, unlike the procurement of goods and construction where price is the predominant criterion in the evaluation process, the price of services is often not considered as important a criterion in the evaluation and selection process as the quality and competence of the suppliers or contractors. Chapter IV is intended to provide procedures that reflect these differences.”

This points to the same justification used by the MDBs in providing for special procurement methods for consultancy services.

Whilst the aforementioned method for procuring services is designated as the “principal” method, this may be slightly misleading. Many services can in fact be procured using the same kind of procedures that are used for procuring goods and construction. This is recognised in the Model Law which contains significant “exceptions” to the use of the special “services” method that provide in many cases for the use of the “goods/construction” method instead.

Thus, there is firstly an exception to the requirement of using the principal method for procurement of services in cases where it is feasible to formulate detailed specifications and tendering proceedings would be more appropriate taking into account the nature of the services to be procured (Article 18(3)(a)). In these cases, it appears that tendering (i.e. the method that is normally used for goods and construction) should be used instead. In addition, Article 18(3)(b) also states that the other methods of procurement available for goods and construction should be used when: i) it is more appropriate than the principal method for procurement of services; and ii) when the conditions for the use of the method in question are satisfied (and subject to the same requirements for approval by a higher organ and inclusion of the grounds and circumstances in the record of the procurement).

These goods/construction methods are in fact often suitable for procuring services, especially some types of manual services, as well as for simple clerical or professional services such as basic bookkeeping. In practice, these goods/construction methods may be used in many states for procuring most types of services – so that the special services method itself might be considered as the exception rather than the rule. Hence, states using the Model Law may want to consider whether to make the principal method itself an exceptional method applicable only to certain kinds of complex services or to services where quality considerations are of paramount importance.

The separate treatment of goods and services in the Model Law in fact arose from the historical development of the Model Law whereby services were added to goods and construction at a later stage and debated separately. The current review of the Model Law is considering adopting a more integrated approach, providing a single set of methods for both goods/construction and services, the use of which will focus on factors relating to the complexity of the procurement rather than a classification of the contract as relating to goods, construction or services. As we have already noted in Chapter 2, the current draft of the revised text, which was developed for the eighteenth session of the Working Group in April 2010 and endorsed with small changes, provides for a single and integrated set of procurement methods, all of which are applicable for goods, construction and services – the “toolbox approach”.<sup>3</sup> So far as services are concerned it is proposed that open tendering will become the “default” method, as it is for goods and construction – i.e. this method will apply in principle and other methods will be available only when the specific grounds for their use are established. Methods not involving negotiation, such as restricted tendering will be available (as is the case now) for services on the same grounds as for goods and construction. For more complex procurement involving negotiation, the key available methods will be:

- Two-stage tendering

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<sup>3</sup> See A.CN/9/WG.1/WP.73/Add.3 ([www.uncitral.org/pdf/english/workinggroups/wg\\_1/73add3E.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_1/73add3E.pdf)).

- Request for Proposals with Dialogue (which we have seen is also available for goods and construction procurement) – essentially a version of the current request for proposals procedure; and
- Request for Proposals with Consecutive Negotiations. This is essentially a version of what is currently the principal method for procurement of services in the version that involves consecutive negotiations (on this, see the next section below). It is envisaged that this will be used, in particular, for the kind of professional and intellectual services where quality considerations are important, for which the current principal method for procurement of services was designed. However, as explained in Chapter 2, it will not be restricted only to services procurement since, as we have seen, all methods are to be available for all types of procurement. It will also be available in the same relatively broad circumstances as the other “complex” procurement methods (such as situations where it is not feasible to formulate detailed specifications and dialogue is considered the best way to determine the entity’s needs). However, the Guide to Enactment will explain in detail the kind of procurements for which this method is intended and when it should be used in practice.

#### **4.1.3 Outline procedure for the principal method for procurement of services**

As set out in Article 37, the principal method for the procurement of services involves the solicitation of proposals. Under this provision, a procuring entity solicits proposals for services, or, where applicable, applications to “prequalify” by publishing a notice seeking expressions of interest through a national publication and also (except for procurement limited to domestic suppliers or for low value contracts) in an international publication. Article 38 provides the following in relation to content:

The request for proposals shall include, at a minimum, the following information:

- (a) The name and address of the procuring entity;
- (b) The language or languages in which proposals are to be prepared;
- (c) The manner, place and deadline for the submission of proposals;
- (d) If the procuring entity reserves the right to reject all proposals, a statement to that effect;
- (e) The criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 7(8);
- (f) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (g) The nature and required characteristics of the services to be procured to the extent known, including, but not limited to, the location where the services are to be provided and the desired or required time, if any, when the services are to be provided;
- (h) Whether the procuring entity is seeking proposals as to various possible ways of meeting its needs;
- (i) If suppliers or contractors are permitted to submit proposals for only a portion of the services to be procured, a description of the portion or portions for which proposals may be submitted;
- (j) The currency or currencies in which the proposal price is to be formulated or expressed, unless the price is not a relevant criterion;
- (k) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes, unless the price is not a relevant criterion;
- (l) The procedure selected pursuant to article 41(1) for ascertaining the successful proposal;

- (m) The criteria to be used in determining the successful proposal, including any margin of preference to be used pursuant to article 39(2), and the relative weight of such criteria;
- (n) The currency that will be used for the purpose of evaluating and comparing proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;
- (o) If alternatives to the characteristics of the services, contractual terms and conditions or other requirements set forth in the request for proposals are permitted, a statement to that effect and a description of the manner in which alternative proposals are to be evaluated and compared;
- (p) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;
- (q) The means by which, pursuant to article 40, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;
- (r) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
- (s) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity;
- (t) Notice of the right provided under article 52 to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;
- (u) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;
- (v) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of proposals and to other aspects of the procurement proceedings.

This solicitation of proposals procedure is similar to the tendering procedures and prequalification procedures in Chapter III of the Model Law in that no attempt is made, other than through prequalification (that is, determining which firms have the minimum competence to undertake the contract work) to limit the identity of the consultants (or general service providers) bidding for the contract. It is a process that is openly advertised, where participation is open to all who possess minimum levels of competence to undertake the work. This process is set out in Procedure 1 as seen in the table below: Summary of methods for soliciting proposals or tenders for services.

**Table: Summary of methods for soliciting proposals or tenders for services**

**Procedure 1 (usual procedure under the Model Law's Principal Method for the Procurement of Services)**

1. Advert
2. Pre-qualification
3. Proposals by all qualified persons

**Procedure 2 (available under limited conditions in the Model Law's Principal Method and under MDB guidelines on consultancy services)**

1. Invitation to specific persons
2. Proposals by the specific invited persons

It is worth noting that the general UNCITRAL procedure as set out above is very different to the procedures relied upon by the Multilateral Development Banks. Under these procedures, once terms of reference have been prepared, the procuring entity will draw up a list of a limited number of potential consultants from which it will invite proposals, rather than inviting any interested person who is competent to undertake the task of submitting a proposal.

However, whilst the UNCITRAL principal method for procurement of services generally envisages that any competent person may submit a proposal, this is subject to the important possibility of direct solicitation – that is, approaching specific firms without even placing an advertisement which is similar to the procedure permitted by the Multilateral Development Banks- to which certain conditions apply. In this respect, Article 37 (3) provides for direct solicitation when:

1. The services to be procured are available only from a limited number of providers, provided that the procuring entity solicits proposals from all those providers; or
2. The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of firms to ensure effective competition; or
3. Direct solicitation is the only means of ensuring confidentiality or is required by reason of the national interest, provided that it solicits proposals from a sufficient number of firms to ensure effective competition.

As we have seen in Chapter 2, this type of approach to soliciting offers i.e. involving a direct approach to specific persons, is available for goods and construction (and suitable services) in similar circumstances under the restricted tendering procedure. We have also seen that the possibility of using the procedure without an advertisement because there are a limited number of suppliers (point (a), above) has been criticised and may be changed – and the same applies to (ground (a), above) in the context of services. It can be noted that (as again was mentioned in Chapter 2) direct solicitation is also available for procurement of goods and construction (and suitable services) in the procedures of request for proposals and competitive negotiation.

How are procuring entities to decide which suppliers to invite to participate in the procedure?

As with similar procedures for goods and construction, both the Model Law and MDB guidelines say little in fact about how the invited firms should be identified and chosen. For identifying firms, an optional advertisement is a possibility, or the procuring entity may simply invite firms that it knows. The procuring entity might also use supplier lists that it maintains itself – and which it might wish to advertise. It could also use lists that are maintained in the case of many consultancy services by the MDBs in the case of contracts financed by the MDBs. The issue of supplier lists is considered further in a separate section below. The question of how a procuring entity might choose between various possible firms that are known to the procuring entity (whether from an advertisement, supplier lists or otherwise) – a process which we can refer to as “shortlisting” - is also considered separately below. It should be noted that when there is no clearly identified group of suppliers from which a choice is to be made (e.g. out of all those submitting a formal response to an advertisement or all those officially registered on a list), the processes of “identification” and “shortlisting” merge into one and may not be regarded in practice as distinct.

Once the proposals have been received under the principal method for the procurement of services the award phase will commence.

In this phase, the proposals will be evaluated in accordance with the rules and criteria that are set out in Article 39 of the Model Law. As aforementioned, the Model Law provides for three different variations in the process of evaluation, which are suitable for different types of services. Although they relate to what we call ‘the award phase’ of the contract, the Model Law refers to these processes as selection procedures:

1. **Selection procedure without negotiation:** Under this procedure, the procuring entity establishes minimum standards for quality and technical content and evaluates proposals that meet this standard using either the lowest price or the “best combined evaluation” of price and non-price criteria.
2. **Selection procedure with simultaneous negotiations:** Under this process, (considered particularly suitable for professional services) the procuring entity negotiates with all suppliers submitting acceptable proposals, ending with the submission of “best and final offers” as the basis for choosing the winning supplier.
3. **Selection procedure with consecutive negotiations:** Under this procedure, the procuring entity negotiates with the supplier submitting the best technical proposal to establish a price; or if it fails to do so, the procuring entity negotiates the price with further suppliers in the order of the merit of their proposals, until agreement is reached with one on a suitable price.

These processes will be discussed in further detail below, in the context of evaluation complex and services procurement.

## 4.2 Selection (shortlisting)<sup>4</sup>

In some procurement methods, notably (open) tendering, procuring entities must invite all those who are interested to tender – or (where pre-qualification procedures are conducted) at least all of those who are interested and meet minimum standards of qualification.

However, as we have seen in Chapter 2 on procurement methods for goods and construction and above in this chapter on procurement methods for services, there are also many procurement methods where the procuring entity may choose only a limited number of firms from those who are qualified and are available to submit offers for the

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<sup>4</sup> See S. Arrowsmith, J. Linarelli and D. Wallace, above; pp. 645-648.

contract. This process of choosing whom is to be invited to make an offer from amongst those qualified to do so can be referred to as shortlisting.

This process is relevant, for example, for restricted tendering, the request for proposals procedure and the principal method for procurement of services, which are the main methods of procurement for more complex contracts and for professional services contracts. A shortlisting process is also envisaged under the procedure for the procurement of privately financed infrastructure under the UNCITRAL Model Provisions on this subject, which is considered later in Chapter 6.

We can start off by noting that under some procurement methods, or variations of those procurement methods, there will be a distinct pool of identified "interested" candidates from whom the shortlist will be drawn up. This will be the case where the procurement has been advertised, as is generally required, for example, the request for proposals procedure (where a notice is required unless non-publication is justified by reasons of economy or efficiency). In this case, the shortlisting process will demand a method of choosing between all these specific persons (provided that they are qualified) – the process has a clear function and the need to choose from amongst particular persons makes it potentially transparent and relatively easy to monitor.

However, in many cases, there is no clearly identified pool of bidders and the shortlisting process is not such a distinct process – the identification of potential bidders and the process of choosing between potentially available firms may effectively merge in practice into a single process.

The question of shortlisting is one of the most difficult for procuring entities and the UNCITRAL Model Law gives little guidance on this process. Its provisions are almost entirely confined to rules on the number of persons to be invited (for example, in request for proposals, it is stated that requests for proposals "shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible"). There is no indication of the criteria that may be used for shortlisting (or identification of the potential group from which a limited number of suppliers can be drawn). This is one important way in which the Model Law can be seen to focus on tendering (whereby shortlisting is not relevant) to the neglect of other methods of procurement. However, the shortlisting phase is one which is just as much open to abuse as any other phase of the procurement process. Its existence as a potential stage at which to favour specific suppliers may be one reason that certain procurement methods might be chosen above open tendering. It can be noted, on the other hand, that UNCITRAL's Model Provisions on privately financed infrastructure do address this question in more detail: see Chapter 6 and also the brief comments below. States enacting the Model Law may wish to give more attention to the process of shortlisting and also to the identification of the potential pool of candidates than is given in the Model Law itself.

It is not, however, always easy to devise criteria that are workable, transparent and which reflect the principle of equal treatment. In truth, procuring entities are often faced with a large number of potential bidders, many of whom are equally acceptable (for example, in the case of consultancy services). In the private sector, the response to this situation, as a starting point, is often simply to work with known and trusted suppliers, which is the best approach from a value for money perspective (although it is necessary to be alert to new developments and to guard against complacency amongst the accepted group). However, this is considered more problematic for the public sector given the objectives and underlying principles of public procurement (such as the aforementioned equal treatment and transparency objectives/principles).

With this in mind, the following approaches, which have all been used in practice at various times, might be considered:

1. **Selecting firms based on their general financial and technical position** – that is, using the same type of criteria for shortlisting as are used for qualification. For example, an authority which wishes to invite five firms to tender might set a requirement for a certain amount of experience of similar projects, and if more than five firms meet this standard, it may then shortlist the five firms which have the most or most directly relevant experience.

One variation of this approach is to score firms under the various headings used for qualification, and then (from the firms that obtain the minimum scores necessary to be considered qualified for the contract) to shortlist the firms that obtain the best scores.

This is the kind of approach that is used under UNCITRAL's Model Provisions on privately financed infrastructure procurement, as will be discussed in section 15 below. It is also the approach used for shortlisting under the EU's Public sector Procurement Directive 2004/18.<sup>5</sup> This approach can be seen as an objective way of identifying which firms are likely to do the best job and/or which are likely to present the least risk of non-performance. It also provides an approach that may seem attractive because of its transparency – it uses criteria that are clearly identifiable and open to monitoring.

There are, however, problems with this approach – it can be very arbitrary if it is not applied in a careful and nuanced manner. For example, if many firms very easily exceed the required level of qualified personnel and other resources for performing the contract, as such that none of them present any risk of non-performance, it is difficult to see what policy is furthered by choosing the firms with the most extensive resources; or how the extent of available resources is relevant. (Thus, it would be appropriate to allocate maximum scores to all those reaching a certain level, rather than giving ever-higher scores for increasing levels of resources). There is also a particular tendency for this method – if not applied in such a careful manner – to favour larger firms at the expense of Small and Medium-sized Enterprises ('SMEs'). This is contrary to the objective of promoting the development of SMEs which is followed by many governments, including through in the area of government procurement. In some cases, the number of very strong potential bidders might be such that using this approach in a manner that is not arbitrary simply will not serve to reduce the numbers down to the required level.

2. **Selecting different types of firms, e.g. some small and some large firms.** This may be logical as a way of increasing the likelihood of value for money if, for example, it is not known which types of firms are more likely to be competitive for a particular project at a particular time.
3. **Selecting by reference to "policy" factors which do not relate to the performance of the specific contract.** For example, a public authority wanting to promote the development of small businesses may give priority to small businesses in issuing invitations. This can be a useful way of promoting such policies (and also of demonstrating political commitment to them) without the costs (e.g. in terms of higher prices) that may result from some other methods of policy implementation such as set asides or preferential award criteria.
4. An approach that can perhaps be considered a variation of point 3 is **selection on the basis of considerations of substantive equity** e.g. gender equity or equity by reference to nationality, in order to ensure that discrimination on such grounds is avoided, and to express a commitment to non-discriminatory policies. This consideration appears to be behind the policy required by the World Bank for the selection of consultants in Bank-funded procurements using its "Quality and Cost-based" selection method for consultants. In this respect, the relevant Guidelines state:

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<sup>5</sup> See the Asia Link companion textbook, *EU Public Procurement Law*, section 6.5.2.4; S. Treumer, "The Selection of Qualified Firms to be Invited to Tender under the EC Procurement Directives" (1998) 7 *P.P.L.R.* 147.

2.6 The Borrower is responsible for preparation of the short list. The Borrower shall give first consideration to those firms expressing interest that possess the relevant qualifications. Short lists shall comprise six firms with a wide geographic spread, with no more than two firms from any one country and at least one firm from a developing country, unless qualified firms from developing countries are not identified.

2.7 The short list may comprise entirely national consultants (firms registered or incorporated in the country), if the assignment is below the ceiling (or ceilings) established in the Procurement Plan approved by the Bank [note omitted] a sufficient number of qualified firms is available for having a short list of firms with competitive costs, and when competition including foreign consultants is prima facie not justified or foreign consultants have not expressed interest ... (in which government and/or donor funds are pooled) as the threshold below which short lists will be composed entirely of national firms selected under procedures agreed with the Bank. However, if foreign firms express interest, they shall be considered.

In addition to requiring a geographic spread, it can be seen that these provisions also incorporate other policy factors, namely promoting the development of the industry in developing countries (Under 2.6: a requirement to include at least one developing country firm) and promoting development of the industry of the Borrower country (Under 2.7: allowing "national" short lists without positively seeking external competition where it appears that this will not prevent a contract on competitive terms. In this respect, 2.7 addresses both the shortlisting and how the relevant group from which to select the short list will be identified – these two questions merge together since in general, there is no formal advertisement to identify the relevant group).

5. **Selecting by rotation.** Some purchasers find this suitable for simple contracts. To spread the benefits of government business opportunities, governments might give priority to firms which have not recently had the opportunity to tender. This can be one way of promoting the objective of equal access to opportunities for countries in which there exists this specific objective of the procurement system. It is also an approach that has the merits of transparency. This method could be combined with method 1 if the group produced by method 1 is too large. Such an approach can be facilitated and made more transparent by the use of supplier lists (see further below) to identify the potential pool of bidders.
6. **Random selection** (such as drawing lots). Again, this is sometimes considered suitable for simple contracts and has the same benefit as selecting by rotation. It can again be combined with method 1. This can easily operate in a fair and transparent manner without the use of supplier lists.
7. **Selecting firms which are likely to make the best offer in terms of price, quality etc without actually seeking an offer for the specific work** (i.e. trying to anticipate which firms will best meet the contract award criteria discussed further below). This could be determined by, for example, looking at the firms' offers in past tenders, or (for simple products where price is the main factor) looking at the firms' price lists.

Another method of reducing the number of firms participating in the whole procedure and looking forward to who can provide the best value for money (in addition to methods 1 and 7) is to invite into the award phase a larger number of firms than will be invited to submit final offers, and then to reduce that number by seeking outline offers, and eliminating those whose offers are the least attractive, leaving only a smaller number to submit fully worked-up tenders. For example, for provision of bespoke information technology systems where the nature of the proposal is an important contract award criterion, purchasers sometimes ask firms to submit "mini-proposals" of their solutions, and then shortlist firms which seem to offer the best solutions.

This kind of approach may be possible under, for example, the request for proposals method in Article 48. This states that a best and final offer must be sought at the end of the process “from those whose proposals” have not been rejected in the preceding stages, which involve the submission of proposals followed by negotiations over the proposals. However, it is not entirely clear whether, under the request for proposals method, the procuring entity can reject proposals that appear inferior to others merely to limit the costs of the competition for the procuring entity and suppliers – or whether it is limited to only rejecting the proposals that do not meet the minimum threshold of suitability to its needs.

To the extent that procuring entities can reduce numbers in this way through initial proposals based on the contract award criteria, this can be considered for analytical purposes as part of an iterative ‘award phase’ rather than ‘shortlisting’ as referred to in this section. (Note that the word ‘shortlisting’ may also sometimes be used in the ‘award’ phase in practice – it is not a term with a precise legal meaning, but is given a narrow definition here so that the different phases can be analysed separately).

## **4.3 Issues in the evaluation and award phase in services procurement and complex procurement**

### **4.3.1 Introduction**

In this section, we will consider the key regulatory approaches to the award phase of the contract in contracts for services procurement and other more complex procurement. In Chapter 3, we considered the way in which the UNCITRAL Model Law regulates the award phase of the contract in tendering procedures. As we saw there, the Model Law takes a strict approach to the open form of tendering (simply called ‘tendering’ by the Model Law) and to restricted tendering. The aim is to implement a procedure that is as transparent as possible, in particular to prevent the abuse of discretion that might occur if significant discretion were given. In particular, this strict approach is characterised by:

- A general prohibition on discussions with tenderers;
- Very limited opportunities for any corrections to tenders once submitted;
- A requirement to choose from only a limited and defined number of specific award criteria (formulated in advance and disclosed to tenderers); and
- General requirements for criteria to be objective and quantifiable.

It is widely recognised, however, that with more complex procurements, even if transparency is considered a very important principle, that principle needs to be modified to some degree to provide for flexibility on the matters above, since flexibility is important (in particular) to ensure value for money. The benefits of transparency need to be balanced against the costs, and an appropriate balance requires a greater degree of flexibility. Thus, for example, in complex procurement where the quality of the work is the main factor that will affect the value for money obtained, there is a greater need to consider subjective and non-quantifiable factors such as the quality of the work done by a particular tenderer. Thus, as we will see, this is accepted even though allowing this reduces the transparency of the process.

In complex procurement, the regulatory rules are often less strict on all the four aspects above, in the award phase. The extent to which the usual strict rules are relaxed in these respects will depend, of course, as with other aspects of procurement procedures, on the particular features of the system and country in question.

The Model Law, as we have seen in Chapter 2 above, provides for various different regimes for more complex procurement:

1. First, as we have seen in Chapter 2, the Model Law provides for the principal method for the procurement of services that is designed for use in various types of services procurement that are not suitable for procurement under the goods/construction methods.
2. Secondly, as we also saw in Chapter 2, there are three procedures under the Model Law for use in complex procurement of goods and construction, namely two-stage tendering, request for proposals, and competitive negotiations. (Two-stage tendering involves a kind of hybrid approach used for complex contracts, under which initial discussions are permitted but this is followed by a formal tendering phase governed by the general rules of tendering).
3. Thirdly, there are separate model legislative provisions on the procurement of privately-financed infrastructure, which is one type of very complex procurement. (See further Chapter 6).

In many respects, the provisions of these three separate regimes in so far as they apply to major complex procurements are quite similar, and the existence of three separate sets of provisions is rather confusing. As explained earlier in this chapter, this is likely to be changed as a result of the current review of the Model Law. Thus, it is likely that the revisions to the Model Law will provide for greater integration of the rules, without regard to any distinction between goods, construction and services, by providing for a single set of procurement methods that are available for all types of procurement. In addition, as explained in Chapter 3 on open tendering, it is also likely that the Model Law will provide a single set of provisions on evaluation and award for both simple and complex procurement, including an integrated set of rules relating to issues such as disclosure of the criteria and methodology.

Finally, by way of a general observation on the rules on complex procurements and services, the observation (often made) that the Model Law does not provide as detailed rules on other procurement methods as it does for tendering is true for the award phase of more complex procurements. Thus, for example, there is no such detailed provision on non-conforming tenders as there is for the tendering procedure. States might wish to give explicit attention to finding ways to deal with such issues in complex procurement. Given that methods for complex procurement generally allow more discretion than other methods throughout the procedure, states may be willing to allow more flexibility in the rules on these points – for example, to allow a greater scope for correcting errors in tenders in complex procurement. However, the policy considerations that we have discussed in relation to these points in open tendering obviously remain relevant in principle in deciding what those rules should be.

We will consider below, the key rules that apply on the award phase under the Model Law to the principal method for the procurement of services (Section 12.2) and the request for proposals. The privately financed infrastructure provisions are noted separately in Chapter 6.

## **4.3.2 Evaluation and award under the principal method for procurement of services<sup>6</sup>**

### **4.3.2.1 Permitted criteria for the award in the principal method for procurement of services**

Article 39 provides for various award criteria to be used for evaluating the proposals and the manner in which they are to be applied.

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<sup>6</sup> In addition to the works cited in note 1 above, see, in particular, F. Dini, R. Pacini and T. Valletti, "Scoring rules", Ch. 12 in N. Dimitri, G. Piga and G. Spagnolo, *Handbook of Procurement* (2006) (CUP).

The criteria may concern the following – and only the following:

- (a) The qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services;
- (b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity;
- (c) The proposal price, subject to any margin of preference applied, including any ancillary or related costs;
- (d) The effect that the acceptance of a proposal will have on the balance of payments position and foreign exchange reserves of the State, the extent of participation by local suppliers and contractors, the economic development potential offered by the proposal, including domestic investment or other business activity, the encouragement of employment, the transfer of technology, the development of managerial, scientific and operational skills and the countertrade arrangements offered by suppliers or contractors;
- (e) National defence and security considerations.

As in tendering, there is also a provision in Article 39 2(1), for a margin of preference for national suppliers.

A number of comments can be made on these permitted criteria.

First, as with the award criteria for tendering under Article 34 of the Model Law, entities are not required to use all the listed criteria but may just choose those that are appropriate.

Second, it can be noted that Article 39(1)(b) is concerned mainly with issues such as the merits of the methodology and approach proposed for dealing with the task (for example, in a project evaluating a government social programme such as the provision of nursery education for poor children, the government might want to consider the merits of the methodology for gathering the relevant evidence as an important criterion). According to the Guide to Enactment, paragraph 39(1)(b), Article 39 also enables the procuring entity to disregard a proposal that has been inflated with regard to technical and quality aspects beyond what is required by the procuring entity in an attempt to obtain a high ranking in the selection process, thereby artificially attempting to put the procuring entity in the position of having to negotiate with the proponent of the inflated proposal, when it uses the procedure involving consecutive negotiations in Article 44, as described later below.

Thirdly, it can be noted that point (a) allows the procuring entity to consider the characteristics of the service provider itself. These may be relevant to the quality and reliability of the service that will be provided under the contract.

For example, intellectual abilities of specific persons employed by the provider (or engaged as a consultant for the particular work) may be important for the quality of the consultancy services that will be offered by that provider. When using such a criterion, one problem is that individual personnel may leave or become unavailable during the award procedure or indeed after the contract has already been signed or commenced. The realistic likelihood of this happening needs to be taken into account in deciding whether to look at this as a specific factor. The procuring entity may wish to limit the risk of this happening by satisfying itself of relevant arrangements (e.g. the legal commitment of a sub-contractor) or by ensuring that the relevant contract requires the named person to be made available unless specific and justifiable reasons arise to make this impossible. Another approach is to consider this issue merely as an indication of the general calibre of persons available to the service provider, or to focus more directly on that question.

For a complex services project involving effective management of a large-scale service provided by many different persons in a large team, the quality of the service provider's quality assurance and management systems may be important to the quality of service received. Further, as noted above, where the project depends on skills of specific persons whose availability is not absolutely guaranteed, the procuring entity may wish to look at internal recruitment and training processes, for example, to ensure that replacements will be of similar quality.

It should be emphasised that in order to ensure effective procurement, it is necessary to ensure that any award criteria related to the provider are actually appropriate to judge the quality of the service to be provided. For example, experience may be relevant to some degree – it may be appropriate to give credit where the work will be done by firms or individuals with some actual experience of the specialist kind of work where the experience makes some difference to that kind of work. However, as with the use of this criterion in relation to the selection process, merely giving more credit for more experience may not be a sensible approach – it might be questioned, for example, whether someone with 22 years experience is likely to be inherently superior to someone with 20. Thus, such criteria need to be employed carefully, and specifically linked to service quality in an appropriate and focused manner.

Finally, one issue that arises in the context of evaluation in services procurement, in particular, is the extent to which regulatory systems should allow consideration of past performance under contracts with the agency to be considered when evaluating a supplier's reputation, reliability etc.

It is widely considered that for services contracts in which performance cannot be easily measured and, hence, a competitive procurement process has inherent limitations in securing a high-quality result, consideration of past performance can be valuable both as a predictor of the quality of the result; and (where the provider seeks repeated business with the procuring entity) as an incentive to the provider to offer a high-quality performance. However, there is a danger that consideration of this factor could operate in such a way as to favour those with whom the procuring entity has an existing relationship. This danger has been a particular concern of legal regimes intending to open up procurement to international trade, on the basis that such practices might favour national firms already in the market. It is, however, possible to give consideration to this factor without prejudicing those who have not yet done business with the procuring entity concerned. To do this, it is necessary to ensure that new entrants to the procuring entity's market are still able to obtain maximum quality scores even without having done business with the procuring entity before. Thus, performance on past contracts with the procuring entity can be treated merely as a single piece of evidence that is relevant to determining the overall score, it being recognised that the evidence which is available will differ from firm to firm.<sup>7</sup>

#### **4.3.2.2 Absence of a requirement for objective and quantifiable criteria**

We saw in Chapter 3 that under Article 34 of the Model Law, the rules on award criteria for tendering procedures seek to limit the discretion of procuring entities in applying the award criteria by requiring that the general criteria should be objective, namely capable of being identified and measured without subjective input; and quantifiable, in the sense that once identified and measured, the relevant feature of the product can be assigned a value without any such subjective input. These limits do not, however, apply to the

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<sup>7</sup> For a discussion of best practices based on the United States experience, see K. F. Snider and M. F. Walkner, "Enhancing Use of Past Performance as a Source Selection Criterion", Ch. 31 in K. V. Thai (ed.), *International Handbook of Public Procurement* (2009, Taylor and Francis).

criteria referred to in Article 39 above in the context of the principal method for procurement of services. This method provides for much more flexible criteria, which is considered necessary in general to obtain value for money in certain services procurement. For example, it was suggested above that the quality of individual persons employed by a service provider may be important in considering which provider to select for a consultancy contract. This may be difficult to measure, depending more on subjective judgments about work quality (e.g. quality of reports and projects already completed) than matters that are objective, such as number of years experience. It can be noted that a fear of allowing subjective judgements sometimes leads procuring entities to utilise objective criteria (such as the number of years of experience) for services procurements – even though they appear inappropriate from a value for money perspective. Careful consideration needs to be given here to the balance between transparency and discretion by taking all these considerations into account.

#### **4.3.2.3 Advance formulation and disclosure of the criteria and the methodology for the award**

In Chapter 3 on tendering, we discussed in detail the reasons why it is often considered appropriate to require procuring entities to formulate in advance and disclose to tenderers full details of their proposed evaluation methodology. We saw that this was reflected in some requirements for disclosure in relation to tendering under the Model Law – but these are by no means comprehensive and there is considerable scope for manipulation of the stated criteria.

Under Article 39, in the principal method for procurement of services, procuring entities must establish both the criteria and the relative weight, and the manner in which they are to be applied (Article 39(1)); it is also provided that the criteria and weighting must be notified to suppliers in the request for proposals (see Article 38(M)). However, as with tendering, these obligations on advance formulation and disclosure are quite limited. Thus, there is arguably no obligation to disclose information on the machinery for evaluation beyond simple weightings. In this respect, the position is similar to that of tendering, as was discussed in Chapter 3, but contrasts with the position under request for proposals which is discussed below. As already explained, the anomaly that exists in the disclosure rules between the different procurement methods is likely to be addressed in the review of the Model Law as part of a general process to streamline the rules on evaluation. Thus, as explained in Chapter 3, the latest published draft of the revised Model Law includes Article 11, intended to be applicable to all competitive methods of procurement, which will both: i) set out general rules on evaluation for these all methods of procurement; and ii) require advance formulation and disclosure of the ‘manner of application’ of the award criteria, as well as the criteria themselves.<sup>8</sup> As previously mentioned, the requirement to inform suppliers of the ‘manner of application’ of the criteria would seem to require the provision of sub-criteria for broad criteria and an explanation of the way in which weightings will be applied, as well as, possibly, any minimum requirements on matters such as affordability.

#### **4.3.2.4 Applying the criteria for the award in the principal method for procurement of services: the three procedures of selection without negotiation, simultaneous negotiation and consecutive negotiation<sup>9</sup>**

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<sup>8</sup> See A.CN/9/WG.1/WP.73/Add.1 to A.CN/9/WG.1/WP.73/Add.8 , [www.uncitral.org/pdf/english/workinggroups/wg\\_1/73add3E.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_1/73add3E.pdf).

<sup>9</sup> See, in particular, Trepte, above, Ch. 5, section 5.5.

In relation to the principal method for procurement of services, the UNCITRAL Model Law also distinguishes between 3 main procedures for choosing between the offers that providers are able to submit, which are set out in Articles 42-43. The Model Law refers to these as "selection" methods. It is important to be clear, however, that, as was mentioned briefly earlier, these are methods for selecting between submitted offers or tenders – what we referred to above as the "award" phase of the procedure.<sup>10</sup>

In the Model Law, the selection methods tend to make a distinction between services of a general nature and consultancy type services. Thus, the commentary on Article 41 of the Guide to Enactment states:

In Articles 42, 43 and 44, three procedures for selecting the successful proposal are provided so as to enable the procuring entity, within the context of a proceeding under Chapter IV, to utilize a procedure that best suits the particular requirements and circumstances of each given case. The choice of a particular selection procedure is largely dependent on the type of service being procured and the main factors that will be taken into account in the selection process, in particular, whether the procuring entity wishes to hold negotiations with suppliers and contractors, and if so, at which stage in the selection process.

For example, if the services to be procured are of a fairly standard nature where no great personal skill and expertise is required, the procuring entity may wish to resort to the selection procedure under Article 42 [selection procedure without negotiation], which is more price oriented and which, like tendering, does not involve negotiations.

On the other hand, in particular, for services of a complex nature in which the personal skill and expertise of the supplier or contractor are crucial considerations, the procuring entity may wish to resort to one of the procedures in Articles 43 [selection procedure with simultaneous negotiation] or 44 [selection procedure with consecutive negotiation], since they permit greater emphasis to be placed on those selection criteria and provide for negotiation.

The three procedures are as follows:

#### 1. **Selection procedure without negotiation** (Article 42 of the Model Law)

In this method, the procuring entity will establish a threshold with respect to quality and technical aspects of the proposals in accordance with the criteria other than price as set out in the request for proposals, and rate each proposal in accordance with such criteria and the relative weight of those criteria also as set forth in the request for proposals. The procuring entity will then compare the prices of the proposals that have attained a rating at or above the threshold.

The successful proposal will be either be:

- (i) the proposal with the lowest price; or
- (ii) the proposal with the best combined evaluation in terms of price and the permitted criteria other than price, referred to above.

This method is used more for non-consultancy services i.e. services that are of a relatively non-complex nature where the price rather than the personal skill and expertise of the provider is the dominant consideration, and the procuring entity does not wish to negotiate. For example:

- This procedure might be used to engage a firm to undertake a simple bookkeeping activity (for example, looking solely at the price and possibly at other factors also such as flexibility).

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<sup>10</sup> Confusion may arise since the concept of "selection" is used in some systems, such as the EU system, to refer to the phase of deciding who should be chosen to submit tenders in the first place – what we refer to in this chapter as "shortlisting": see above.

Minimum levels of competence and expertise are guaranteed through establishing a threshold level to measure the non-price aspects of the proposals. Those attaining the threshold can in all probability provide the services at a more or less equivalent level of competence.

## 2. **Selection procedure with simultaneous negotiations** (Article 43 of the Model Law)

This selection method is rather similar to the two-stage tendering and the request for proposals procedures noted in Chapter 2 of this book.

It is effectively a two-stage procedure for the procurement of services, which involves the possibility of negotiating with providers on the basis of their offers during the award phase. As with those procedures, it would be used where the procuring entity seeks various proposals on how best to meet its procurement needs. By allowing for early negotiations with all providers, the procuring entity is able to clarify better what its needs are, which can be taken into account by providers when preparing their "best and final offers".

However, in the context of services there are no specific limits laid down in the Model Law on when this two-stage approach can be used. This contrasts with the position in relation to goods and construction, where the use of an iterative procedure of this kind is permitted only when specified conditions are met (such as where a specification cannot be set). However, the procuring entity must explain and record its choice of selection method in the record of the procurement (Article 41(2), thus ensuring a degree of control over use of this approach).

Under this procedure, the procuring entity engages in negotiations with providers that have submitted acceptable proposals. It may then seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all providers whose original proposals were acceptable. For example, for a service requiring a significant amount of flexibility to respond to urgent and last-minute requirements, the procuring entity might wish to negotiate on this aspect of supplier proposals. Negotiations on initial proposals could also be used to identify and address quite diverse variations concerning the nature of the services to be provided – as in a contract for design and provision of a bespoke Information Technology system (which can be considered as a services contract), where negotiations would focus around the features that will be provided by each supplier's proposal.

Following the completion of negotiations, the procuring entity will request all suppliers remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

Paragraph 3 of Article 43 effectively requires the use of the two envelope system, which is also used by the MDBs for consultancy services. This is a system whereby the technical and financial proposals are submitted in separate envelopes at the same time. Such a procedure is used by MDBs except in the case of the award of very low value consultancy contracts to individual consultants, when the technical and financial proposals may be sent together.

This approach requires the consultant or other service provider to prepare and submit two proposals, one technical, the other financial. The technical proposal will contain information relating to the consultant's technical capacity and proposed methods of completing the contract. Each proposal, which will be submitted at the same time, will be contained in two separate, sealed envelopes, which generally must be clearly identified. Article 43(3) of the Model Law requires that the financial proposal, which will contain the

price for which the consultant is prepared to carry out the contract on the terms included in the technical proposal, shall only be opened after evaluation of the technical proposal.

The Guide to Enactment explains that this two-envelope procedure has been included in the UNCITRAL Model Law in order to ensure that the price of the proposal is not given undue weight in the evaluation process to the detriment of the evaluation of the technical and other aspects of the proposal, including the evaluation of the competence of those who will be involved in providing the services. The two-envelope system can also help to guard against the abuse of discretion – that is, it guards against not just inappropriate use of quality criteria but also against the deliberate abuse of discretion that such criteria entail for the purpose of favouring specific providers.

### **3. Selection procedure with consecutive negotiations** (Article 44 of the Model Law)

This third procedure for the award phase of the principal method for procurement of services that is provided for under the Model Law is the one that traditionally, according to the Guide to Enactment, has been widely used, in particular, in procurement of intellectual services.

Here, the procuring entity sets a threshold on the basis of the quality and technical aspects of the proposals, and then ranks those proposals that are rated above the threshold. It invites the supplier that attained the highest score for negotiations on the price of its proposal. In practice, the representatives of the consultants or other service providers, who are generally required to have the authority to conclude a binding contract in these kinds of negotiations, will be expected to discuss and may be required to justify, with appropriate documentation, their cost estimates and the individual elements thereof.

If the parties fail to reach agreement on the financial or other terms of the contract, the procuring entity may terminate negotiations with the selected provider (Article 44(e)) – this must be done under this provision “if it becomes apparent to the procuring entity that the negotiations” will not result in a contract. It must at this point inform the provider concerned that it is terminating the negotiations (Article 44(e)). Note that it is not possible to reopen negotiations again with that same provider.

The procuring entity is then required to open negotiations on the financial proposal of the provider that was second-ranked in respect of its technical proposal (Article 44(f)). If those negotiations fail, the procuring entity may then enter into negotiations with the third-ranked provider and so on until it concludes a contract or rejects all proposals (Article 44(f)).

## **4.3.3 Evaluation and award under the request for proposals procedure**

### **4.3.3.1 Permitted criteria and disclosure of criteria**

The permitted award criteria in the request for proposals procedure are set out in Article 48(3) of the Model Law. As with other procurement methods, procuring entities may use just some or all of the permitted criteria. They are:

- relative managerial and technical competence;
- effectiveness of the proposal in meeting the needs of the procuring entity; and
- the price for carrying out the proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

It can be seen that the main criteria are similar to the commercial criteria that are available under the principal method for procurement of services. In particular, point 1 allows for the consideration of matters relating to the tenderer itself rather than merely the content of the offer. Managerial competence may, for example, be very important in the context of large construction projects to enable the procuring entity to assess whether the project is likely to be delivered up to standard and on time. These kinds of criteria have been discussed above in the context of services in the principal method for procurement of services.

As with the principal method for procurement of services (in contrast with the position in relation to tendering), there is no requirement for the award criteria to be objective and quantifiable.

As regards advance formulation and disclosure of the criteria, and the methodology for the award, we discussed above the reasons as to why it is often considered appropriate to require procuring entities to formulate in advance and then disclose to tenderers the full details of their proposed evaluation methodology. We have seen that this is reflected in some requirements for disclosure in relation to tendering under the Model Law and also in some disclosure requirements under the principal method for procurement of services. However, for both procurement methods, these requirements are by no means comprehensive and leave considerable scope for manipulation of the stated criteria.

By contrast, the formulation and disclosure provisions for request for proposals are more comprehensive. Article 48(4)(c), dealing with the contents of the documents by which proposals are solicited, requires criteria to be expressed in monetary terms to the extent practicable and also requires the disclosure of both their relative weight and “the manner in which they will be applied in the evaluation of the proposal”. It is not entirely clear how far this will go, but it seems to require formulation and disclosure in advance of any detailed sub-criteria that apply and of other aspects of the machinery for evaluation such as scoring systems and how they will be applied.

As was explained in Chapter 3, the anomaly that exists in the disclosure rules between the different procurement methods is being addressed in the review of the Model Law: as we have seen there, the current draft of the revised text includes a comprehensive disclosure provision for all competitive procurement methods along the lines of that already included in the Model Law’s request for proposal method.

#### **4.3.3.2 Applying the criteria for the award in the request for proposals**

As we have seen in Chapter 2, the request for proposals procedure provides for the opportunity to discuss proposals with suppliers through an iterative process that involves initial proposals that are subject to discussion and amendment followed by final offers. This process was outlined further in Chapter 2. We have also seen above that a similar sort of process applies in the principal method for procurement of services under the procedure of “selection with simultaneous negotiation” (Article 43 of the Model Law). In both cases, one of the main reasons for using such a process is to get supplier input into the design or detail of the project.

We can also note that the UNCITRAL rules on request for proposals also provide for use of the kind of two-envelope procedure found also in the principal method for procurement of services in the selection procedure with simultaneous negotiations (Article 43 of the Model Law). Thus, for the purpose of evaluating the final proposals, Article 48(3) provides that the effectiveness of the proposal is to be evaluated separately from the price, and that the price is to be considered only after the completion of the evaluation. The reasons for such a two-envelope procedure are the same as with the principal method for

procurement of services, namely to ensure that appropriate weight is given to the different criteria and to prevent the deliberate abuse of discretion.

# Chapter 5: Supplier lists and framework agreements

## 5.1 Introduction

In this brief chapter, we consider two related subjects – supplier lists and framework agreements. Both are types of on-going arrangements used by procuring entities to identify suppliers for receiving contracts directly or for participating in a further competition to win a contract. Very broadly defined, supplier lists are simply lists of suppliers that are interested in and, possibly, qualified to a greater or lesser degree for particular types of procurement. These lists – or particular types of supplier lists – are known in different legal systems and in practice by various names, including approved lists, qualification lists and qualification systems. Framework agreements likewise are lists of interested suppliers but in addition to the listed suppliers being limited to those interested in and qualified to perform specific contracts, the arrangement also sets out some or all of the terms on which future contracts will be made – both those established by the procuring entity and, in many cases, those offered by the particular supplier (e.g. the price to be paid for the products, works or services). This setting up of the terms of the transaction is the distinctive feature of framework agreements. Framework agreements in the sense used here, or various sub-types of these agreements, are also referred to by different names in different legal systems, including indefinite delivery/indefinite quantity ('IDIQ') or task-order contracts, and "requirements contracts",<sup>1</sup> "periodic purchase arrangements", "recurrent purchase arrangements", "periodic requirements arrangements", "periodic supply vehicles", "running contracts", and umbrella contracts.

Whilst supplier lists and framework agreements are treated as conceptually distinct in some legal systems, and have been discussed as such in the process of reviewing the UNCITRAL Model Law on Procurement of Goods, Construction and Services,<sup>2</sup> as a matter of commercial practice, they have the same rationale, namely the completion of stages of the procurement transaction (identification of interested persons, qualification processes, and/or setting terms) in advance of placing specific orders, with a view to saving both time and resources of the parties involved. As a generalisation, it can be said that supplier lists tend to be used where the procurements covered are of a non-standardised type – such as major construction works – that make it difficult to set the terms (both the terms set by the procuring entity in its specifications and other contract documents) until the specific need actually arises. Framework agreements, on the other hand, are often used for purchasing standardised goods and services, such as stationery or maintenance services, where the terms can easily be set in advance and call-offs from the arrangement made without much further work once the specific requirement materialises. However, this is only a generalisation and not the universal case. The variety of arrangements that fall within the definitions given above of supplier lists and framework agreement are numerous, and from a commercial perspective, arrangements of both types constitute shades on a spectrum of on-going purchasing arrangements.

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<sup>1</sup> All these three are used in the United States procurement system: see D. Gordon and J. Kang, "Task-order Contracting in the US Federal System: the Current System and its Historical Context", Ch. 5 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

<sup>2</sup> A broad conception of a framework agreement has been adopted in discussions of the UNCITRAL Working Group on procurement which, as we will see below, has devised one type of "framework" – the open framework – that does not involve eliminating suppliers through competition before the time of call off, although the framework establishes terms and conditions of supply.

## 5.2 Supplier lists (qualification lists or approved lists)<sup>3</sup>

### 5.2.1 Policy issues

In its simplest form, a supplier list takes the form merely of a list of names of all suppliers interested in certain procurements; at the other end of the spectrum, a list could be limited to a small number of suppliers whose qualifications for a particular contract have been fully assessed by the procuring entity or entities using the list. Many lie somewhere between the two – certain qualifications or attributes may be set as pre-requisites for registration but others considered only when particular contracts are awarded.

It is useful to distinguish two different sorts of list,<sup>4</sup> which we will see are often quite different in their implications for the key procurement principles of transparency and competition (although we will also see below that the two types cannot always be fully distinguished):

1. **A mandatory list.** This can be defined as a list on which suppliers are required to register as a condition of being considered for a contract; and
2. **An “optional” list.** This can be defined as a list that procuring entities use to identify potential suppliers, and registration on which may evidence some of the supplier’s qualifications for the contracts covered by the list, but on which suppliers may choose whether or not to register in the sense that non-registration does not prejudice their opportunity to obtain contracts covered by the list.

As the literature has explained,<sup>5</sup> there are many potential advantages of both mandatory and optional lists, for both suppliers and procuring entities. They can eliminate the need to provide and evaluate separate qualification information for each contract (benefiting both parties) and can also save time by eliminating or reducing the period for advertising the procurement and conducting the qualification process. They can also ensure more efficient qualification procedures by encouraging procuring entities to adopt standard questionnaires and qualification policies across their different procurements. Many of these advantages are magnified when the same list is used by a number of procuring entities. Use of common lists also allows entities to pool information on supplier performance to make a better selection of suppliers. Use of mandatory lists may increase the benefit of using lists - for example, saving time by avoiding the need to consider supplier qualifications before a contract is placed. Mandatory lists can also facilitate close relationships – for example, providing a means for working with a limited number of suppliers to develop new products or improve the quality of products. They also enable entities to assess qualifications more fully than is possible within the time frame of a procurement. Lists could also be used to publicise an entity’s requirements, avoiding the resource and time costs of advertising every procurement individually.

Another important point is that lists can be used to achieve greater transparency and competition than might otherwise be found in the cases of low value and urgent procurements. This is because in the absence of supplier lists, tendering or other formal

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<sup>3</sup> See generally, S. Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International 2003), pp. 232-236; S. Arrowsmith, “Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard” (2004) 53 *International and Comparative Law Quarterly* 17, section C; S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (London: Kluwer Law International 2000), pp. 639-645; C. Maund, “The Development of Vendor Registration Systems for European Utilities” (1996) 5 *P.P.L.R.* CS51.

<sup>4</sup> S. Arrowsmith, D. Wallace and J. Linarelli, above.

<sup>5</sup> See, in particular, S. Arrowsmith, J. Linarelli and D. Wallace, above, pp. 639-641, and in more detail, S. Arrowsmith, “Framework Purchasing and Qualification Lists under the European Procurement Directives” (1999) 8 *P.P.L.R.* 115-146 and 161-186 (cited in A/CN.9/WG.I/WP.32, available at [www.uncitral.org](http://www.uncitral.org), at para. 13, which also summarised the relevant advantages and disadvantages for the Working Group, at paras. 9-12); S. Arrowsmith, *Government Procurement in the WTO*, above, pp. 232-236.

procurement methods may not be practical so the outcome is that the entity will instead engage in informal procurement methods, such as the request for quotation methods.

However, it is also clear that use of supplier lists, most especially mandatory lists, can create problems if they are not properly regulated. First, the effect of a mandatory list is to reduce competition by excluding some potential suppliers from procurements. As Arrowsmith and Nicholas have stated:

“This problem can be mitigated by requiring entities to advertise lists. However, this will not resolve the issue entirely since some suppliers may not find it worthwhile to respond except to a specific opportunity that is of interest to them, or may miss the general advertisement but hear of the specific opportunity. Procuring entities could also admit tenders from non-registered suppliers when the benefits outweigh the costs in a particular case, but might fail to do so even when this appropriate, either because of the administrative inconvenience or because of deliberate abuse of the system”.<sup>6</sup>

The way in which lists are operated in practice also has the potential to restrict competition - for example, if there are unreasonably delays in processing applications or when the procuring entity does not use transparent and verifiable criteria to make decisions on whether suppliers may register on the list.

## **5.2.2 Supplier lists under regulated procurement systems: the example of the WTO’s Agreement on Government Procurement**

In view of their recognised advantages for the procurement processes, many legal systems, including international systems such as those of the World Trade Organization, NAFTA and European Union, permit the use of supplier lists, including mandatory lists, to a greater or lesser extent.<sup>7</sup> However, it is considered good practice to include significant controls over the use of supplier lists to ensure that they operate in a competitive and transparent manner, so as to eliminate or reduce the potential problems that were outlined above.

An example of such an approach, combining broad possibilities for the use of lists with significant controls, is found in the Government Procurement Agreement (‘GPA’) of the World Trade Organization.<sup>8</sup> Lists covered by these GPA rules are referred to in the current Agreement as “permanent lists of qualified suppliers”.

In this respect we can note, firstly, that under the GPA, procuring entities may use an advertisement of such a list as the sole means of meeting GPA requirements for advertising contracts: this can serve as an alternative to other possible methods of advertising procurements (which are, essentially, a notice of each procurement– called a notice of proposed procurement, or a general notice alerting the market to a number of upcoming procurements– called notice of planned procurement). This applies to procurements conducted by selective tendering by entities listed in Annex 2 and Annex 3

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<sup>6</sup> S. Arrowsmith and C. Nicholas, “The UNCITRAL Model Law on Procurement: Past, Present and Future”, Ch. 1 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West) p. 63.

<sup>7</sup> See the information in S. Arrowsmith and C. Nicholas above, p. 64, note 4. On the GPA rules, see further below, and on the EU rules, the companion text book *EU Public Procurement Law*, Ch. 7, section 7.4.6. NAFTA allows for use of lists under similar conditions to the GPA: see, in particular, NAFTA Article 1011(2) allowing use of lists to select suppliers in restricted procedures; and Article 1009(2) (containing controls).

<sup>8</sup> See further S. Arrowsmith, *Government Procurement in the WTO*, above, at pp. 237-241 and the cross references there. On possible revisions to the GPA (not yet formally adopted) see R. Anderson, “Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations” (2008) 17 *P.P.L.R.* 255; S. Arrowsmith, “The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions”, Ch. 10 in S. Arrowsmith and R. D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (forthcoming 2011, CUP).

of the Agreement which broadly speaking, cover provincial and local entities and state enterprises, although not departments of federal/central government (listed in Annex 1 of the GPA). However, this restriction on using lists to advertise procurements conducted by open tendering needs to be seen in the context of the GPA's more general rules on procurement methods: since (unlike the UNCITRAL Model Law) the GPA allows a free choice between selective tendering (with an open advertisement) and open procedures, it effectively allows Parties to permit use of mandatory lists for any procurement, since Parties can always make selective tendering available as a procurement method for their procuring entities. A revised text of the GPA which was agreed in 1994, though it is not yet in force,<sup>9</sup> retains this possibility of using the list as the sole means of advertising in these cases (Article IX.12).

Secondly, under the GPA, for all procuring entities (including central/federal government) in selective tendering procedures, permanent lists of qualified suppliers may be used as the sole basis for selecting suppliers to tender. In other words, procuring entities may restrict access to procurements solely to suppliers who have registered on the list in question (GPA 1994 Article X.2, and Article IX.11 of the revised GPA text).

In this respect, we can note that Annex 1 entities (that is, most central/federal entities) must advertise all procurements separately from the list and then consider any interested suppliers who respond (GPA 1994 X.3 and Articles VIII(c)); and Article IX.11 of the revised text). On the other hand, as we have just seen, other entities can rely solely on the list to advertise a procurement; this possibility combined with the possibility of using only the list to select suppliers effectively means that often only registered suppliers have the chance to know of the contract and to participate. However, even in this case, other suppliers could come forward to seek registration in time to be selected should they hear about the procurement through other means. The current GPA provides for this case simply that non-registered suppliers must be considered in the cases above if there is time to complete the registration process (GPA 1994 X.3 and Articles VIII(c)). The revised text, however, now emphasises more strongly the need to consider suppliers who have not previously registered, stating as follows:

'The procuring entity may not exclude the supplier from consideration in respect of the procurement on the grounds that the entity has insufficient time to examine the request, unless, in exceptional cases, due to the complexity of the procurement, the entity is not able to complete the examination of the request within the time period allowed for the submission of tenders' (Article IX.11 of the revised text).

The GPA also applies other rules on transparency and access to supplier lists. These rules arguably apply to all permanent lists of qualified suppliers, both mandatory and optional, and apply whether or not these lists are used to satisfy the GPA's advertising requirements.<sup>10</sup>

First, there is a requirement under the GPA 1994 to publicise the list when it is set up, and also to re-publicise it annually - unless the duration of the list is three years or less, in which case the list may be publicised only when it is first set up: GPA 1994, Article IX.9.<sup>11</sup> This ensures that all interested suppliers have the opportunity to know about any lists operated by procuring entities and thus may apply for registration to gain access to the contracts covered by the lists.

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<sup>9</sup> See R. D. Anderson, above.

<sup>10</sup> When lists are used to advertise procurements, they are also subject to additional requirements concerning the information that must be given to suppliers.

<sup>11</sup> This provision of the 1994 GPA refers, however, only to entities maintaining lists 'in the case of selective tendering procedures', but Article IX.7 of the revised text is not limited to selective tendering. Article IX.7 of the revised text now provides a new requirement that *if* the notice is published electronically, (an electronic notice is not required) the notice must be made available continuously, as well as providing that a list for less than 3 years is now exempt from the obligation to publish an annual notice of the list only if it is published electronically and made continually available (Article IX.9).

Secondly, there is a requirement that suppliers must be able to apply for qualification at any time and must be included within a reasonably short period (GPA 1994, Article VIII(d)). It is also stated that the process of registration and the time taken to complete it must not be used to keep suppliers off the list (GPA 1994, Article VIII(c)). The GPA also requires procuring entities to inform suppliers of any qualification decision, which will include a decision on registration on a list, and of any termination of the list or a supplier's removal from it (Article VIII). The revised text, in Article IX:14, now also goes further in its requirements for transparency, requiring that suppliers be given information on these decisions 'promptly' and that they should be given a written explanation of the decision on request. These provisions deal with the potential problem of access to contracts being hindered by slow registration procedures.

There is also a general requirement under the 1994 GPA to minimise differences in qualification procedures between entities (GPA 1994, Article VIII(g)(2)) and for entities and their different parts to use the same qualification procedures (GPA 1994, Article VIII(g)(1)). This provision is not specific to supplier lists but it is important in that context.

Thus, for many procurements, the GPA allows for procuring entities and their suppliers to reap the full potential advantages of using supplier lists, whilst also including provisions to ensure transparency as well as full and speedy access to those lists, to minimise potential disadvantages, including opportunities for abuse. In this respect, the GPA can provide a useful possible model for addressing the issue of supplier lists, including particular mandatory lists, for states that wish to allow use of these lists.

### **5.2.3 Supplier lists under the UNCITRAL Model Law**

The UNCITRAL Model Law currently does not specifically address the position of supplier lists. It appears that under procurement procedures operated under the Model Law, a procuring entity cannot limit participation in any procurement solely to suppliers who are registered on a supplier list: Article 6(3) prohibits entities from imposing any "criterion, requirement or procedure" other than those in Article 6, and Article 6 does not refer to registration on a list. The Model Law also does not provide for entities to use an advertisement of a list as a method of advertising procurements covered by the list, but requires entities to place a notice advertising each specific procurement.<sup>12</sup>

On the other hand, nothing in the Model Law prevents procuring entities from operating optional lists for other purposes. Thus, entities can, for example, use lists to indicate which suppliers hold certain qualifications, to prevent the need for suppliers to undergo a separate consideration of their qualifications for individual procurements. Lists can also be used as a means to advertise those procurements for which no formal advertisements are required – such as under the request for proposals or principal method for procurement of services when the procuring entity considers that the conditions for dispensing with an individual advertisement apply. Such lists could also be used in procedures under the Model Law to identify interested potential suppliers, including when using direct methods of solicitation – whether in the competitive methods of restricted tendering, competitive negotiation, request for quotations or (when the direct solicitation version is chosen) under the request for proposals procedure and the principal method for procurement of services, or when using single source procurement. As stated by Arrowsmith and Nicholas:

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<sup>12</sup> For (open) tendering and two-stage tendering, for example, UNCITRAL Article 24 requires entities to advertise to solicit "tenders" or "applications to prequalify", indicating that an advertisement is necessary for each procurement (although it could be divided into lots). See also UNCITRAL Article 48(2).

*"...when lists are used to identify suppliers when using these procurement methods, non-registered suppliers are at a disadvantage in learning about contracts and putting themselves forward for consideration, so that the mandatory/optional distinction is blurred. When lists used in this way for non-advertised procurements are themselves advertised and operated in a transparent manner, as referred to above, they can actually enhance transparency and competition, by allowing all relevant suppliers to put themselves forward for consideration, thus having a positive effect in promoting the objectives of the Model Law".<sup>13</sup>*

On the other hand, as they also point out, if lists are kept and used effectively as mandatory lists without advertisement and transparency, their effect may be more detrimental.

As the author of this present chapter has argued elsewhere,<sup>14</sup> an argument can be made in favour of allowing use of mandatory lists, at least for procurement methods that are not "open", given the potential benefits and the fact that the potential disadvantages may be addressed through provisions such as those found in the GPA; and arguably advertising a list should be a permitted means of advertising such procurements. The possibility of revising the Model Law to address supplier lists was put to the Working Group in procurement in a paper prepared by the secretariat,<sup>15</sup> which specifically highlighted the renewed importance of this subject of supplier lists in light of developments in information technology. However, the Working Group has taken the view that the Model Law should not provide for mandatory lists and that the Guide to Enactment should also emphasise that registration on a list should not be made a condition of participating in procurements.<sup>16</sup>

However, perhaps even more importantly, in the context of the Model Law, there are very strong arguments for including explicit provisions to regulate the use of optional lists to ensure that, when used, they operate in a transparent manner and that speedy access to such lists is available to any supplier, and also for including provisions to encourage or require entities to use open-access lists to enhance the principles of competition and transparency when operating procurement methods other than open tendering. As we have elaborated in the previous chapters, for procurement methods using direct solicitation and/or which involve selecting a limited number of suppliers to participate, the Model Law currently provides almost no guidance on how suppliers are to be selected. The absence of regulatory provisions on this issue may be detrimental to achieving the goals of the procurement system, including the rise of opportunities for abuse when decisions are wholly unregulated. Providing for use of regulated supplier lists in these cases could make a significant contribution to enhancing transparency in this area of decision-making. The UNCITRAL Working Group has apparently considered that optional lists should not be provided for in the text of the Model Law itself. However, the Working Group has agreed that those provisions should be included in the Guide to Enactment on the benefits of lists and on appropriate controls over their use in the context of methods of procurement other than (open) tendering.<sup>17</sup>

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<sup>13</sup> S. Arrowsmith and C. Nicholas, above, pp. 66-67.

<sup>14</sup> S. Arrowsmith, "Public Procurement: an Appraisal of the UNCITRAL Model Law as a Global Standard" (2004) 53 *International and Comparative Law Quarterly* 17, section C.

<sup>15</sup> Recent developments in the area of public procurement— issues arising from recent experience with the UNCITRAL Model Law on Procurement of Goods, Construction and Services (6<sup>th</sup> session, 30 August-3 September 2004) A/CN.9/WG.I/WP.32, paras. 5-22.

<sup>16</sup> Report of Working Group I (Procurement) on the work of its thirteenth session (13<sup>th</sup> session, 7-11 April 2008) A/CN.9/648, paras. 135.

<sup>17</sup> *Ibid*, para. 136.

## 5.3 Framework agreements<sup>18</sup>

### 5.3.1 The concept and types of framework agreements<sup>19</sup>

As noted above, a framework agreement is a list of suppliers able to perform specific contracts which also establishes some or all of the terms on which the contracts in question will be performed.

As is explained in the companion text EU Public Procurement Law, framework agreements can be of the multi-supplier or single-supplier type:

*"Framework agreements can be divided generally into two basic categories. The first is a single-supplier framework, which may be either a binding contract, or setting the terms for future contracts with a legal commitment only when an order is agreed.*

*Frameworks may also take the form of multi-supplier arrangements. These involve:*

- *An initial competition to select several potential suppliers;*
- *Then, when a requirement arises the entity chooses one of these several "framework suppliers" to fulfil the order.*

*Reasons for multi-supplier rather than single-supplier frameworks include that they allow entities to choose the best supplier for each order, whilst avoiding a new procedure; that they help entities to ensure security of supply; and that they can secure benefits of centralised purchasing – such as cost savings from aggregation – whilst retaining user flexibility. Multi-supplier framework agreements can also facilitate the participation of Small and Medium Enterprises (SMEs) in the procurement process – "call-off" orders under a framework agreement are smaller in size than a single large procurement and also are spread over a longer period of time".*

In many frameworks, the framework agreement itself is set up so that as much as possible of the competitive process is completed when the agreement is established and the number of places for suppliers on the framework is kept to the minimum necessary for adequate competition, security of supply and/or whatever are the other objectives of using a framework (as discussed further below). Setting up such a framework involves obtaining tenders that cover all of the terms of the future contracts to the extent possible, including prices, which are based on a sample of likely call-offs under the contract or on unit prices. This approach encourages suppliers to submit their best possible tenders, since there is a strong chance of business if the supplier is placed on the framework, and suppliers will be able to make a reasonable estimate of the likely volume of business. At the call-off stage – the stage at which orders are allocated to specific supplier(s) on the framework, as discussed below, there may be no need for further competition or there may be competition merely on limited aspects (see later below on methods of placing call-offs). These frameworks are as close to regular tendering procedures and maximize

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<sup>18</sup> For experiences and approaches of specific national and international systems to framework agreements see, in particular, S. Arrowsmith, "Methods for purchasing on-going requirements: the system of framework agreements and dynamic purchasing systems under the EC Directives and UK procurement regulations", Ch. 3 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West); L. Folliot Lalliot, "The French Approach to Regulating Frameworks under the New EC Directives", Ch. 4 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West); D. Gordon and J. Kang, "Task-order Contracting in the US Federal System: the Current System and its Historical Context", Ch. 5 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West); S. Karangizi, "Framework Arrangements in Public Procurement: A Perspective from Africa", Ch. 6 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

<sup>19</sup> See further, S. Arrowsmith, "Framework Purchasing and Qualification Lists under the European Procurement Directives" (1999) 8 *P.P.L.R.* 115, pp. 115-126; S. Arrowsmith and C. Nicholas, "Regulating framework agreements under the UNCITRAL Model Law on procurement", Ch. 2 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

competition to the fullest extent possible within a multi-supplier framework. The number of suppliers on the framework needs to be set in light of various factors - the need to ensure competitive tenders (which is more likely where there are fewer framework suppliers and hence more certain expectations of receiving call-offs), procedural efficiency (which could be prejudiced by considering too many tenders in a mini-competition at the call-off stage) and any other specific objective such as the need for security of supply. When the framework suppliers have been selected based on the terms in their tenders, it will often be considered inappropriate to allow new suppliers to join the framework because of the desire to provide a common tender deadline (as in formal procurement procedures that do not involve a framework).

At the other end of the spectrum of arrangements, framework agreements can be arrangements open to all interested or qualified suppliers with no, or very limited, competition, involved in deciding which suppliers should be placed on the framework. This is the case, for example, with the most important type of frameworks operated under the United States federal procurement system – ID/IQ contracts (where there may be thousands of framework suppliers.<sup>20</sup> Such frameworks are only one step removed for a simple supplier list. Some arrangements that involve little competition at the first stage can be justified, in particular, where it is not meaningful for suppliers to submit their own terms – such as price – when applying to go on the framework because of the volatile nature of the market (if prices are always subject to revision in a later mini-competition, it seems inappropriate to eliminate supplies at a first stage based on their prices.

With multi-supplier agreements, work placed through call-offs under the framework can be allocated amongst the suppliers on the framework in various different ways. Methods often used include:

- Awarding the work to the supplier who submitted the best tender for work of this kind the supplier tendered to be put on the framework.
- Holding a new “mini-competition” between the framework suppliers to allow them to revise or supplement their original tenders. Such an arrangement is useful, for example, in situations where tenders need to be completed to take account of the particular features of the work that has arisen – for example, to ask consultants to supplement their tenders with an explanation of their proposed methodology for a specific project that is being awarded. The award can then be made, taking into account both the information known when the framework was set up and the further information that could not have been obtained earlier – thus maximising value for money for the procuring entity. When prices or specifications of products are volatile, a mini-competition can be used to establish price in appropriate cases.
- Simply rotating the work between the best suppliers on the framework – an approach sometimes seen as useful to ensure security of supply since other suppliers will be available and ready to perform the work if one of the framework suppliers is unable to deliver.

### **5.3.2 Advantages and potential problems<sup>21</sup>**

As we have already seen, like supplier lists, such arrangements are intended to avoid the need to repeat every stage of the procurement process when the need for a specific

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<sup>20</sup> See D. Gordon and J. Kang, above. Suppliers may sometimes be asked to pass a minimum test of competitiveness in terms of offering a reasonable price.

<sup>21</sup> See further, S. Arrowsmith and C. Nicholas, “Regulating framework agreements under the UNCITRAL Model Law on Procurement”, above; S. Arrowsmith, “Framework Purchasing and Qualification Lists under the European Procurement Directives” (1999) 8 *P.P.L.R.* 115, pp. 115-126; S. Karangizi, above; C. R. Yukins, “Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting” (2008) 37 *PCLJ* 545; T.S. Reed, D.E. Bowman and M. E. Knipper, “The Challenge of Bringing Industry Best Practices to Public Procurement”: Strategic Sourcing and Commodity Councils”, Ch. 14 in K. V. Thai et al (eds.), *Challenges in Public Procurement: an International Perspective* (2005).

purchase arises, saving time and resources for both purchasers and suppliers. The saving in the time involved in placing orders means that framework agreements can be an important vehicle for efficient, yet competitive, emergency procurement. Essentially, by providing for some of the competition to be completed “up front” before an order is actually placed, framework agreements seek to provide a balance between competition and transparency, on the one hand, and speed and procedural efficiency, on the other.

They can also offer a number of other specific benefits.

Thus, framework agreements, like supplier lists, can also provide an important way of enhancing transparency and competition for smaller procurements. As already mentioned in Chapter 2 and Chapter 3, small procurements for on-going requirements will often fall below the financial thresholds for formal tendering is required, allowing the use of informal procedures, such as the request for quotations method under the UNCITRAL Model Law.<sup>22</sup> If repeated small orders are aggregated and purchased through a framework agreement, this may result in greater transparency than use of purely informal procedures.

Secondly, framework agreements can also be used in the context of centralized purchasing when a central agency places a framework agreement for use by a number of user entities, thus allowing for entities to take advantage of the benefits of central purchasing (such as lower costs, better terms from suppliers and specialist purchasing expertise).

Thirdly, multi-supplier framework agreements can also be useful of achieving security of supply, since if one supplier is not available, orders can be placed with others on the framework.

Whilst frameworks undoubtedly have potential advantages as outlined above, as with supplier lists, however, they create dangers that mean that they may need to be carefully regulated. Arrowsmith and Nicholas have summarised these dangers as follows:<sup>23</sup>

1. Administrative efficiency may be given undue weight at the expense of other objectives of public procurement policy. This arises because immediate practical pressures to use framework agreement to save time and costs can create a tendency to use them when their use is not justified by value for money or other considerations. They may often be used in practice as a substitute for good procurement planning.
2. They may create risks for competition and transparency both inadvertently and deliberately. For example, abuse of discretion or other legal violations in awarding call-offs from a framework can be difficult to monitor: suppliers will not always know when orders are placed and the small size of call-offs makes it difficult to provide a supplier remedy system that is not disproportionately disruptive to an efficient procurement process.
3. There is an opportunity cost in excluding call-offs suppliers who are not selected at the first stage when suppliers tender to be placed on the framework (although, of course, tendering all the work to a single supplier can involve an even greater cost in this respect).
4. Aggregation of small purchases under a framework agreement may make it difficult for SMEs to compete. This point may seem surprising given that facilitating participation of SMEs was one of the potential advantages of frameworks listed above. Whether a framework has a positive or negative impact on SMEs will in fact depend on the particular way in which the framework is operated.

As Arrowsmith and Nicholas also explain, in some of these respects:

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<sup>22</sup> See Ch. 2 of this book.

<sup>23</sup> S. Arrowsmith and C. Nicholas, “Regulating framework agreements under the UNCITRAL Model Law on procurement”, above.

*"Special dangers arise from the fact that, whilst the framework agreements themselves may sometimes be placed by procurement officials with special expertise in procurement (such as centralised purchasing agencies), second-stage purchases may be made by a multiplicity of users (agencies or officials). These users may have more limited expertise, both in terms of commercial judgement – which can result in poor value for money – and in their knowledge of internal and external regulatory requirements governing call-offs, resulting in maverick purchasing. The very dispersal of responsibility for placing orders may also make control and oversight more difficult".<sup>24</sup>*

On the other hand, as they also explain, the involvement of centralised purchasing agencies in the conclusion of framework agreements may itself lead to problems – for example, agencies earning fees from these arrangements may push their use when they are not in fact suitable.

Obviously, any regulatory regime contemplating the use of framework agreements, especially multi-supplier agreements, by public bodies, needs to consider how to allow entities to reap the benefits of framework agreements whilst at the same time controlling their use to minimise potential problems.

### **5.3.3 Framework agreements under the UNCITRAL Model Law<sup>25</sup>**

The Model Law as it presently stands does not explicitly refer to framework agreements and does not make any provision for the use of multi-supplier framework agreements – although framework agreements in which one supplier only is chosen as the framework supplier for work of a specific type are, of course, possible simply by the award of a contract of this type using the ordinary procurement methods of the Model Law.

In its current revisions of the Model Law, the Working Group has, however, taken the view that explicit provisions should be included on frameworks.

It is proposed to allow for use of multi-supplier framework agreements in three sets of (potentially overlapping) circumstances, namely:

- i) A requirement is anticipated to be recurring;
- ii) When the nature of procurement is such that the need is likely to arise on an urgent basis during the term of the framework, or
- iii) When the entity seeks to ensure security of supply.

Article 29bis of the most recently published draft, which sets out conditions under which framework agreements may be used, also contemplates including an open-ended provision that would leave it open for enacting states to add their own grounds for use of frameworks.<sup>26</sup>

The current published draft referred to above provides for three different types of framework agreements. The first and second types of framework agreements are "closed" in that suppliers cannot become parties to the framework agreement after the first stage of the procurement of choosing the framework suppliers. The third type is an open framework i.e. open to suppliers to join throughout the duration of the framework agreement.

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<sup>24</sup> *Ibid*, pp. 101-102.

<sup>25</sup> See further S. Arrowsmith and C. Nicholas, "Regulating framework agreements under the UNCITRAL Model Law on procurement", above.

<sup>26</sup> See A.CN/9/WG.1/WP.73/Add.3, [www.uncitral.org/pdf/english/workinggroups/wg\\_1/73add3E.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_1/73add3E.pdf).

The three types provided for are as follows. These are set out in Articles 52-57 of the most recently published draft of the Model Law.<sup>27</sup> It is proposed that – as under EU law, for example<sup>28</sup> – framework agreements will not be a special type of procurement method but will be an option that is available when using the procurement methods outlined in Chapter 2 (as modified, of course, by the next text). The usual rules of these procurement methods will apply when using contracts awarded by means of framework agreements, but with modifications and additions as set out in Articles 52-57 of the draft.

### **1. Closed framework with no further competition between suppliers**

A “closed” framework agreement, in which the specification and all the terms and conditions of the procurement are set out in the framework after tenders, and there is no further competition for call-offs. Under this type of framework, suppliers tender to become framework suppliers, setting out their proposed prices (and/or other matters, such as quality, that are the subject of the award criteria). The best tenderers (or tenderer) are then chosen as framework suppliers. Orders (call-offs) for particular requirements are then placed on the basis of the information contained in the original tenders – there is no further “mini-competition” between the suppliers.

### **2. Closed framework with a mini-competition between suppliers**

A “closed” framework agreement, which sets out the specification as well as the main terms and conditions of the procurement, but involves further competition when orders are actually placed. Under this type of framework, suppliers again tender to become framework suppliers, setting out their proposed prices (and/or other matters, such as quality, that are the subject of the award criteria). The best tenderers (or tenderer) are then chosen as framework suppliers. However, orders can be placed after further competition among the suppliers on one or more aspects of the contract.

### **3. Open framework agreement**

An “open” framework agreement, involving a framework agreement concluded with more than one supplier and involving a second-stage competition between all the framework suppliers. It is envisaged that this will be operated electronically in most cases and be used for simple procurement.

The Model Law does not provide any detailed guidance on when each particular type of framework is suitable. However, more information on this may be given in the Guide to Enactment, and enacting states might want to consider adding specific conditions in their own procurement laws – based either on specific circumstances in which certain forms of framework agreement are suitable (for example, to deal with volatile pricing) or by specifying certain products and services for which they may be used.

It is also proposed that the Model Law should include a number of rules to guard against the dangers of framework agreements that we outlined above. Thus, for example, states will be required to include in their laws a maximum duration for frameworks, to avoid suppliers being shut out from a market for long periods of time.

A particular feature of these provisions is that the Working Group has provided for suppliers and the public to be given information on call-offs, and for the usual supplier review mechanisms to apply both to the award of the framework and to call-offs. This contrasts with some other regulatory systems, such as those of the European Union and

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<sup>27</sup> See A.CN/9/WG.1/WP.73/Add.37 [www.uncitral.org/pdf/english/workinggroups/wg\\_1/73add3E.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_1/73add3E.pdf).

<sup>28</sup> See the companion text *EU Public Procurement Law*, section 7.4.14; S. Arrowsmith, “Methods for purchasing on-going requirements: the system of framework agreements and dynamic purchasing systems under the EC Directives and UK procurement regulations”, chapter 3 in Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

the United States, which limit provision for information and/or supplier review in order to preserve flexibility and avoid disruption at the call-off stage. Thus, the proposed definition of a procurement contract in the revised Model Law which will make it clear that the concept of a procurement contract covers call-offs, with the result that the general rules of the Model Law, including those on remedies, will apply at the call-off stage.

# Chapter 6: Procurement of privately financed infrastructure

## 6.1 Introduction to privately financed infrastructure projects<sup>1</sup>

### 6.1.1 General introduction

In this chapter, we will look at the subject of procurement of privately financed infrastructure projects. The chapter will, first, provide a basic introduction to the concept of privately financed infrastructure projects, including the basic objectives of these types of projects. It will then consider the procedures that are used for procuring such projects, focusing on the provisions contained in the UNCITRAL instruments on this subject. It should be emphasized that the focus, in line with the focus of the present book, is on the procurement of privately financed infrastructure. Effective project implementation also has many other dimensions (for example, the development of effective regulatory structures for the project duration), but these are outside the scope of the present work.

### 6.1.2 Basic concepts and terminology

In essence, the concept of a privately financed infrastructure project refers to the situation in which:

- The government is responsible for a service or facility which involves the use of significant buildings or other assets; and
- The management of the service or facility for which the government is responsible is entrusted to the private sector; and
- The private sector provides the capital for the project.

Traditionally, such infrastructure projects have been financed by government. For example, the traditional way to build a motorway is for the government to award a contract to a firm to build it, under which it pays the contractor (usually a fixed sum) for doing so. The government then takes over the motorway itself (this means, for example, that the government is responsible for maintenance, and keeps any tolls which it collects – although in fact it is not traditional for governments themselves to charge for the use of motorways). Under the Private Finance method, the government lets a contract for a private firm to construct a motorway with the firm's own finance, and then the firm recovers its costs and profit by levying tolls on vehicles using the motorway or (as an alternative) through periodic payments from the government. Often, the private sector will actually have the ownership of the asset involved during the contract period, although this is not always the case (for example, privately financed roads projects in the United Kingdom). In many cases, the private sector will also retain ownership after the end of the contract period, hence, retaining the risk of the residual value of the asset (i.e. the risk of what the asset will be worth at the end of the period). However, sometimes, the asset is transferred to the government at the end of the contract (for example, in the case of prisons in the United Kingdom, since it is difficult for the government to obtain

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<sup>1</sup> This chapter merely provides a basic introduction to the concept; this subject is also covered in detail from a comparative perspective in the companion Asia Link text, *Public-Private Partnerships*. There is an extensive literature, some of which is referred to in that textbook. For a general global perspective, see M. Bult-Spiering and G. de Wulf, *Strategic Issues in Public-Private Partnerships: an International Perspective* (Blackwell Publishing 2006). On the position of the United Kingdom, which has used the privately financed infrastructure approach extensively, see generally, P. Badcoe (ed.) *Public Private Partnerships and PFI* (Sweet & Maxwell; looseleaf).

planning permission for new prison sites). This Private Finance approach has increasingly been adopted in many countries, both in the developed and developing world. The concept of Private Finance in the sense discussed in this section should be distinguished from:

1. **Privatisation.** This term often refers to the case where the whole responsibility for providing a service is given to the private sector – for example, where the electricity industry of a state is sold to the private sector. The private sector company makes its own decisions about when and where to build power stations etc - the government is not involved at all. (However, with many privatisations, the government does retain significant control over the industry concerned through means of regulation). The "private finance" alternative to this would be where the government keeps control of the industry and decides when and where to build power stations, but seeks a private contractor to finance and operate each station, with the government paying a fee to the contractor for doing so. However, you should also note that "privatisation" is a term used in some countries to embrace not only privatisation in the sense it is used here, but also privately financed projects and even certain kinds of very simple outsourcing.
2. **Contracting out ("outsourcing").** This concept covers all cases where the private sector is given responsibility for the day-to day carrying out of services previously carried out by the government – it does not necessarily mean that the private contractor provides the finance for the project in question. Most outsourcing is done through "traditional" public procurement where the government simply pays the contractor a sum for carrying out the work. In the above example of power stations, a simple contracting out without private finance would mean that the government engages a private contractor to build it a power station, pays the contractor a sum for doing so, and then owns and operates the power station itself.

The implementation of projects through private finance is a method of organising the provision of services/facilities which falls somewhere between privatisation and simple contracting out. All three often involve broadly similar objectives. However, they are all concerned to some extent with getting the private sector more involved in the provision of services, on the basis that the private sector is more effective at management than the public sector.

By way of example, illustrations of infrastructure projects often implemented in this way in one country, the United Kingdom, are set out in the boxes below.

**PFI Example 1: Road projects**  
Contractor builds a road and then maintains the road for a substantial number of years. Contractor is sometimes remunerated by government, based on use of the road during each period of the contract ("shadow tolls"), and sometimes remunerated by tolls paid directly to the contractor by motorists using the road.

**PFI Example 2: Hospitals**  
Contractor provides a hospital facility and manages the facilities (providing maintenance, security, cleaning etc) over a substantial period, for use by the public health service. Medical staff are provided and managed by the health service itself. The building provided might be a new facility on the same site, a new facility on a different site, or a refurbished facility (often contractors are asked to submit their own proposals on this). The health service then pays a monthly sum to the contractor for the use of the serviced facility.

#### PFI Example 3: Schools

Contractor provides a school facility and manages the facilities (providing maintenance, cleaning etc) over a substantial period for use. Teaching staff still are provided and managed by the relevant education authority. As with hospital projects, the building provided might be a new facility on the same site, a new facility to a different site, or a refurbished facility (often contractors are asked to submit their own proposals on this). The government pays a monthly sum to the contractor for the use of the serviced school facility.

#### PFI Example 4: Prisons

Contractor provides a prison facility and manages the facilities (providing maintenance, cleaning, security services etc) over a substantial period for use. The government pays a monthly sum to the contractor based on the available of spaces for prisoners in the serviced facility.

There are two main types of traditional privately financed project.

1. One is where the contractor recoups the costs of finance by charging the private sector users of the services or facility. The construction of a motorway or bridge for which tolls are levied on vehicles using the motorway/bridge is a common example of this, as are the construction and operation of tramway systems and light railways in town centres. Sports facilities or visitor centres at tourist sites are also sometimes provided in this way under the private finance method. This kind of arrangements, whereby payments are received wholly or mainly from the public rather than the procuring entity, are often referred to as "concessions".
2. The second is where the contractor charges the government for its services. The examples given of school, prison and hospital projects fall into this category.

Some projects involve a mixture of both. In some cases, the private contractor also generates income in other ways – for example, by leasing spare land or facilities connected with the project to other private companies.

Note also that PFI projects are not necessarily wholly funded by the private sector: the government may make a financial contribution in some way because of the "public benefit" aspects of projects. For example, with a motorway the government may make a payment to the contractor as well as allowing the collection of tolls, if it wishes to "subsidise" vehicles using the motorway.

You may also come across a distinction between:

- Build-Own-Operate (BOO): where the contractor keeps ownership of the relevant asset (e.g. prison, or underground trains) and does not ever transfer it to the government.
- Build-Operate-Transfer (BOT) (sometimes Build-Own-Operate-Transfer (BOOT)): where at the end of a certain period, the asset is transferred back to the government (e.g. where a prison built under a private finance scheme and operated by a private firm for, say, ten years is transferred to government ownership at the end of the period).

A term frequently used to refer to this kind of project is Public-Private Partnerships. This term has no precise or universal meaning. At its broadest, it is used to refer to any kind of arrangement in which the private sector becomes involved in providing public services and infrastructure, covering not only privately financed but many other forms of

outsourced provision. Often, it is used to refer to arrangements that are long-term in nature. It also often covers non-contractual forms of co-operation between the public and private sectors, such as setting up joint venture companies to provide public services that are part public and part privately owned – that is, institutional, as opposed to contractual, forms of public-private co-operation. For an example of a definition of PPPs given by the UK Treasury, see the extract below:

### **What is a public private partnership?**

PPPs are arrangements typified by joint working between the public and private sectors. In their broadest sense, they can cover all types of collaboration across the private-public sector interface involving collaborative working together and risk sharing to deliver policies, services and infrastructure.

In the context of this document, the term PPP means project and programme-based PPPs involving the provision of assets. Such a PPP exhibits the following key features:

- a joint working arrangement between the public and private sector, which may be by contract or through a joint venture company, to deliver infrastructure assets and usually, but not always, the ongoing maintenance and operation of the infrastructure assets and the delivery of associated services;
- risks are allocated between the parties on the basis of which party is best placed to manage and bear the risk. Typically, design, construction and operational risks are expected to be borne by the private sector; other risks which are shared are allocated in the way that best incentivises both parties to manage the risks;
- generally, a PPP is a long term (25-30 years) arrangement between the parties but it can be a shorter term, for example, where ongoing maintenance of the infrastructure assets and associated services are excluded;
- where ongoing operation and maintenance of the infrastructure assets and delivery of associated services are included, the public sector may pay the private sector for all or part of the use of the infrastructure over the life of the arrangement;
- payment to the private sector is structured in such a way as to ensure the private sector is incentivised to deliver the required services or obligations under the arrangement;
- payments are usually made by the authority but can be made by the end user, for example, for the use of a toll road;
- the public sector is seeking to access private sector management and expertise to drive value for money; and
- the project is often financed either in part or in whole through private finance.

Source: H.M Treasury, Infrastructure procurement: delivering long-term value (March 2008), p.18 (available at [http://www.hm-treasury.gov.uk/ppp\\_index.htm](http://www.hm-treasury.gov.uk/ppp_index.htm)).

Various different types of model of Public-Private Partnership, including some new ones that have evolved in the UK over the last few years, are outlined in Chapter 2 of the above publication. As that publication emphasises (pp.9-10), the lessons of PFI – including in procurement – are very relevant also for many of these other types of Public-Private Partnership projects.

### **6.1.3 The objectives and benefits of private finance**

There are two main reasons for the use of the private finance approach. One or both may be present in any particular case.

#### **1. To enhance value for money (improve service quality, lower costs, etc)**

This is achieved in a number of ways, for example by:

- The transfer of more project risks to the private sector, which is considered better able to manage the risk. For example, if the government contracts with a private contractor for that contractor to provide computer services with its own systems, rather than to buy a major computer system to be owned by the government itself, the risk of obsolescence is on the private contractor, who must then adopt strategies to avoid and manage the risk. The transfer of risk to the party considered better able to manage that risk is a very important aspect of the potential savings which can be realised through the use of the private finance approach.
- The existence of incentives for the private contractor so that projects are carried out with maximum effectiveness. Revenue depends on the successful implementation of the project, throughout the whole cycle of the project, from design and construction to operation. The private sector "profit motive" is generally considered a better incentive than the public sector "service-mission" (this is, to a large extent, the same philosophy which underlies the policy of contracting).
- The fact that the same party - the private contractor - is responsible for design, construction and implementation: this leads to greater integration of these elements and more efficient use of resources. For example, a private firm which is to operate a prison will have a great incentive to ensure that the design makes for maximum operational convenience, and is the one most suited to the operating firm.
- The potential for efficiencies due to the fact that the assets employed are more easily put to wider use by the private sector. For example, when an asset such as a computer system is privately owned, it may be used to serve other customers as well in periods of "slack" in government use. Governments often cannot make effective use of the spare capacity of their assets, either because of legal restrictions (for example, they may be forbidden to engage in trading activities) or because of practical constraints, such as the lack of experience in the required marketing skills.
- The development of innovative solutions through contractor input at the design stage. This has often included solutions taking into account the wider use of assets which can be made by the private sector: for example, a contractor might suggest that a new hospital can be built in such a way as to convert to other uses (such as a private nursing home) when no longer required by government, so that the contract need not require the government to accept ownership or even to keep the hospital running for a long period of time.

Achieving these objectives is, however, no easy matter in practice. For example, the extent and nature of risk transfer needs to be carefully devised to obtain the optimum benefits from PFI.

It is necessary to bear in mind that borrowing is generally cheaper for the public than it is for the private sector. Thus, any benefits of private finance must generally outweigh the extra cost of financing which the private sector incurs, in order for the project to represent improved value for money.

#### **2. The development of projects which otherwise might not have occurred**

A second main reason for the use of private finance has been to fund programmes which would not have gone ahead, because there were insufficient public funds available. This can occur because any public funds used for PFI, e.g. in paying private firms for the use of a hospital, are generally spread over a longer period of time than if the government purchased a capital asset itself. In addition, if savings are made because of the greater efficiency of PFI (see reason 1 above), this means more funds are available to spend on new projects.

With some projects, both these rationales for using private finance – better value for money and deferred payment – may exist. In other cases, the main rationale may be the greater value for money which is achieved. In other cases, the main motive may be the second – to put off expenditure for projects into the future. In this case, if the privately financed solution does not offer better value for money, not only are future taxpayers or users paying for the project, but they are paying more than is really needed for the project.

## **6.2 Regulating the procurement process for privately financed infrastructure projects<sup>2</sup>**

### **6.2.1 Features of privately financed infrastructure projects relevant to procurement**

Privately financed transactions have some special features which may make the application of normal public procurement rules on tendering etc. inappropriate. The treatment of such projects must be considered in devising any regime to regulate procurement. These features include the following (also summarised in the Table below), many of which are closely related (e.g. the need for negotiations and difficulty of defining specifications).

- The exceptionally high costs of submitting proposals, which can run into millions of pounds. Is it reasonable to run an open competition or even a restricted-type procedure with three or more firms? If so, should the government pay tendering costs in some of these cases? When a competition is held, there is often significant pressure to choose a provisional winner – referred to as a “preferred bidder” – relatively early in the process, so that the other bidders do not waste large sums in the competition. However, if the winner is chosen too early, the choice may be the wrong one, and the preferred bidder also gains significant negotiating power: it is difficult for the government to negotiate good terms with a firm that has already effectively won. To avoid this, governments sometimes select a “reserve bidder” with the aim of returning the reserve if the favoured bidder does not negotiate a fair deal – but a problem with this is that firms that have not been designated the preferred bidder often then prefer to withdraw from the process altogether.
- The fact that projects run for many years (often more than 20, perhaps up to 99). What happens if the procuring entity wishes to change the nature of the project e.g. to add new services? Obviously, this should be provided for as far as possible

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<sup>2</sup> The legal rules applicable in several jurisdictions/instruments are also discussed in the companion Asia Link project text *Public-Private Partnerships*. See also, de Cazalet and Crothers, “Presentation of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects” (2001) 6 RDAI/IBLJ 699; Faria, “UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects” (2002) 11 P.P.L.R. NA89; D. Wallace, “UNCITRAL Draft Legislative Guide on Privately Financed Infrastructure: Achievement and Prospects” (2000) 8 *Tulane Journal of International and Comparative Law* 286; K. Michel, R. D. Gray, T. Irwin, C. Levesque, and R. R. Taylor, *Concessions for infrastructure: a guide to their design and award*, World Bank technical paper no. 399, esp. Ch. 4. In the EU, a procurement method commonly used for such projects, including in the United Kingdom, is the competitive dialogue procedure: see the companion Asia Link textbook *EU Public Procurement Law*, section 6.10. On procurement procedures for privately financed infrastructure, including the application of competitive dialogue, see, for example, P. Badcoe (ed.) *Public Private Partnerships and PFI* (Sweet & Maxwell; looseleaf).

in the agreement, but what if the agreement does not provide for this? Does a new competition need to be held in such a case?

- The difficulty of defining specifications for the purpose of a formal competition.
- The complexity of such projects and the difficulty of submitting and evaluating proposals without negotiations between the government and contractors.
- The fact that these projects are generally financed using project finance. This means that those putting money into the project, including banks (most project are financed by borrowing from banks), depend solely on the income from the project to obtain their payment. (In general, firms usually borrow money from banks for their business as a whole, and the bank has recourse to the company generally for repayment – not just to the income from a specific project of the company). This means that the banks have an interest in ensuring that the project is viable and may want a say in the terms and conditions, even though they are not party to the agreement with the procuring entity.
- The fact that most tenderers are consortia of different firms with different skills (e.g. most projects involving buildings involve participation by a construction company, facilities management company and various specialist firms such as security or catering firms). This gives rise to problems such as: What happens if one of the firms drops out, either during the procurement process or after the contract has been awarded? What happens if a firm tries to participate in more than one consortium?
- The fact that ideas for projects may be put forward by the firms themselves. Will they come forward with ideas, if the project will later be put out to tender?

#### **Considerations relevant for privately-financed infrastructure procurement: a summary**

1. High costs of proposals.
2. Length of contracts.
3. The difficulty of defining specifications.
4. The complexity of projects and the difficulty of submitting and evaluating proposals without negotiations between the government and contractors.
5. Use of project finance.
6. Importance of bids by consortia.
7. Unsolicited proposals.

## **6.2.2 The UNCITRAL provisions on privately financed infrastructure procurement**

### **6.2.2.1 Introduction**

The UNCITRAL Model Law does not have any special provisions for privately financed infrastructure projects in the Model Law on Procurement of Goods, Construction and Services or in the Guide to Enactment. In most countries, the most important types of privately financed projects are those which are paid for by the public users – e.g. toll roads. Often, these projects are not treated as ordinary “procurement” and are not covered by general procurement law. Instead, they are covered by special laws on “concessions”.

In 2001, UNCITRAL produced a guide for national legislators to help them establish an appropriate legislative, administrative and contractual framework for dealing with these kinds of projects (UNCITRAL, Legislative Guide on Privately Financed Infrastructure Projects (2001)).<sup>3</sup> The Guide covers, inter alia, procurement procedures for awarding these

<sup>3</sup> The full text of the Guide is available at <http://www.uncitral.org>.

projects, which is dealt with in section III of the Guide, Selection of the Concessionaire.<sup>4</sup> In 2003, in its 36th session, UNCITRAL agreed on model provisions on privately financed infrastructure projects (UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects), based on the Guide.<sup>5</sup>

The current Guide remains applicable for the time being. However, UNCITRAL is considering a consolidated publication that will combine the Model legislative provisions adopted in 2003 with the notes in the current Guide, and reproduce at the end the full text of the recommendation adopted in 2000 on which the 2003 Model provisions are based.

The procurement procedures recommended in the Guide and Model provisions are based on the principal method for the procurement of services procedure found in the UNCITRAL Model Law on Procurement of Goods, Construction and Services, with adaptations and additions. The Guide and Model Provisions do not refer to all the details of the procedure but suggest that enacting states fill out the basic procedure that is set out by cross-reference to other national legislative provisions on procurement (which may, of course, themselves be based on the general UNCITRAL Model Law on Procurement of Goods, Construction and Services).

### **6.2.2.2 Which transactions are covered?**

The Model Provisions apply to “infrastructure projects”, defined as “the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities” (Model Provision 2). Infrastructure facilities are defined as “physical facilities and systems that directly or indirectly provide services to the general public”.

In terms of the type of infrastructure projects (within the above definition) that are covered, the provisions are not entirely clear and satisfactory. Throughout, the Model Provisions refer to the application of these provisions to “concession” contracts. Traditionally, the concept of a concession is used (as we noted above) to refer to projects under which remuneration is provided by public users of the facility (e.g. toll roads) rather than the government. Concession is defined in the Model Provisions as any agreement setting forth terms and conditions for an infrastructure project i.e. the express definition does not seem to be limited to the case of remuneration from the public. However, it is assumed in other provisions of the Model Law that the definition of concession is limited in this way. For example, Model Provision 6(3) requires a statement of whether funding will come “entirely” from fees or tariffs, which seems to assume that at least some funding comes from this source with the covered projects.

This assumption is probably made because most projects involving the kind of features outlined above have taken the form of concessions, and traditionally, many legal systems (especially those based on the Civil Law systems of France) have treated concessions separately from other public procurement in their regulatory systems. However, whilst it is assumed that the definition of concession is limited in this way, it is clear that other types of privately financed projects, especially those recently developed, such as the schools and hospitals, exhibit many of the exact same features that concessions do, particularly those relevant from a procurement perspective as outlined above (long

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<sup>4</sup> Other aspects of these projects covered include the other aspects of these projects that need to be dealt with in national legislation, what should be included in contracts (for example, clauses concerning allocation of risks; dispute settlement procedures – the kind of matters covered in the UK’s standard contracts forms) etc, but, as mentioned above, these will not be considered in the present chapter. Available at <http://www.uncitral.org>. The discussions on the Model are set out in paras. 12-171 of the report of the 36<sup>th</sup> session, and the model provisions in Annex I.

<sup>5</sup> Also available at <http://www.uncitral.org>.

duration, participation of consortia, need for negotiation, high tendering costs etc). Thus, the Model Provisions may be equally suitable for awarding those contracts. This is recognised in a footnote to the Model Provisions which expressly points out that they may be suitable for such cases (e.g. roads financed through payment of shadow tolls by government).

It can also be noted that the Guide seems to suggest that the provisions are relevant only where the assets in question are owned by government - but in fact, the procedures seem equally suitable for cases where the contractor retains ownership.

### **6.2.2.3 Procedure: the basic approach**

The Model Provisions set out a procurement procedure based broadly on the UNCITRAL principal method for the procurement of services (see footnote 7 to the Model Provisions).

For matters not dealt with, it is envisaged (in footnote 7 to the Model Provisions) that the provisions of ordinary public procurement law will apply; and these should be cross-referred to in the Infrastructure law e.g. on:

- records of proceedings
- manner of publication of notices
- remedies

### **6.2.2.4 Advertisement of the contract**

In this respect, the Model Provisions provide that publicity is to be given to the contract in a manner specified by the enacting state: Model Provision 6(3).

### **6.2.2.5 Pre-qualification**

The provisions provide for a pre-qualification stage to determine who has the competence to fulfil this kind of project before inviting tenders. It will be recalled from Chapter 3 that pre-qualification is possible but not suggested as a general rule for procurement under regular tendering (under the Model Law).

The Model Provisions (Provision 7) themselves set out the specific criteria that must always be applied, as follows – which are similar to those provided as optional for services and other complex procurement under the Model Law. They are:

- “(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;
- (b) Sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;
- (c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities”.

Provision 7 also leaves room for entities to add any additional criteria considered relevant.

### **6.2.2.6 Selection of those to tender from amongst those qualified (“shortlisting”)**

Once the qualified bidders have been identified, the Model Provisions propose two options (Provision 9):

1. That all those qualified should be invited to bid in the award phase; or
2. That only a limited number of those qualified should be invited – i.e. that a shortlisting process should be carried out (Provision 9(2)).

For the case in which option 2 is chosen, the Model Provisions do not specify how many should be invited to commence participation in the award phase. However, note 14 to the Model Provisions observes that some countries limit participation to the lowest number for meaningful competition e.g. three or four. This takes into account the fact, as we saw above, that the costs for submitting proposals in this kind of procedure can be very high. Setting limited numbers can in such a case encourage good quality bidders to participate who might otherwise be reluctant to do so because of the investment needed. It is relevant here also to note that the Model Law provides for all those invited into the award phase to continue right to the end and submit final bids if they wish to do so (see further, point 6 below).

What of the criteria and procedure for shortlisting? In this respect, it can be noted that unlike the provisions on procedures under the Model Law where a limited number may be selected (as to which see Chapter 4 on shortlisting), the Model Provisions on privately financed infrastructure contain relatively detailed rules on how this selection is to be made (Provision 9(2)).

First, it is provided that any intention to select just a limited number must be notified in the pre-selection documents (Provision 9(2)).

Secondly, it is also stated that any rating method must be disclosed in the pre-selection documents (Provision 9(2)).

Thirdly, it is provided that the procuring entity must make its selection by rating bidders in accordance with the criteria used for assessing qualifications (Provision 9(2)). Thus, for example, the procuring entity could give each potential bidder a score for each of the qualification criteria (experience of past projects etc) and take forward those obtaining the highest scores. A common way of approaching this kind of shortlisting selection is to set out threshold qualification criteria of a fairly generic nature, and then to rate potential bidders for shortlisting purposes using more precise criteria relating to the same matter.

For example, in a procedure for procurement of a privately-financed hospital the procuring entity might require experience of construction and management of major infrastructure facilities as a threshold criterion, and then rate those who meet that criterion their experience of construction and management of hospital facilities as a means of choosing the shortlist to participate in the award phase.

It appears that it would be possible to use some of the criteria (or sub-criteria) in question simply as qualification criteria (i.e. to consider whether potential bidders meet a minimum threshold to be qualified) whilst applying others both as minimum threshold criteria and as criteria for giving a relative rating to bidders for shortlisting purposes.

### **6.2.2.7 The award phase of the procedure**

We refer here, as in previous chapters, to the phase in which the procuring entity seeks to identify who can provide the best offer by comparing the price and other features of different offers.

The Model Provisions provide for two main options for this phase:

1. A single-stage process in which bidders submit a single set of final proposals;

Or

2. A two-stage process that involves bidders submitting, first, initial proposals and then later, final proposals (sometimes called in practice, "Best and Final Offers" - BAFOs)

The provisions suggest that the two-stage procedure may be used when the authority does not deem it feasible to formulate project specifications, performance indicators, financial arrangements, or contractual terms in a manner that is sufficiently detailed or precise to allow final proposals to be formulated (Model Provision 10). This two-stage process can be compared with the request for proposals procedure for goods and construction, and the principal method for procurement of services with simultaneous negotiations, both of which also involve an initial proposal phase. It is also notable that the Guide states (para.54) that "typically", the first stage will not involve submission of any kind of financial offer but will focus on the nature of the solutions that can be offered to both technical and contractual issues (which might include allocation of certain risks – e.g. risk of terrorist attack, acts of God etc, that damage the infrastructure).

It is provided that following the receipt of the initial proposals, the procuring entity can discuss any aspects of their proposals with bidders.

Model Provision 10(3)(d) provides that at the stage which the second (final) proposals are submitted, the procuring entity must issue a revised specification that provides for a single project specification, performance indicators or contractual terms. There is a question about how precise these must be. For example, must a procuring entity seeking to procure hospital facilities choose a single solution such as a new-build or refurbishment? This could be unduly restrictive since not all bidders would necessarily be able to provide all the options or even the most promising option. It seems that the Model Provisions under Provision 10(3) do not in fact require this but allow for wide variations around an outline performance specification, as is discussed in the Guide, para.64.

It can be noted that Model Provision 10(3)(c) allows the procuring entity to delete, add to or otherwise amend the initial specifications, financing requirements etc and also to add to or delete award criteria before the second (final) proposal stage.

Finally, in relation to this two stage procedure, it needs to be emphasised, as envisaged in the Guide, that all the suppliers selected to participate at the start of the "award phase" (i.e. those who are qualified and (where shortlisting is used) are shortlisted from amongst those qualified) will proceed to the final proposal stage. It can be noted that this is a major difference from an approach commonly adopted in some countries, including the United Kingdom (and which is explicitly permitted under the EU's competitive dialogue procedure): in the United Kingdom, it is common with large projects to obtain initial proposals from around six contractors but to invite only a few of these (perhaps 3 or 4) to submit final proposals, chosen by considering the quality of the participants' initial proposals.<sup>6</sup> It can be noted that the practice in the United Kingdom has often been to limit the number of bidders at this second stage even to only as few as two tenderers, given the very high cost of tendering under the competitive dialogue procedure projects – provided, however (as the legislation requires), that this will be sufficient for competition (which will require, for example, that the procuring entity should expect that both bidders selected will actually submit full tenders).

Once final proposals have been submitted (whether as a single stage or a second stage), the procuring entity will proceed to selection of the provisional winner - sometimes called the "preferred bidder" in these kind of projects, due to the fact that some matters may still remain to be finalised, as is discussed below.

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<sup>6</sup> See, for example, Badcoe, above; P. Braun, "Strict Compliance versus Commercial Reality: The Practical Application of EC Public Procurement Law to the UK's Private Finance Initiative" (2003) 9 *European Law Journal* 575 (concerning practice prior to the introduction of the competitive dialogue procedure); HM Treasury, Competitive dialogue in 2008, July 2008, available at [www.ogc.gov.uk](http://www.ogc.gov.uk). See further the Asia Link companion textbook *EU Public Procurement Law*, Ch. 6, section 6.10.

Model Provision 14 deals in detail with the award criteria for selecting the preferred bidder. This provides that the criteria for evaluating technical proposals must include:

- technical soundness
- compliance with environmental standards
- operational feasibility
- quality of services

Thus, (as with qualification) the Model Provisions go further than the equivalent provisions of the Model Law – they do not merely suggest use of certain criteria at the discretion of procuring entities, but positively require that certain specific criteria be included for this kind of procurement.

Note that the first three seem to indicate at least a “threshold” level of acceptability. (Model Provision 15 states explicitly that threshold levels may be set for each criterion and those that do not meet these thresholds may be rejected as non-responsive).

It is provided that the criteria for evaluating commercial proposals shall include, “if appropriate”:

“(a) The present value of the proposed tolls, unit prices and other charges over the concession period;  
(b) The present value of the proposed direct payments by the contracting authority, if any;  
(c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;  
(d) The extent of financial support, if any, expected from a public authority of [the enacting State];  
(e) The soundness of the proposed financial arrangements;  
(f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;  
(g) The social and economic development potential offered by the Proposals”.

Again, it seems that some of these matters may be relevant at the “threshold” level and also for assessing a bidder’s overall position amongst those proposals that meet any relevant thresholds.

Model Provision 15 makes it clear that the criteria themselves, their weighting and the “evaluation process” must be set out in the request for proposals. It seems that this will require the procuring entity to make very clear the extent to which the criteria above: i) require certain threshold levels to be met and/or ii) are to be rated for each contractor in order to compare the relative merits of the different offers against each other. For example, if, for quality of service, i) a proposal must receive a minimum score to be considered and, ii) the score for each proposal meeting the threshold is to be factored into the bidder’s overall score for comparing bids, both of these points must be made clear.

One of the most vexing and important questions for these kinds of procurement procedures is the flexibility that should be left to complete and amend the preferred bidder’s tender after the preferred bidder has been chosen. An argument for allowing some flexibility in this respect is to reduce the high costs of submitting a complete tender for such a complex contract. Another is the need to address matters that sometimes simply cannot be dealt with prior to selecting the preferred bidder (for example, it may not be possible to obtain complete planning permission before the winning design is chosen – and the planning authorities might later require amendments to the design).

On the other hand, the greater the scope for flexibility, the greater the danger that the results of the competition will be undermined by changes that are hard to monitor or by

the content of new terms that favour the contractor. The fact that once the preferred bidder is chosen, the pressure of competition is largely removed may exacerbate this danger: clearly the bidder is not under such pressure to offer favourable terms at this point as it has not yet become apparent that it has submitted the best bid. The possibility for negotiations may be used to provide favourable treatment for the bidder concerned (i.e. a favoured bidder in collusion with a procuring entity could submit a favourable bid on the understanding that it will be able to make changes or additions in its favour during the negotiation phase).

The provisions state that negotiations may be held with the preferred bidder before contract award is finalised: Provision 17. However, there are some rules on this, including that:

- Negotiations may not be held on those matters stated as being non-negotiable.
- If negotiations will not succeed, negotiations begin with the next ranked bidder. Negotiations may not be re-opened with the first-ranked bidder.

The provisions themselves say little on the extent to which negotiations may be used to fill in the details of proposals rather than this being done in the final proposals themselves. The Guide (para.83) contains more detailed provisions on discussions, suggesting that:

- Discussions with the winner should be limited to:
  - Finalising the details of the documentation
  - Satisfying reasonable requirements of lenders
- No changes should be permitted to essential elements of proposals
- No other changes should be permitted to the proposal (e.g. price or technical solutions) that would distort the ranking.

### **6.2.2.8 Participation of consortia**

We can finally note that the Model Provisions contain provisions on some matters not dealt with in the general Model Law on procurement which are of particular concern in the context of privately financed infrastructure procurement (though not unique to that context), such as participation of consortia, in Provision 8. This provides that:

1. Firms may participate directly or indirectly in one consortium only (though there is a provision for waiver on the authorisation of another authority in case this may be necessary e.g. where there is only one available firm with particular skills needed for the project); violation of this rule results in disqualification.
2. The procuring entities must assess the combined capability of the members.

# Chapter 7: Electronic Procurement and Electronic Reverse Auctions

## 7.1 Electronic communications<sup>1</sup>

### 7.1.1 Introduction

Electronic communications and technologies are used by government procuring entities (i) for dealing with suppliers, (ii) in communicating with the public and other public bodies, and (iii) in the government's internal administrative processes. They can be employed at all stages of the procurement cycle: in planning; in the procurement process itself (advertising, transmitting documents and information (such as specifications and invitations to tender), tendering etc); and in administering the contract (ordering, invoicing, payment etc).

Electronic means can assist procuring entities in furthering many of the policies and principles that are implemented in their national procurement systems and which the UNCITRAL Model Law seeks to support, as discussed in Chapter 1, including value for money, efficiency in the procurement process, integrity, accountability and transparency.

Potential advantages for procurement include:

- improved value for money from access to more suppliers or more competitive techniques (such as auctions);
- savings on transaction costs (for example, the costs of paper processing);
- saving time (for example, from speedier communications and easier access to supplier and contract information);
- improved compliance with rules and policies (through better monitoring);
- stimulating a more competitive local supply base by speeding up private sector adoption of modern practices and promoting standardisation; and
- driving e-government more generally.

The extent to which individual states can benefit from electronic procurement obviously depends on various factors, including access to infrastructure (electrical power, reliable and affordable telecommunications etc); entities' access to adequate hardware and software; the adequacy of the general law on electronic commerce (see further below); suppliers' electronic capability; the extent of standardisation; and the available human resources.

As we have already mentioned in Chapter 1, the current review of the UNCITRAL Model Law was to a large extent driven by the need to accommodate the increasing use of electronic means in procurement. The current text contains few provisions on this subject and the early part of the review process focused much of its attention on this issue.

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<sup>1</sup> See generally, and on UNCITRAL's approach, C. Nicholas, "The regulation of electronic communications under the UNCITRAL Model Law on Procurement", Ch. 7 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West); and for experiences of regulating electronic communications in other specific jurisdictions/systems, see R. Bickerstaff, "E-Communication Regulation in Public Procurement: the EC and UK Perspective", Ch. 8 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West); M. Burgi, "The Policy on Regulating Electronic Communications in Germany", Ch. 9 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West); C.R. Yukins and R. Jennings, "Electronic Communications in Public Procurement: Lessons from the US Experience", Ch. 10 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West). The Multilateral Development Banks have established a joint website that provides advice and practical tools for implementing electronic government procurement: <http://www.mdbegp.org>. This provides some resources for considering various practical issues relating to electronic procurement that may need to be addressed when implementing regulatory rules in practice.

The following are the main areas in which issues of regulation under public procurement law arise. We will consider below both the policy issues that arise and the current position and proposals in the context of the UNCITRAL Model Law.

### **7.1.2 Electronic publication of information**

Electronic advertising of specific projects, and provision of other information in electronic form on contract opportunities, can promote the economy, transparency, integrity and broad competition by making contract information more accessible, in practical and cost terms, to more suppliers (especially when efficient search tools are available, or when the system provides automatic notice of opportunities to registered suppliers). It can also save advertising costs (especially when substituting the means of hard copy). Often, it has led to more information being available than was supplied using paper media: this is worthwhile because of the lower costs and greater accessibility. On the other hand, its use could limit access to contract information if charges are levied for access or the technical means used makes access difficult and it displaces more accessible paper means.

Historically, providing information on contracts has been the first use of electronic means in procurement in many states. Many states and entities now use electronic means to publish invitations for suppliers to participate in specific procurements (including those required to be published by law). For example, this was the case for eight out of nine developing countries surveyed by the World Bank as far back as 2002.<sup>2</sup> Very frequently, electronic means are also used to publish advance information about forthcoming projects (that may later become the subject of a separate notice) and/or general information about contract opportunities with particular entities. In states where procurement is regulated by law, often the law does not require this information to be published, but it is published at the entity's choice for the benefit of its suppliers. The means of publication of both invitations for specific contracts and other information can be an entity's individual website, or a centralised electronic system covering many entities. When a common system exists, in countries where procurement is regulated by law, a centralised electronic system is often required for publishing the invitations to participate that are required by law.

Many states are also increasingly making use of electronic media for publishing information about award procedures that are being conducted or have taken place, for the benefit of suppliers and also the public in general. Information systems of this kind that are presented in an accessible and useful form can provide a significant tool for oversight and scrutiny of the procurement process.

From a regulatory perspective, the key considerations are: i) whether states should make the use of electronic publication compulsory and ii) the extent to which this should be allowed at present to displace more traditional media, rather than operate alongside it. Obviously the answers to these questions should depend on factors such as the availability of suitable information as well as search systems, and the extent to which potential suppliers are able to access them in comparison with other media for the states and types of contract in question.

### **7.1.3 Electronic communications in the award process**

Electronic communications are also used during the award procedure – for example, for entities to distribute tender documents and make amendments as well as to issue invitations to participate, or for suppliers to submit pre-qualification information, requests

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<sup>2</sup> Talero and Carp, *Electronic Government Procurement: A Legal Perspective on Country Practices* (March 2002), section IV.

to participate or tenders/proposals. Advantages include reduced processing costs, speedier communications (including reduced overall time-scales), reduced corruption and abuse (as a result of less direct contact between officials and suppliers, and greater anonymity of tenders) and (in countries where postal delivery is unreliable) more reliable communication for non-local suppliers. These advantages can result in increased competition (for example, from wider participation by non-local firms).

Generally, these benefits are enhanced when the use of electronic means is mandatory for both parties. However, they are often very significant even when electronic means are optional. Further, any enhanced benefits from mandatory electronic means could be outweighed by increased costs, especially in the early stages of implementing electronic systems (see below).

Some relevant considerations in establishing a policy on electronic means – for example, human resource capability and the legal environment - were noted above. Even if there are no problems from the government side, it also needs to be taken into account that using electronic means may deter or prejudice some suppliers.

Problems can include the difficulties and costs of access for suppliers with limited access to electronic means, and the obstacles presented by particular technologies in terms of accessibility or cost. These are less of a problem now that Internet-based technology has largely replaced use of expensive proprietary systems. Studies by the World Bank a few years ago suggest that the use of electronic means creates real practical or cost problems for the feasible supplier group in a few countries, but not in most.<sup>3</sup>

More problems arise, however, when more sophisticated requirements – for example, for digital signatures – are imposed. There can also be significant costs in setting up catalogue systems – for example, to comply with government coding requirements. Special access problems may also arise for foreign suppliers because of the use of different systems and standards – for example, electronic signatures. The significance of all these problems may change with new developments such as development of market standards for exchanging information and for coding, development of international, regional or bilateral systems for mutual recognition etc.

Psychological factors may also affect suppliers. The novelty of electronic means and fears over confidentiality and authenticity (even if they are not grounded in fact) may deter suppliers from using electronic means and from participating in procurements for which electronic means are mandatory.

It is also relevant to consider whether the general legal environment in a country (as opposed to measures specific to government procurement) provides adequate support for using electronic means. For example, laws on admissibility of evidence in court or formalities (such as signatures) for certain types of contract may refer only to non-electronic documents; or the law on issues such as the time and location of offer and acceptance in contract through electronic means may be unclear. UNCITRAL already assists states in dealing with some of these issues, in particular, through the Model Law on Electronic Commerce (1996) and the Model Law on Electronic Signatures (2001). These set out model provisions for the state in its capacity as regulator to adapt its general laws to accommodate electronic communications, when these electronic communications fulfil the purposes of those laws. For example, the Model Law on Electronic Commerce provides that electronic documents and signatures are to be recognised when they take a form that allows them to fulfil the purpose behind the legal requirement of documentation or a signature. Most of the jurisdictions studied for this paper had enacted legislation of this kind, often very similar to or based on the Model Law on Electronic Commerce. The Model Law on Electronic Commerce also contains rules

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<sup>3</sup> Talero, Electronic Government Procurement: Concepts and Country Experiences, World Bank Discussion Paper (Sept.2001), pp. 27-28.

governing contractual relationships that apply unless the contracting parties stipulate otherwise – for example, the time of offer and acceptance in contract; and the time of receipt of electronic messages.

The state of the general law on these questions is relevant to a state's decision to use electronic communications in government procurement. For example, if the law requires that to be valid, contracts must be concluded by non-electronic means, a government is unlikely to use electronic means to conclude its own contracts.

In practice, the desire to use electronic means in government contracting may provide the driver to change such general legal provisions (as, for example, appears to have happened in the United States). A government will normally enact rules of this kind for all types of contracts: for example, it is not normally appropriate to provide that government contracts concluded by electronic means are valid, without also providing for the validity of private contracts concluded by electronic means.

Separate from these questions of how to deal with e-commerce in the market as a whole, the government needs to consider its own interests in as a contractor in:

- legal certainty (a record of the proceedings);
- authenticity;
- confidentiality; and
- security

It also needs to consider the corresponding interests of its suppliers, especially since the achievement of government procurement objectives depends on willing supplier participation.

The general legal rules on electronic commerce referred to above can help achieve these objectives to some extent by ensuring, for example, that electronic signatures can be recognised as evidence in court. However, contracting parties generally enjoy a wide degree of autonomy over, for example, the degree of reliability of authenticity and integrity – if any – that they themselves desire for concluding a contract by electronic means. For example, contracting parties could agree generally to use a form of electronic signature that is not recognised as evidence by law and take the risks that it entails; they could agree that a signature meeting the minimum requirements for legal recognition is adequate for their own transactions; or they could insist on a higher degree of reliability than is normally required for signatures to be admissible in evidence, and thus agree to use a particular technology that gives this higher level protection. They also may decline to use electronic means at all – for example, if they consider the tools for authentication to be insufficiently reliable, or too expensive, for themselves or their business partners. When the government itself is a contracting party, it needs to decide how it will deal with these questions as a contracting party. It may decide to do this by laying down special legal rules that regulate and control the use of electronic procurement in the government procurement market. To the extent that they are suitable for regulation, these questions may fall to be dealt with by public procurement law. These are the matters that are dealt with in traditional paper-based tendering – including in the UNCITRAL Model Law - by the requirements for a signed and sealed bid in writing, as we have seen in Chapter 3.

From the perspective of government regulation through public procurement law, a number of related regulatory issues arise. It is very important, for the purpose of clarity and certainty in the law, to distinguish these different questions and to provide for each clearly in the relevant regulatory provisions.

It is only quite recently that international regimes have started to address these questions explicitly – until recently, uncertainty over these questions (because they were not expressly addressed) created problems for states that were subject to them. The EU, for example, dealt comprehensively with these questions in its procurement directives only in

2004,<sup>4</sup> whilst the current text of the WTO's Government Procurement Agreement (GPA) still does not do so (although they are addressed in a revised proposed text)<sup>5</sup>. So far as the UNCITRAL Model Law is concerned, this has been an important issue for the current review and the current published version of the text proposes some significant changes and new provisions, as outlined below. Most of the relevant provisions are contained in Article 7 of the most recently published draft of the Model Law,<sup>6</sup> which deals generally with communications.

The first important principle of the Model Law in dealing with this subject (as with the EU rules and GPA revisions) is to treat electronic and paper-based communications on an equivalent basis. Effectively, this means that when an action can be done in paper form, it can be done also in electronic form provided that the particular functions of the paper form (for example, ensuring confidentiality) are equally fulfilled by the electronic form that is used. In this respect, Article 7(1) of the most recently published draft of the Model Law simply states, "Any document, notification, decision or any other information generated in the course of a procurement and communicated as required by this Law, including in connection with the review proceedings under Chapter [VIII] or in the course of a meeting, or forming part of the record of procurement proceedings [required under the Model Law], shall 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". This means that paper form is not required for any of the decisions etc specifically referred to in the Model Law. As regards communications in general, Article 7 also provides that the form of communication in the procedure is to be specific by the procuring entity, without restricting the procuring entity's right to use electronic communication, as well as other forms of communication.

A second important principle is technological neutrality. Thus, the Model Law does not specify any technical means by which functions such as ensuring confidentiality are to be achieved, but merely states the required objective. This ensures, inter alia, that the fulfilment of procurement objectives can be achieved in the most appropriate way, in the light of any new technological developments.

Specific key issues that need to be considered in devising an appropriate regulatory regime for electronic communications include the following:

**1. Whether, balancing the benefits against the possible problems, the legal rules on government procurement should allow procuring entities to impose electronic means of communication when they choose to do so and if suppliers agree.**

It is difficult to see any arguments against allowing the use of electronic communications when both parties agree to it, provided that there are adequate controls in place to safeguard the confidentiality of tenders etc (see point 5 below).

There has been uncertainty in some public procurement systems over the possibility of using electronic means in procurement simply because the relevant laws have not been updated to take into account the electronic age. However, many laws have been updated in the last few years to provide legal certainty in this area. For example, as referred to above, the EU regime has been updated in 2004 to make very clear that entities may use electronic means in procurement, subject to relevant safeguards (the WTO's Government Procurement Agreement text on this subject(also mentioned above) that does this also is

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<sup>4</sup> See Bickerstaff, above; and the companion Asia Link text *EU Public Procurement*, Ch. 8.

<sup>5</sup> See R. Anderson, "Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations" (2008) 17 *P.P.L.R.* 255; S. Arrowsmith, "The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions", Ch. 10 in S. Arrowsmith and R. D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (forthcoming 2011, CUP).

<sup>6</sup> See A.CN/9/WG.1/WP.73/Add.1, available at [www.uncitral.org](http://www.uncitral.org).

not yet in force). This has been done by explicit provisions making it clear that electronic communications may be used for conducting procurement procedures (e.g. Article 42 of Directive 2004/18). (Indeed, as mentioned in point 2 below, entities may require the use of electronic communications under the EU regime even against the wishes of suppliers). In addition, it is also explicitly clarified that when certain actions (such as giving reasons to suppliers for a decision about them) are required by the directive to be given in writing or in a written form, this refers to "any expression consisting of words or figures which can be read, reproduced and subsequently communicated" (Article 1(12) of Directive 2004/17) – which could, of course, include electronic means. The World Bank's guidelines for procurement and for consultancy projects have also been updated to allow Borrowers from the Bank to use an electronic system to distribute bid documents and permit electronic submission of tenders and proposals, subject to various general safeguards, provided that the Bank is satisfied with the adequacy of the system to be used: see Guidelines Procurement Under IBRD Loans And IDA Credits, May 2004, Revised October 1, 2006, at 2.11 (concerning distribution of bid documents) and 2.44 (concerning tendering). The Multilateral Development Banks have together published information on criteria that electronic tendering systems must meet to be acceptable: see e-GP Tendering Systems, at <http://www.mdbegp.org>.

**2. Whether the law should allow procuring entities to require suppliers to use electronic means for sending and/or receiving documents, even when the suppliers do not wish to do so (or even require the procuring entity to insist on electronic means in such a case).**

Some procurement regimes allow procuring entities to insist on electronic dealing. Thus, in the European Union, the Public Sector Directive 2004/17 allows procuring entities to require suppliers to deal electronically if procuring entities wish to do so. In the United States, at the federal level, the means of communicating with suppliers is also at the discretion of procuring entities. (Both the Uniform Electronic Transactions Act (UETA), a uniform law on electronic commerce adopted by many U.S. states, and the federal ESIGN Act, see Public Law No. 106-229 §§ 102(b), 104(b)(4), provide that governments may set their own requirements for electronic commerce in procurement). In some cases, procuring entities have required tenderers to deal electronically. The legality of such a requirement is not dealt with directly in legislation, but the General Accounting Office (the main forum for challenging government procurement decisions in the United States) has repeatedly ruled that it is lawful to require electronic dealing, even if suppliers do not wish to operate in this way. *Arcy Mfg. Co., Comp. Gen. No. B-261538 et al.*, 95-2 CPD ¶ 283 (1995).

On the other hand, some systems retain the right of suppliers to deal by traditional paper-based means should they wish to do so. This is the general approach of the World Bank which provides in its Guidelines that when an electronic bidding system is used "bidders shall continue to have the option to submit their bids in hard copy" (para.2.44).

One main rationale for this difference between the World Bank's approach and that of the regimes discussed in the previous paragraph could be that in some of the countries to which the World Bank guidelines are relevant, requiring electronic dealing might effectively exclude some suppliers because of the difficulties of electronic access. This exclusion of some suppliers might prejudice value for money. Such an approach might also be justified by the value of equal treatment as an independent objective of the procurement process, which might justify retaining a right to deal by paper-based means even if the potential supply base is so large that requiring electronic dealing would not prejudice value for money at all. Obviously, in any given case, these kinds of concerns need to be balanced against the benefits of mandatory electronic communications referred to earlier such as more efficient procedures for the procuring entity.

The World Bank's position – that does not allow procuring entities to insist on electronic tendering – is also reflected in the current provisions of the UNCITRAL Model Law. In

particular, in formal tendering procedures, it is quite clear that procuring entities may not require suppliers to tender electronically. Article 30(5)(b) specifically provides for the right of a supplier to submit a tender by the “usual” method set out in Article 30(1)(a), namely in writing, signed and in a sealed envelope. According to the Guide to Enactment, this is an “important safeguard against discrimination in view of the uneven availability of non-traditional means of communication such as EDI” (commentary on Article 30).

However, it is currently proposed by the UNCITRAL Working Group on procurement that there should be a general right for procuring entities to determine the means of communication with suppliers under the revised Model Law, including the requirement that electronic means is to be used. This is reflected in Article 7 of the current published draft which, as we have seen above, provides generally for procuring entities to specify the means of communication to be used in the procedure. This is considered appropriate now that electronic commerce has moved away from proprietary EDI systems that may involve significant costs to suppliers towards communications through the Internet. For this reason, (as the reading explains) the Working Group is to propose deleting a current provision in Article 9(3) of the Model Law that prohibits “discrimination” in the form of communication used, as it considers that this is open to an interpretation that would allow a successful challenge by anyone prejudiced by use of electronic communication). It is important to note, however, that under the revised Model Law provisions, entities will be able to specify more than one possible means of communication to be used, thus allowing them to give suppliers a choice. Further, the use of particular means of communication will be subject to certain “accessibility standards” outlined later below.

Another approach, that would leave suitable rules to be developed on a case by case basis, could be to provide a general rule that the means chosen should not restrict access to the procurement process. This could mean that the use of electronic means per se (as well as the use of specific types of electronic means) might be subject to challenge if the use of that means had a significant impact on the access of suppliers in general (perhaps in such a way that might affect value for money) – rather than merely affecting one or two specific firms. How such a provision is to be interpreted may well depend on the different objectives and weight given to those objectives (e.g. equal treatment) in specific procurement systems.

### **3. Whether suppliers themselves should be given a right to insist on using electronic means for sending and/or receiving communications.**

Allowing suppliers to use electronic means as a right has some advantages that promote the objectives of public procurement systems, notably reducing participation costs for suppliers and hence encouraging participation. The question thus arises as to whether suppliers should be given a right to send or receive documents in electronic form. Obviously, any such right would have to be limited to cases in which the procuring entity has reasonable access to the electronic means chosen. Even in systems where procuring entities have a right to use electronic means, suppliers do not necessarily do so. However, it can be noted that the general rule that exists in some systems that the means of communication imposed by the procuring entity should not unreasonably restrict access to the procurement might potentially be interpreted to provide a right for suppliers to use electronic means in some cases as well as a right to use paper-based means, as discussed above. Specific rights for suppliers to use electronic means have also sometimes been given by some legal systems.

So far as the Model Law is concerned, it is not currently planned that suppliers should be given any general right under the Model Law to insist on electronic communications – as noted above, the current draft provides in principle, in Article 7 for the means of communication to be set by the procuring entity.

**4. Whether the procurement law itself should require the use of electronic means in procurement (or certain types of procurement) rather than leaving this to the discretion of procuring entities.**

Provisions that require procuring entities to use electronic means for their procurement – or for certain types of procurement – might also be introduced in some cases in order to maximise the advantages from electronic procurement referred to above. Whether the use of electronic means should be compulsory in any cases depends again on balancing the potential advantages with the potential costs, including the possibility that some suppliers may be excluded and the possibility that some procuring entities may find it difficult to conduct certain procurement using electronic communications. One example of a situation in which the use of electronic means may be required is in the conduct of procurement auctions, which are discussed later in this chapter.

**5. What conditions, if any, should be attached to the use of electronic means to safeguard the objectives of the procurement law.**

An important question for all states is the question of the controls to be applied to use of electronic means in procurement. As mentioned above, controls may be considered appropriate to secure a number of objectives listed below. These controls are provided in traditional paper-based tendering, in particular, for the submission of the tender itself – where such concerns are most important. This is done by the requirement for a signed and sealed bid. For other aspects of the procurement process, there may also be rules – or at least administrative processes – to secure some of these objectives to an appropriate degree (for example, to keep confidential information contained in a pre-qualification questionnaire). It can be expected that the government will wish to apply the same standards and principles in electronic procedures as in paper-based procedures, ensuring that protection is as stringent, but no more stringent. This is the intended approach of the Working Group’s proposed recommendations under the UNCITRAL Model Law.

It is important in this respect that suppliers and the public have the same degree of confidence in electronic procedures as in paper-based procedures. Equally, however, it seems important that overregulation through, for example, excessively stringent technological requirements, should not deter participation and be counterproductive in promoting the objectives of the systems. For example, Bickerstaff has argued that, in the context of EU law, certain EU requirements are unnecessary (going beyond those applied in equivalent paper-based transactions) and discourage use of electronic means.<sup>7</sup>

Key objectives of controls, as we have mentioned, relate to:

- **Confidentiality**

Measures may be needed to ensure that the contents of documents cannot be accessed by unauthorised persons or by authorised persons prior to the designated time. This is particularly important for tenders themselves but may apply to other documents (for example, a tenderer’s information supplied on its qualifications). Whilst procurement laws include confidentiality requirements, sometimes they do not specify further how these are to be achieved, but almost invariably do so in the context of tendering, through the rules on the form of tenders (sealed bids).

- **Authenticity**

Measures may also be needed to ensure that any submission by a supplier is final and authoritative, cannot be repudiated and/or is traceable to the supplier or contractor submitting it. All three requirements are generally considered to be important for tenders. Some aspects may also be relevant again to other documents.

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<sup>7</sup> Bickerstaff, above.

- **Security** (or integrity)

Finally, it may be appropriate to require measures to ensure that documents cannot be tampered with, altered, added to or manipulated.

There is a tendency now seen in many procurement regimes to keep such controls in the procurement law itself at a very general level, both in order to prevent obsolescence and to prevent development of new technology from being stultified, and also to counteract a possible tendency to overregulation that may arise with new phenomena.

This is the approach likely to be proposed for the UNCITRAL Model Law during the current review, which will merely require adherence to these basic principles to an equivalent level as is provided for traditional tendering. In this respect, it is provided in Article 7(5) of the most recently published draft<sup>8</sup> that: "The procuring entity shall put in place appropriate measures to ensure the authenticity, integrity and confidentiality of information concerned".

Further guidance on how these objectives might be regulated and achieved will be found in the Guide to Enactment rather than in the Model Law itself.<sup>9</sup> The Guide will also suggest that the regulations complementing the basic procurement law itself should not also tie legal requirements to a given state of technical development – and thus will not, for example, recommend specific technical solutions (such as public key infrastructure with accredited digital certificate service providers). As is explained further below, the Guide will, however, suggest some more specific rules or measures that should be applied, such as the principle that at least two persons should by simultaneous action perform the opening of tenders and produce logs of their actions, and that data opened should remain accessible only to those persons.

A similar approach that focuses on objectives of the provisions rather than technical detail is found in the World Bank Guidelines. Thus, apart from general discretion exercised though the requirement for the Bank to be satisfied with the system, for electronic tenders and proposals, the Guidelines require that the Bank must be satisfied that the system is secure, maintains the confidentiality and authenticity of submissions, uses an electronic signature system or the equivalent to keep suppliers bound, and only allows bids or proposals to be opened with due simultaneous electronic authorisation of the Supplier and Borrower (para. 2.44). (Para. 2.45 then goes on to provide specifically for on-line opening of bids where appropriate). It is also provided that if bidding documents are distributed electronically, the electronic system shall be secure to avoid modifications to the bidding documents and shall not restrict the access of Bidders to the bidding documents. EU provisions ensuring the above objectives are slightly more detailed.<sup>10</sup> In addition, in the context of electronic procurement, there is a further consideration that has not generally been raised with paper-based communication, namely:

- **Ensuring reasonable access to public markets ("accessibility standards")**

As we have noted above, the use of electronic means may itself potentially limit access to markets. Electronic communication requirements that limit access can obviously prejudice various objectives of public procurement, including equal treatment as an independent objective and value for money (by limiting the available pool of suppliers). This may be dealt with to a large extent by allowing tenderers to use traditional paper-based means as an alternative in any procedure.

However, to the extent that procuring entities are allowed to make the use of electronic means compulsory for tenderers – which, as we have seen, is the case in some systems and is likely to be proposed under the Model Law – it is important to ensure that the particular electronic means used does not unreasonably inhibit access. Even when the use of electronic means is optional for suppliers, this may be an issue since it may be an

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<sup>8</sup> See A.CN/9/WG.1/WP.73/Add.1, available at [www.uncitral.org](http://www.uncitral.org).

<sup>9</sup> See Nicholas, above.

<sup>10</sup> See Bickerstaff above; and the companion Asia Link text *EU Public Procurement*, Ch. 8.

advantage for suppliers to use electronic tools in the process. As we have noted, access could be inhibited by, for example, requiring the use of systems or software requiring heavy investment or even by requiring the use of the latest versions of standard software which are not yet widely used on the market.

The UNCITRAL Model Law is likely to deal with this issue through a provision that the electronic means used should be "in common use by suppliers or contractors in the context of the particular procurement", as found in Article 7(4) of the latest published draft.<sup>11</sup> This provision will effectively replace the current general requirement in Article 9 prohibiting discrimination in the means of communication chosen: as already explained above, it was considered that this might be interpreted as precluding the use of any communication form not available to only some suppliers.

To some extent (especially when the use of electronic means is mandatory for suppliers), there is a tension between the objective of ensuring access to procurement and other objectives, such as ensuring authenticity, that may suggest the use of technological devices such as electronic signatures. In some jurisdictions where procuring entities may insist on electronic communications, the law has been cautious in imposing burdensome technical requirements, so that broad access to the market can be preserved. Thus, the U.S. government has been slow to require that contractors ensure any specific levels of confidentiality or authentication in electronic commerce with the federal government: General Accounting Office, "Status of Federal Public Key Infrastructure Activities at Major Federal Departments and Agencies," GAO Rep. No. GAO-04-157 (Jan.15, 2004). Guidance to federal agencies has generally recommended that agencies apply higher levels of security to more sensitive transactions. Thus, for example, although there is a rule potentially allowing the use of electronic signatures in U.S. federal procurement (FAR 2.101 (definitions), 48 C.F.R. § 2.101.), there is no general legal ruling or guidance requiring an electronic signature for formal tenders or in submissions using informal procedures.

The danger of unduly stringent regulation can be illustrated by looking at the position in Germany regarding electronic signatures. At one time, Germany was amongst a number of EU Member States that only accepted electronic tenders if they were signed with a qualified electronic signature. However, this is no longer required. Burgi has explained this EU concept of a qualified electronic signature as follows (footnotes omitted):

*"This signature is basically an advanced electronic signature but its creation is much more complex. It probably guarantees the highest security in electronic communications. Article 5, paragraph 1 of the EC directive 1999/93/EC on electronic signatures sets out the requirements for such a signature (see also section 2, no. 3 of the German Signature Act). Unlike advanced electronic signatures, it cannot be created with encryption software but only with the support of a secure-signature-creation device (Smart Card) and a qualified certificate. This Smart Card can only be gained after an exact process of identification by a certification service provider (Trust Centre) that verifies the affiliation between the signature and the owner of the signature. A qualified electronic signature that is added to a digital document allows a clear assignment between a certain signature and a certain person. It also contains an encrypted verification sum of the document's content (so called "Hash-Value") which makes it possible for the addressee to verify the document's integrity. The qualified electronic signature can therefore fulfil the main function of a personal signature (identity, authenticity, verification and evidence). It also has a warning function as it is not easy to create this signature".*

M. Burgi, "The Policy on Regulating Electronic Communications in Germany", Chapter 9 in S. Arrowsmith (ed.), Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement (2009; West).

Burgi has argued that "[t]he previous requirement for qualified electronic signature is the main reason why the public procurement process in Germany has not taken place entirely

<sup>11</sup> See A.CN/9/WG.1/WP.73/Add.1, available at [www.uncitral.org](http://www.uncitral.org).

with electronic means". As he notes, however, Article 42(5) of the Public Sector Directive 2004/18 still allows Member States to require qualified electronic signatures if they wish to do so.

## 7.2 Electronic auctions

### 7.2.1 Introduction

A new procurement technique that has been increasingly adopted in public procurement in recent years – following on from its adoption by the private sector – is the electronic auction (or electronic reverse auction). An electronic reverse auction is an on-line, real-time competition between, on the one hand, a buyer (or buyers) and, on the other, a number of suppliers who compete to win the contract by submitting successively improved tenders, with the benefit of information on other tenders provided during the competition. Auctions are considered to have a significant potential to improve value for money in procurement. Arrowsmith has summarised these benefits, the main ones of which appear to be as follows:<sup>12</sup>

- Benefits from inducing tenderers to make more competitive offers than they would have made in traditional sealed tendering. "Providing tenderers with information on competitors' tenders through the auction process and allowing them to adjust their own tenders accordingly can induce improvements to those elements for which adjustment is allowed in the auction – which... is almost invariably price".<sup>13</sup>
- Savings from better planning and drafting of specifications and award criteria.
- Benefits from limiting opportunities for corruption or discrimination. The fact that auction participants can adjust their tenders and see at any time whether they are the first-ranked tenderer can reduce the possibility for abuse by a procuring entity passing information to a favoured bidder since all bidders have the relevant information.<sup>14</sup>
- Benefits from the use of electronic means and the incentive that auctions give to this – thus better offers may result from the wider accessibility of the procedure, and electronic means may help reduce corruption by removing or limiting face to face contact.
- Benefits from reduced administrative costs and procurement timescales, as in Brazil, where a special speedy and simplified auction procedure has been adopted.<sup>15</sup>

On the other hand, it must be recognised that there are a number of dangers and costs associated with electronic auctions.<sup>16</sup>

First, it has sometimes been suggested that the focus in reverse auctions on achieving savings through price reductions may result in insufficient attention being given to non-

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<sup>12</sup> S. Arrowsmith, "Regulating Electronic Reverse Auctions under the UNCITRAL Model Law on Procurement", published in slightly amended form as Ch. 11 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

<sup>13</sup> Ibid. The economic literature has also emphasised that auctions can also, in theory, induce improved tenders since information on competitors' prices provides useful information on common costs that might give tenderers greater confidence to lower their own tenders: for a summary of the literature, see G.L. Albano, N. Dimitri, R. Pacini and G. Spagnolo, "Information and Competitive Tendering", Ch. 6 in Dimitri, Piga and Spagnolo, *Handbook of Procurement* (2006) (CUP). However, it is not clear how significant this is in practice in a typical procurement auction in view of the timescales involved.

<sup>14</sup> For a summary of the economic literature, see Y. Lengwiler and E. Wolfstetter, "Corruption in procurement auctions", Ch. 16 in Dimitri, Piga and Spagnolo, above, at pp. 413-416.

<sup>15</sup> See R. Pagliari Levy, "Electronic Auctions for the Procurement of Goods and Services in Brazil", Ch. 15 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West); Pagliari Levy and Correia, "Electronic Procurement of Goods and Services in Brazil under the Electronic Auction Procedure" 12 P.P.L.R. 21 (2003).

<sup>16</sup> This summary is again based on S. Arrowsmith, "Regulating Electronic Reverse Auctions under the UNCITRAL Model Law on Procurement", above.

price factors – either that relevant non-price concerns may not be sufficiently factored into the auction procedure (for example, the contract may be awarded on price alone when it would provide better value for money to use other award criteria in addition); or that auctions might be used in cases in which the limited importance of price means that an auction is not appropriate at all, again leading to the price being given undue weight. There is also concern that tenderers could be induced to lower prices excessively, leading to problems in contract performance.<sup>17</sup>

Another very important concern is that electronic reverse auctions can facilitate collusion between suppliers.<sup>18</sup> This is, first, because in a procedure involving an auction, it is difficult for tenderers to profit from breaking a cartel, as other cartel members can establish that a tender violates the cartel agreement and can themselves then submit better tenders. In addition, cartel members may also have more to gain from collusion than in traditional tendering: in traditional tendering, to win the contract, the cartel tender must beat any outside tender, creating a risk that it will be pitched lower than necessary to win the contract, but this is not the case in an auction. Finally, auctions can also make it easier for cartels to operate without prior communication, making it harder to monitor and enforce competition law (anti-trust) rules.

It is also relevant that suppliers have sometimes been hostile to the use of auctions.<sup>19</sup> This may be because of genuine concerns that auctions are not suitable in the particular context, or because of the lack of familiarity and relevant expertise (which could be addressed by, for example, supplier training or allowing paper or telephone tenderers alongside the electronic auction. However, it can also, of course, be expected that suppliers will oppose new procurement techniques that increase competition and reduce profit margins. Whatever the reason, auctions cannot be an effective tool if this hostility causes a sufficient number of suppliers to abstain from participation, and this needs to be taken into account.

We should finally note that potential problems with electronic reverse auctions may be affected by various political and other factors that tend to encourage the overuse of auctions. One problem is the fact that immediate savings from auctions may be more visible than the costs (for example, in terms of problems at the contract performance stage). Levy, for example, has argued that electronic auctions have been overused in Brazil: he suggests that the savings from their use in standard procurements and the government's drive towards auctions, as an anti-corruption tool, have led entities to use them for less suitable complex procurements also.<sup>20</sup> It has also been suggested that the pressure from providers of auctions services and software manufacturers may lead to an overuse.

These concerns need to be taken into account appropriately in designing regulatory rules to deal with electronic auctions in public procurement. As we will see in the next section below, these issues have been addressed through various rules and conditions proposed for inclusion in the UNCITRAL Model Law, in the context of new provisions on electronic auctions. States considering the use of electronic auctions may also wish to consider the adequacy of their competition laws to address the potential problems with collusion between suppliers.

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<sup>17</sup> See, for example, C. Yukins and D. Wallace, "UNCITRAL considers electronic reverse auctions, as comparative public procurement comes of age in the US" (2005) 14 *P.P.L.R.* 183 at pp. 198-199. A study on auctions in the UK, however, found no evidence of this in practice: see S. Arrowsmith and A. Eyo, "Electronic Auctions in the EC Procurement Directives and a Perspective from UK Law and Practice", Ch. 12 in *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

<sup>18</sup> The literature on this subject is usefully summarised in W.E. Kovacic, R.C. Marshall, L.M. Marx and M.E. Raiff, Ch. 15 in Dimitri, Piga and Spagnolo, note 6 above.

<sup>19</sup> As in Canada where, according to Yukins, the government has rejected them altogether because of industry opposition: C. Yukins, "Use and Regulation of Electronic Reverse Auctions in the United States", Ch. 14 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

<sup>20</sup> Levy, above.

## 7.2.2 Regulation of electronic auctions<sup>21</sup>

The phenomenon of electronic auctions has in recent years been accepted in many public procurement systems, and has been explicitly regulated in several systems. For example, there are detailed legal rules on conducting electronic auctions in the EU (and now in many of its Member States)<sup>22</sup> as well as in Brazil,<sup>23</sup> and the revised text of the WTO's Government Procurement Agreement also now makes explicit provision for electronic auctions.<sup>24</sup> A jurisdiction in which electronic auctions are used in practice but are not subject to any explicit regulation (and are merely governed by the general rules of the procurement system) is the United States.<sup>25</sup>

Before outlining the proposals under the UNCITRAL Model Law for regulating auctions, it is interesting to consider two systems, that of Brazil and the UK, which adopt rather different approaches.

Brazil provides for reverse auctions as a distinct method of procurement designed specifically for awards that use an auction. This method is available only for standardised goods and services. Standardised procurements are often of the kind suitable for auctions: in particular, price is generally a very important award criterion, meaning that there is often scope for the kind of price competition that can induce price savings through improved tenders, as discussed in section 3 above. Collusion may also be less likely in some of these markets because there is a significant number of suppliers.

The auction procedure provided in Brazil is also "open" in form – any interested supplier may tender – and it is provided that price is the only award criterion that may be used in the procedure. Very short time scales are provided for the completion of the procedure, including a special electronic appeals system. Such a procedure is simple and convenient. By confining the procedure to standardised purchases for which price alone is an appropriate award criterion this approach makes auctions available for the most suitable cases, but limits the potential for use in unsuitable situations and the danger of undue focus on the price that may occur with other purchases. On the other hand, it precludes the use of the procedure for certain other types of procurement in which savings could be made by using an auction in an appropriate way, eliminating any discretion for procuring entities to choose an auction in such cases.

At the opposite end of the spectrum is the approach of the United Kingdom, which has been implemented within the parameters of the EU procurement directives which apply in the United Kingdom.<sup>26</sup> The UK legislation allows entities to use auctions for almost all types of procurement (although there is an exception for procurement of intellectual services). An auction is not a separate procurement method, but an auction can be used

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<sup>21</sup> See further S. Arrowsmith, "Regulating Electronic Reverse Auctions under the UNCITRAL Model Law on Procurement", Ch. 11 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

<sup>22</sup> See Arrowsmith and Eyo, above (covering the EU rules and approach of the UK); Soudry, "Promoting Economy: Electronic Reverse Auctions under the EC Directives on Public Procurement" (2004) 4 *Journal of Public Procurement* 340; and the Asia Link companion text, *EU Public Procurement Law*, Ch. 8, section 8.4, and the other literature cited there. On the approach taken in France within the framework of the EU directives, see F. Lichere, "The Regulation of Electronic Reverse Auctions in France", Ch. 13 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

<sup>23</sup> Levy and Correia, above; Levy, above.

<sup>24</sup> See R. Anderson, "Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations" (2008) 17 *P.P.L.R.* 255; S. Arrowsmith, "The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions", Ch. 10 in S. Arrowsmith and R. D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (forthcoming 2011, CUP), which provides a detailed analysis of the GPA's provisions on auctions.

<sup>25</sup> See C. Yukins, "Use and Regulation of Electronic Reverse Auctions in the United States", Ch. 14 in S. Arrowsmith (ed.), *Public Procurement Regulation in the 21<sup>st</sup> Century: Reform of the UNCITRAL Model Law on Procurement* (2009; West).

<sup>26</sup> See Arrowsmith and Eyo, above.

as one phase when operating other procurement methods. These methods include the restricted tendering method which, as mentioned in Chapter 2, which allows (in any type of procurement) for a procedure in which the number of participants are limited to just some of the qualified suppliers interested in tendering – although, as explained in Chapter 2, these must be selected using objective and defined criteria from all suppliers who reply after an open advertisement.<sup>27</sup> This means, effectively, that auctions can always be limited to selected suppliers if the procuring entity chooses, rather than being open to all interested persons. Procurements are also subject to the usual rules on award criteria, including broad possibilities for using non-price criteria in the procedure. This effectively makes it possible to use auctions for non-standardised procurements in which non-price criteria are important. However, it does not preclude the use of price alone as an award criterion if the entity chooses. It also means that a procedure involving auctions is subject to the same minimum time scales as other procurements.

There has been some debate within the UNCITRAL Working Group on whether to prefer a simple or a flexible model or an approach tending more towards one of those two models. As we will see below, the current text is a compromise, providing for limits on the use of auctions which appear to confine their use to standardised products and services, but also offering considerable flexibility in the procedure, including the possibility of using non-price criteria and restricting the number of participating suppliers.

## **7.2.3 Proposals under the UNCITRAL Model Law**

### **7.2.3.1 Introduction**

The UNCITRAL Model Law currently does not provide for the possibility of using electronic auctions in public procurement. When the Model Law was first drafted, auctions in general were rare in public procurement and were non-existent in electronic form. The possibility of auctions of any kind was deliberately omitted from the Model Law at that time, in particular because of the danger of collusion between suppliers.<sup>28</sup> However, as the current UNCITRAL Working Group has recognised, the risk of collusion can be mitigated to a degree when auctions take an electronic form, by providing for the anonymity of tenderers. In view of this, and of the potential benefits of electronic auctions, the Working Group is intending to propose that a provision be made in the Model Law to allow the use of auctions, and to regulate their use.

The basic approach of the draft is to provide that electronic auctions should be available either as a stand-alone method of procurement OR a phase in conducting one of the existing UNCITRAL procurement methods (usually tendering) – with the choice of approach in this regard being left to enacting states.

### **7.2.3.2 Conditions for using auctions**

The current published draft<sup>29</sup> proposes (in Article 28) that auctions should be available only under limited conditions (in addition to any conditions that apply generally to the procurement method chosen by the procuring entity). These conditions are:

*"(a) Where it is feasible for the procuring entity to formulate a detailed and precise description of the subject matter of the procurement;*

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<sup>27</sup> See further, the Asia Link companion text, *EU Public Procurement Law*, Ch. 6.

<sup>28</sup> See the Report of Working Group I (Procurement) on the work of its sixth session (Vienna, 30 August-3 September 2004), A/CN.9/568, para. 48, available on the UNCITRAL website referred to in note 1 above.

<sup>29</sup> See A.CN/9/WG.1/WP.73/Add.3 [www.uncitral.org](http://www.uncitral.org).

*(b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; and*

*(c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.”*

The first and third conditions are apparently intended, inter alia, to restrict the use of auctions primarily to “standardised, simple and generally available goods, commodities, standard IT equipment and primary building products”<sup>30</sup> (which, as explained above, are widely considered the most suitable purchases for auctions because of the importance of price as an award criterion). However, they do so only in a rather indirect way.

The first criterion, concerning the possibility of a detailed and precise specification, is justified by the need to ensure that all tenderers are submitting tenders to a common specification, so that the tenders can be compared directly, and the winner determined directly, by the auction process. However, it does not limit auctions to standardised procurements per se since many more complex procurements also meet this condition.

The third condition, for “quantifiable” criteria, seems to require the use of criteria that can be applied without any subjective input<sup>31</sup> e.g. in assessing the monetary value to be assigned to the quality features of a product. If this is the case, the provision will place substantial limits on the procurements for which auctions are available, since it will preclude most kinds of non-price criteria – it will preclude criteria such as comfort, aesthetic merit, or environmental impact (noise or pollution levels, for example), merely allowing non-price criteria which can be both quantified and identified on an auditable basis, such as running and maintenance costs.

As an alternative to this indirect approach towards limiting auctions, states may prefer to consider more direct methods such as limiting auctions to standardised products and/or services only, and/or specifically listing products or services that may (or may not) be the subject of auctions.

The third condition, whether there is a competitive market to ensure competition, is intended, in particular, to address the risk of collusion,<sup>32</sup> which we have seen above, is a particular danger in auctions and was the reason for omitting an auction procedure from the original Model Law. In addition: “It also seems to require entities to consider whether firms will actually be willing actually to participate in an auction (an entity that is unsure may wish to state in the notice merely that an auction may be used). It also possibly embraces the need to consider whether there is significant scope for price competition and a sufficient number of bidders to prompt submission of competitive bids”.<sup>33</sup>

### **7.2.3.3 The proposed procedure for auctions**

So far as the procedure for conducting auctions is concerned, as we have noted above, the revised draft of the UNCITRAL Model Law provides for enacting states either to:

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<sup>30</sup> UNCITRAL Secretariat, Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, electronic reverse auctions and abnormally low tenders (14th session, 8-12 September 2008), A/CN.9/WG.I/WP, para. 16.

<sup>31</sup> This can be deduced from the fact that it has been stated that this condition precludes use of a points system for converting criteria to monetary equivalents. The author has also been informed by Caroline Nicholas of the UNCITRAL Secretariat in a conversation and written comments of 4 September 2008 that this is the intended meaning.

<sup>32</sup> A/CN.9/WG.I/WP.61, above, para. 16 at 14.

<sup>33</sup> S. Arrowsmith, “Regulating Electronic Reverse Auctions under the UNCITRAL Model Law on Procurement”, p. 386.

1. Incorporate an auction phase into the normal procurement methods of the Model Law (thus allowing, as with the approach in the United Kingdom, for the possibility of using auctions either in open forms of tendering or more selective forms) or
2. Include auctions as a stand-alone procurement method, as in Brazil.

However, whichever approach is chosen, the procedure will be subject to a body of core rules on auctions that are set out in draft Articles 47-51.<sup>34</sup>

These draft rules effectively provide, in particular, that electronic auctions must be conducted according to a "sausage-machine" approach – an approach also adopted in, for example, the EU procurement directives.<sup>35</sup> This requires that the best tender is identified automatically at the end of the auction process, and that tenderers must know at all times during the auction whether or not their own tender is the best tender.<sup>36</sup> This approach can maximize some of the key benefits of an auction, which derive from the fact that information on other tenders can induce a tenderer to put forward its best offer. This approach also enhances transparency, both by limiting the possibility of giving an advantage of information to a favoured bidder and requiring the use of a pre-set mathematical formula for evaluation that reduces discretion by procuring officers.

As we have noted above, the draft rules also provide for the use of both price and non-price criteria (see Article 50(1) of the draft). However, the discretion of procuring entities in choosing their own criteria for the award procedure is significantly limited by the third condition for using auctions in the first place, namely that the award criteria are quantifiable and expressed in monetary terms – which, as we have seen, makes the proposed auction procedure unsuitable for many types of non-standardised procurement. In general, in practice, non-price criteria will be submitted and evaluated outside the auction phase itself, with only the price being subject to revision in the auction – although the UNCITRAL draft provisions do leave open the possibility for running auctions where procuring entities allow non-price elements, as well as price, to be changed by bids during the auction.

Various rules are included to guard against some of the potential problems referred to above, in particular the risk of collusion, including that the identity of bidders must not be revealed during the auction (draft Article 50(3)) and there shall be no communication between bidders during the auction (Article 50(2)(d)).

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<sup>34</sup> see A/CN.9/WG.1/WP.73/Add.6 [www.uncitral.org/pdf/english/workinggroups/wg\\_1/73add3E.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_1/73add3E.pdf).

<sup>35</sup> On this, see the literature cited in note 22 above.

<sup>36</sup> Article 50(2) of the current draft provides that (c) "Each bidder must receive, instantaneously and on a continuous basis during the auction, sufficient information allowing it to determine the standing of its bid vis-à-vis other bids". However, (according to information obtained from the UNCITRAL secretariat) this may be changed to clarify that bidders only receive information sufficient to know whether theirs is the best tender rather than to know the ranking of their tender against all others, since the latter information can facilitate collusion: on this point, see Arrowsmith and Eyo, above.

# Chapter 8: Remedies and Enforcement

## 8.1 Introduction

Effective enforcement is of utmost importance for the proper functioning of a field of law and one must be highly aware of this in the field of public procurement.<sup>1</sup> However, the understanding of “effectiveness” differs considerably in the various procurement systems. The EU enforcement system in the field of public procurement is highly developed and will be used as the basis for the introduction of the concept of effectiveness and the challenges linked to enforcement of public procurement rules.<sup>2</sup>

The European legislator has made extra efforts in order to ensure effective enforcement of the EU public procurement rules at national level. The European Commission showed early awareness of the need of fast and efficient enforcement of the public procurement rules and this led to the early adoption of the so-called Remedies Directives, namely Directive 89/665 and Directive 92/13, applicable to the classic sector and the utilities sector respectively. The Remedies Directives were recently amended and developed by Remedies Directive 2007/66. The Remedies Directives allow a wide degree of discretion for the Member States and there are substantial differences between the enforcement regimes at national level in the EU.

The Remedies Directives give a number of indications of what the European legislator understands by effective enforcement. It follows from the initial recitals in the Preamble of Remedies Directive 89/665 that the Directive has been issued in order to ensure that the substantial public procurement rules produce tangible effects. It is specified that this presupposes that “effective and rapid remedies must be available in the case of infringements of Community law in the field of procurement law or national rules implementing that law” and that it is “necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully”. The Member States were obliged by the Remedies Directives to ensure that interim measures could be granted in the review procedures, that unlawful decisions could be set aside and that persons harmed by an infringement of the public procurement rules could be awarded damages. It follows from the above that the remedies must have effect and be quick in order to be considered effective. Furthermore, it has to be ensured in the EU system that 3 essential remedies are in place at national level: interim measures, setting aside and damages. These remedies and their relative strength are essential for the level of effectiveness in a given enforcement system.

The EU enforcement system outlined above had several weaknesses and this recently led to a revision by Remedies Directive 2007/66. One of these weaknesses was the absence of a minimum standstill period allowing an effective remedy between the decision to award a contract and the conclusion of the contract in question. As will be further outlined in section 2.3 below it has been almost impossible to force the termination of a concluded public contract and sometimes contracting authorities have rushed for the signature of the contract in order to make irreversible the consequences of a disputed award decision. Therefore Remedies Directive 2007/66 introduced a minimum standstill period (where the precise duration of the period takes into account different means of communicating the award information). The Directive only provides for minimum standstill periods and the

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<sup>1</sup> See the Preamble to the EU Remedies Directives where it is spelled out that “effective and rapid remedies must be available in the case of infringements of Community law in the field of procurement law or national rules implementing that law” and the WTO instruments (Article XX.2 of the GPA and Article XVIII of the revised GPA), the United Nations Convention Against Corruption Article 9(1)(d) and the APEC Non-Binding Principles on Government Procurement (Annex 3, at 4.1.).

<sup>2</sup> A couple of works with an in-depth analysis of the issue of enforcement in the field of EU public procurement law are S. Arrowsmith, *The Law of Public and Utilities Procurement*, (2<sup>nd</sup> ed. 2005), chapter 21 where the reader will find elaborate references to other works in the field and P. Trepte, *Public Procurement in the EU (A Practitioner's Guide)*, chapter 9,(2<sup>nd</sup> ed., 2007)

Member States are free to introduce or maintain periods which exceed those minimum periods.

Another weakness in the EU enforcement system - which is a common weakness in enforcement regimes in general - concerned the ineffectiveness of remedies against concluded public contracts and in particular the lack of effective remedies against illegal direct award.<sup>3</sup> The Court of Justice of the European Union has referred to direct illegal awards as the most serious breach of the public procurement rules. The traditional and common perception in legal theory was clearly that there is no duty based on EU law to terminate a public contract in breach of the EU public procurement rules, regardless of the number of breaches or their character. This traditional perception has been commonly followed in European public procurement practice, and in most Member States a breach of the EU public procurement rules has never led to a termination of the contract. However, this legal situation has now changed fundamentally. Firstly, the Court of Justice on July 18, 2007 established in *Commission v Germany*,<sup>4</sup> that a breach of the EU public procurement rules in the concrete case led to a duty to terminate the concluded contract in question. Secondly, Remedies Directive 2007/66 introduced the new remedy of ineffectiveness.

Ineffectiveness is in particular a remedy against direct illegal award of contracts, cf. recital 13 of the Preamble of Remedies Directive 2007/66. It follows from Article 2d(2) that the consequences of a contract being considered ineffective shall be provided for by national law. Nevertheless, it follows from the same provision that national law may provide for the retroactive cancellation of all contractual obligations or limit them to obligations which still have to be performed. Furthermore, recital 13 makes clear that ineffectiveness essentially implies that "the rights and obligations of the parties under the contract should cease to be enforced and performed".

The presence of the above-mentioned remedies is an important element in the creation of an effective system of remedies. Several other elements are relevant. It is also very important that the law regarding the substantive provisions of public procurement and remedies is clear and precise and that the balancing of interests is fair in the enforcement system. It is important not only to take into consideration the interests of the tenderers but also of the contracting entities such as their interest in avoiding delay in contracting. It is also important to ensure that the enforcement system is organized in a way that it cannot be abused by the tenderers. Also the direct costs linked to making a lawsuit or a complaint are extremely important and vary considerably. As an example the costs are very low in Denmark where the complaints fee for bringing a case before the Complaints Board for Public Procurement is only about 500€ and if the complainant loses the case it cannot be obliged to pay the costs of the contracting entity. The situation in United Kingdom is fundamentally different as there is no complaints board, you have to bring the case before the ordinary courts and the legal costs are extremely high. Pre-trial advice from a solicitor would cost at least £10,000 if the case is relatively complex. Interim measures cost between £50,000 and £100,000, whereas a full case tried with both solicitors and barristers could cost up to £3-4 million.<sup>5</sup> The high costs of legal proceedings appear to be one of the main reasons for the fact that the UK has little litigation and case law in comparison with other Member States of the EU. Other reasons appear to be a general perception on the part of suppliers that procedures are fair combined with an urge to avoid a culture of litigation.<sup>6</sup>

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<sup>3</sup> See S. Treumer, "Towards an Obligation to Terminate Contracts Concluded in Breach of the EC Public Procurement Rules: the End of the Status of Concluded Public Contracts as Sacred Cows", (2007) 16 P.P.L.R. 371.

<sup>4</sup> Case C-503/04, *Commission v Germany* [2007] ECR I-6153. A detailed analysis of the case can be found in S. Treumer, *op.cit.*

<sup>5</sup> See Despina Pachnou, "Bidders' Use of Mechanisms to Enforce EC Public Procurement Law" (2005) 14 P.P.L.R. 256. As this data is 5 years old the costs are likely to have increased.

<sup>6</sup> Cf. Despina Pachnou, *op.cit.* and S. Arrowsmith, "Implementation of competitive dialogue in the UK", paper submitted to the conference of Public Procurement: Global Revolution V, Copenhagen 9-10 September 2010, p. 3.

Also the speed of the complaints boards or national courts handling the complaints is of utmost importance for effectiveness in practice. The differences at national level are outspoken. Complaints Boards tend to be much faster than ordinary courts at least in the EU system. A fully tried case before a Complaints Board would usually take a few months whereas cases before national courts typically take years. The facts of a recent case pending before the Austrian courts illustrate this. The tender procedure took place in the middle of 1999 and it was or is still pending at the end of 2010.<sup>7</sup>

It is also important how, if at all the enforcement regime in question relates to the fear of blacklisting. Tenderers think twice in practice before they challenge infringements of public procurement rules as they fear retaliation in the form of blacklisting, that is to say that the contracting authority will disregard the tenderer in question deliberately and not based on objective grounds in the actual and future tender procedures. It is often very difficult to assess whether this fear is justified or not, but clearly blacklisting does happen in practice. The phenomenon can be obvious - this appears to be the case in, for instance, Greece.<sup>8</sup> The fear of blacklisting can also be observed in the United Kingdom even though it is uncertain whether this fear is justified or not. One way to remedy the fear of blacklisting could be to broaden the scope of legal standing. In most countries the complainant needs to document an individual interest in the case but in Denmark a broad range of professional organizations have been granted a right to file a complaint on behalf of their members. The purpose of this modification to the usual approach is exactly to remedy the fear of blacklisting and the organizations have used their right to complain several times.

## 8.2 Remedies

The purpose of this section is to present and comment on a number of selected remedies and elements of enforcement systems in the field of public procurement. The analysis is primarily based on the UNCITRAL Model Law and the EU enforcement regime.

### 8.2.1 Interim measures

Access to interim measures is crucial in order to ensure an efficient enforcement of the public procurement rules especially since it is very difficult to force the termination of a concluded public contract.

The UNCITRAL Model Law contains a specific provision on interim measures. Article 56(1) suggests that a timely submission of a complaint should lead to the suspension of the tender proceedings for a period of 7 days<sup>9</sup> subject to certain conditions. The complaint should not be frivolous and the supplier or contractor must demonstrate that it will suffer irreparable injury in the absence of a suspension, that it is probable that the complaint will succeed and that the granting of the suspension would not cause disproportionate harm to the procuring entity or to the other suppliers or contractors.<sup>10</sup>

The last three conditions are very similar to the conditions for granting interim measures in cases before the Court of Justice of the European Union. It follows from Article 279 of TFEU (formerly Article 243 of the EC Treaty) that the Court of Justice has the general power to grant interim measures in a case before it. The Rules of Procedure of the Court of Justice spells out the conditions for the grant of interim relief and these conditions have

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<sup>7</sup> C-314/09, *Stadt Graz v Strabag and others*.

<sup>8</sup> See Despina Pachnou, *op.cit* p.91.

<sup>9</sup> The suspension period may be prolonged up to 30 days, cf. Article 56(3).

<sup>10</sup> Article 56(4) also outlines that suspension shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed.

been developed in the case law of the Court. The first condition is that the party applying for interim measures establishes that he has a prima facie case. The second condition is urgency which usually<sup>11</sup> implies that the applicant has to show that it will suffer serious and irreparable harm if interim measures are not granted. It appears that the condition of urgency is satisfied whenever there is a threat of a breach of EU law and this constitutes a serious breach. The breach must also be "irreparable" which in the procurement case law appears to have been applied in the sense of "irreversible".<sup>12</sup> The Court of Justice has emphasized in the few procurement cases the need to prevent a breach and to avoid presenting the Court with a *fait accompli* and it has even granted interim measures where a contract had been concluded.<sup>13</sup> Finally, there is a balance of interest test. Interim measures will be granted if the two first conditions are fulfilled unless the contracting authority can show that it would also suffer serious and irreparable harm.

There have been relatively few cases concerning interim measures before the Court of Justice in the field of public procurement.<sup>14</sup> In this respect there is a clear difference from the pattern in national enforcement of EU public procurement law. It is very common to apply for interim measures in national case law even though it is very difficult to obtain these at least in some Member States. Interim measures at national level are regulated in the Remedies Directives and it follows from Article 2(1)(a) that Member States shall ensure that interim measures can be granted in the review procedures. Member States may provide that the body responsible for review procedures may take into account the likely consequences of interim measures for all interests that can be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits, cf. Article 2(5) of the Remedies Directives. The criteria suggested in this Article are heavily inspired by the case law of the Court of Justice on interim measures. However, it is worth to note that Article 2(5) does not establish the criteria for the assessment of whether interim measures should be granted or not. As a consequence the national legislator has a wide legislative discretion and therefore the criteria and procedures established in national legislation on interim measures vary to a considerable extent. It is typically difficult to obtain interim relief at national level<sup>15</sup> and it has been so difficult in Denmark that it has been questioned whether the requirements following from the principle of effectiveness have been met.<sup>16</sup>

Remedies Directive 2007/66 introduced new rules on automatic suspension for review in the standstill period. It also introduced a minimum standstill period, the precise duration of which depends on the means used to communicate the award information. The background for the introduction of the new rules on automatic suspension is spelled out in recital 12: seeking review shortly before the end of the minimum standstill period should not have the effect of depriving the body responsible for review procedures of the minimum time needed to act, in particular to extend the standstill period for the conclusion of the contract. It is stated in Article 2(4) of the Remedies Directives that review procedures need not automatically have an automatic suspensive effect on the

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<sup>11</sup> This is the usual approach even though the Court of Justice does not always assess explicitly or consistently the condition this way, cf. P. Trepte, *Public Procurement in the EU (A Practitioner's Guide)*, chapter 9, (2<sup>nd</sup> ed., 2007), p. 586.

<sup>12</sup> Cf. P. Trepte, *op.cit.*, p. 587.

<sup>13</sup> Cf. C-194/88 R, *Commission v Italy (Lottomatica)* Order of 20 July 1988, [1988] ECR 4547; order of 27 September 1988, [1988] ECR 5647

<sup>14</sup> See C-45/87 R, *Commission v Ireland (Dundalk)* Order of 16 February 1987, [1987] ECR 783; Order of 13 March 1987, [1987] ECR 1369, C-194/88 R, *Commission v Italy (Lottomatica)* Order of 20 July 1988, [1988] ECR 4547; order of 27 September 1988, [1988] ECR 5647 and C-87/94 R, *Commission v Belgium (Walloon Buses)* [1994] ECR I -1395. The Commission had also applied for interim measures in C-243/89, *Commission v Denmark (Great Belt Bridge)* [1993] ECR I-3353 but as Denmark acknowledged the breaches the Commission withdrew the application.

<sup>15</sup> A. Brown, "Effectiveness of Remedies at National Level in the Field of Public Procurement", *Public Procurement Law Review* 1998 p. 89.

<sup>16</sup> See section 3 in the article of S. Treumer, *National håndhævelse af EU's udbudsregler - er håndhævelsessystemet effektivt på EU-udbudsområdet?* p.99 in J. Fejø and S. Treumer (eds.), *EU's Udbudsregler - implementering og håndhævelse i Norden (The EC Public Procurement Rules-Implementation and Enforcement in the Nordic Countries)*, 2006.

contract award procedures to which they are related except where provided for in Article 2(3) and Article 1(5) of the Directive. It follows from Article 2(3) that Member States shall ensure that the contracting authority cannot conclude the contract before the review body has decided on the application either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5). It furthermore follows from Article 1(5) of the Remedies Directives that Member States may require that the person concerned first seeks review within the contracting authority. In that case Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

The Model law does not contain provisions on a standstill period. However, it is envisaged that the revised version of the Model Law will introduce a standstill period to ensure that there is a sufficient window for a review procedure.<sup>17</sup>

## 8.2.2 Damages

The purpose of an application for review is very frequently to establish a breach of the public procurement rules in order to set aside the illegal decisions of the contracting entity, allowing the complainant to be taken into consideration for the award of the contract. However, as the outcome of a renewed or continued competition for the contract is very uncertain many tenderers will take an interest in the remedy of damages which is a remedy typically included in enforcement systems in the field of public procurement.

Tenderers will normally assess carefully the possible costs and benefits of a claim for damages and as mentioned in the introduction many tenderers have an outspoken fear that an application for review could lead to blacklisting. The risk and fear of becoming blacklisted increases when the issue of damages is considered and a high percentage of tenderers will not consider it worth the effort to initiate an action, or at least not when there is a realistic chance only to recover the bid costs. The interest of tenderers increases markedly if you can inform them that they might be able to recover the loss of profit in principle. However, the right to damages for the loss of profit is not a part of all public procurement law systems.

The relevant provision in the UNCITRAL Model Law is Article 54(3)(f) which outlines two options. The first option is payment of compensation for "any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity". This excludes compensation for loss of profit.<sup>18</sup> The second option is "loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings". This implies that loss of profit might be included in appropriate cases.<sup>19</sup>

Article XX of the WTO GPA specifies that challenge procedures shall provide for corrective action or compensation for the loss or damage suffered, which may be limited to costs for tender preparation or protest. Article XVIII of the revised WTO GPA outlines that "Each Party shall adopt or maintain procedures that provide for corrective action or compensation for the loss or damage suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both. These provisions seem to allow States a wide margin of discretion and do not ensure coverage of loss of profit at national level.

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<sup>17</sup> See the report of the working group A/CN.9/664, paras 14 to 15 available on the website of UNCITRAL.

<sup>18</sup> The Guide to Enactment of the UNCITRAL Model Law specifies that those costs do not include profit lost because of non-acceptance of a tender, proposal, offer or quotation of the supplier or contractor submitting the complaints, cf. para 10 of the remarks on Article 54.

<sup>19</sup> The Guide to Enactment of the UNCITRAL Model Law, op. cit.

The state of law in the EU public procurement regime is more advanced. In the middle of the 1990s it was rightly stated<sup>20</sup> that a striking feature of the case law in the field of enforcement of the public procurement rules was the almost<sup>21</sup> total absence of successful actions for damages. This position has changed as now there are several examples in various Member States, including cases where damages for loss of profit have been granted.<sup>22</sup>

It follows from the Remedies Directives that the review bodies must be able to award damages to persons injured by the infringement of the rules. However, the details of the issues concerning damages are not regulated in detail and their formulation does not contribute much to the creation of a clear legal situation and even generates doubt on some points. It is not even clear from these directives whether they require the award of lost profit or not, which is of crucial importance for the efficiency of the remedy of damages. A high percentage of aggrieved tenderers do not consider it worth the effort to initiate an action seeking to recover the costs of preparing a bid or participation in the procurement procedure. However, it is normally presumed in both theory and frequently in the case law of the Member States that tenderers under certain conditions can require the award of lost profit for breach of the EU public procurement rules although this has been unclear from the outset.

The national trend in national implementation of the Remedies Directives with regard to damages appears to be towards implementation provisions that are limited and very superficial. The sources of law on damages for breach of the EU public procurement rules are limited and often unclear both at EU level and national level, which clearly does not promote efficient enforcement of the EU public procurement rules.<sup>23</sup> The primary source of law in most instances is national case law on damages and sometimes from a field other than public procurement. The recent revision of the Remedies Directives did not address the general need for clarification regarding damages.

It is not clear from the wording of the Remedies Directives whether damages are available for all violations of EU public procurement rules or whether other conditions apply. Article 2(1)(c) of the Remedies Directives indicates only that the Member States are obliged to award damages to persons harmed by an infringement. However, it is clear from the ruling of the European Court of Justice in *Commission v Portugal*,<sup>24</sup> that the Remedies Directive is violated by making damages conditional on proof of intentional or negligent breach. The recent case C-314/09, *Stadt Graz*, is important as it seems to follow from this case that any breach in principle is sufficient ground for damages.

### 8.2.3 Setting aside concluded contracts

An apparent weakness in enforcement regimes in the field of public procurement has clearly been the lack of effective remedies in situations where the contract has been concluded.

The UNCITRAL Model Law addresses 'setting aside' in Article 54(3)(d) and (e) where it is outlined that you can annul an unlawful act or decision of the procuring entity, or revise

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<sup>20</sup> See A. Brown, "Effectiveness of Remedies at National Level in the field of Public Procurement", (1998) 7 P.P.L.R. 89 at p.93. This article is of particular interest as some of the information in the article of Adrian Brown was derived from a study, which his employer Herbert Smith law firm co-ordinated for the European Commission in 1996, involving a comparative assessment of procurement remedies in all of the Member States (15 at that time).

<sup>21</sup> A. Brown, *op.cit.* mentions that an isolated example occurred after the ruling in the Storebaelt case (C-243/89, *Commission v. Denmark*, [1993] E.C.R. I-3353) where a number of unsuccessful tenderers were awarded damages to cover wasted bid costs, rather than loss of potential profit.

<sup>22</sup> See S. Treumer, "Damages for Breach of the EC Public Procurement Rules-Changes in European Regulation and Practice" (2006) P.P.L.R. 159.

<sup>23</sup> See for further details on this S. Treumer, *op.cit.* (section 2 of the article).

<sup>24</sup> Case C-275/03, *Commission v Portugal*, ECJ judgment of 14 October 2004 (unpublished)

an unlawful decision, or substitute its decision for any act or decision other than those bringing the procurement contract into force. It follows that the Model Law does not suggest the setting aside of concluded contracts. The Guide to Enactment of the UNCITRAL Model Law explains the background for this in further detail:<sup>25</sup> "There may be cases in which it would be appropriate for a procurement contract that has entered into force to be annulled. This might be the case, for example, where a contract was awarded to a particular supplier or contractor as a result of fraud. However, as annulment of procurement contracts may be particularly disruptive of the procurement process and might not be in the public interest, it has not been provided for in the Model Law itself. Nevertheless, the lack of provisions on annulment in the Model Law does not preclude the availability of annulment under other bodies of law. Instances in which annulment would be appropriate are likely to be adequately dealt with by the applicable contract, administrative or criminal law".

As mentioned in section 1 of this chapter the traditional and common perception in legal theory and practice in the field of EU public procurement law was clearly that there was no duty based on EU law to terminate a public contract in breach of the public procurement rules, regardless of the number of breaches or their character. This legal situation has now changed fundamentally as the Court of Justice has established that a breach of the EU public procurement rules can lead to a duty to terminate a concluded contract, and Remedies Directive 2007/66 introduced the remedy of ineffectiveness. As these developments are fundamental and could be a source of inspiration in other enforcement regimes; these will be commented on in further detail below.

The ruling of the Court of Justice in *Commission v Germany*<sup>26</sup> is an example of enforcement of the EU public procurement rules at supranational level. Enforcement of the EU public procurement rules also takes place at supranational level as the European Commission supervises the compliance of Member States with their obligations under EU law. It follows from Article 258 of the Treaty on the Functioning of the European Union (formerly 226 of the EC Treaty) that the Commission can bring a Member State before the Court of Justice of the European Union (hereinafter the Court of Justice) if it considers that it has failed to fulfil an obligation under the Treaty including compliance with specific Directives. The Commission has used this procedure in several cases in the field of public procurement.

If the Court of Justice finds that a Member State has failed to fulfil an obligation under the Treaty, the State shall take the necessary measures to comply with the judgment of the Court of Justice, cf. Article 260 TFEU. If the Commission considers that the Member State concerned has not taken such measures it can, after following certain procedural steps, bring the case before the Court of Justice and the Court may impose a lump sum and/or penalty payment on the Member State, cf. Article 260 TFEU (formerly Article 228 of the EC Treaty).

This procedure has not been used on many occasions but was applied in C-503/04, *Commission v Germany*, with far-reaching implications. This case was a follow up to the judgment in the joint cases C-20/01 and C-28/01, *Commission v. Germany*.<sup>27</sup> It concerned 30 years service contracts awarded without notice and the view of the Commission was that the contracts had to be terminated which had not been done originally. The argument of the Commission was that the duty to terminate the contracts followed from the Court's establishment of the breach and Article 228 EC (now Article 260 TFEU). From the latter provision, it follows that a Member State is required "to take the necessary measures to comply with the judgment".

In order to motivate Germany to comply with its obligation the Commission requested the Court to impose a daily payment of €126,720 with regard to one of the contracts and

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<sup>25</sup> See para 12.

<sup>26</sup> Case C-503/04, *Commission v Germany* [2007] ECR I-6153

<sup>27</sup> Joined Cases C-20/01 and C-28/01, *Commission v Germany* [2003] ECR I-3609

€31,680 with regard to the other contract until compliance. Not surprisingly Germany found that the local authorities in question terminated the contracts. Interestingly enough it took more than half a year from the time the action in C-503/04 was brought until the contract that potentially could cost €126,720 in daily payments was terminated.<sup>28</sup> Germany then thought the matter had been settled but the Commission insisted that the case continued before the Court of Justice. Because of the terminations of the German contracts before the judgment, the Court only had to consider the possible breach of EC law with regard to one of the contracts, cf. para 20 of the judgment.<sup>29</sup> This resulted in the landmark judgement of 18 July 2007, C-503/04, *Commission v Germany*, where the Court established that a breach of the EC public procurement rules in the actual case led to a duty to terminate the public contract in question.

An important issue to consider is whether there is a duty to terminate the contract as a main rule. It is striking that the Court of Justice in C-503/04, *Commission v Germany*, does not waste many words on the justification for imposition of a duty to terminate the contract and that it does not come up with many references to the particularities of the breach of the public procurement rules in the case even though they are special. Nevertheless, the Court of Justice stresses that without termination of the contract in question the failure to fulfil obligations would continue for decades, cf. para 29, as it was a 30 years service contract.

One possibility would be to interpret the judgment as implying that as a main rule the contract has to be terminated once the Court has established under Article 258 TFEU that the public procurement rules have been violated. However, it is submitted that this would not be a correct interpretation of the judgment.<sup>30</sup> It is submitted instead that the judgment must be interpreted more narrowly in the light of the particularities of the case in question. The case concerned what is considered the most serious violation of the public procurement rules by the Court, cf. *Stadt Halle*,<sup>31</sup> at para 37, as the contract was awarded without notice and therefore in breach of the EC public procurement rules. As it has been pointed out<sup>32</sup> it would be a paradox if in such a situation there would not be an obligation to terminate the contract. This would have led to a lacuna in the legal protection<sup>33</sup> as competitors could have forgotten about the contract as per se it would be "protected" due to it having been concluded, and the possibility of obtaining damages where there has been no tender is almost impossible. This has to be borne in mind when reading the judgment together with the fact that the disputed contract was a particularly long-running contract.

The laconic formulations of the Court seem to indicate that a duty to terminate contracts is not only limited to situations where there has been no tender and thus there is an obligation with a broader scope. The Court would surely have taken care to specify otherwise if the opposite had been intended. It is submitted that it will take a careful examination of the concrete circumstances in each individual case to establish whether there is an obligation to terminate a contract concluded in breach of the EC public

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<sup>28</sup> The action was brought on 7 December 2004 and the city of Braunschweig and BKB agreed to cancel the contract on 4-5 July 2005, cf. M. Niestedt, "Penalties Despite Compliance? A Note on Case C-503/04, *Commission v Germany*", P. P.L.R. (2005) 14, NA 164 (NA 165). The slow termination of this contract was eventually decisive for the admissibility of the action.

<sup>29</sup> Germany, supported by The Netherlands argued that the action had become void of purpose and thereby inadmissible because of the termination of the contracts prior to the judgment, cf. para 17 of the judgment. This argument was set aside as the contract concluded by the City of Brunswick had not been terminated on 1 June 2004 which was the date of expiry of the period prescribed in the reasoned opinion issued under Article 228 EC.

<sup>30</sup> It can be added that it would also lead to an undesirable legal situation as it would not take into account the need for basic legal certainty with regard to contracts concluded on the basis of the EC public procurement rules.

<sup>31</sup> Case C-26/03 *Stadt Halle* and *RPL Recyclingpark Lochau v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-1

<sup>32</sup> See S. Treumer, "The Discretionary Powers of Contracting Entities – Towards a Flexible Approach in the Recent Case Law of the Court of Justice?" (2006) 15 P.P.L.R. 71 at p. 81.

<sup>33</sup> Compare with L.Hummelshøj and H.Bang Schmidt, "EU-udbud: Retsvirkningen af at undlade udbud" (EC public procurement: The legal effect of lack of tenders) (2006) *Ugeskrift for Retsvæsen* B 80. These authors also pointed out the lacuna but argued in favour of legislative action on the issue in Denmark and not that there was a Treaty based obligation to terminate contracts concluded in breach of the EC public procurement rules.

procurement rules and that it will not become the prevailing rule that a breach leads to such an obligation.

However, enforcement of the public procurement rules mainly takes place at national level in the EU system and it is therefore important to also consider the subsequent introduction of the new remedy of ineffectiveness by Remedies Directive 2007/66. It follows from Article 2d(2) that the consequences of a contract being considered ineffective shall be provided for by national law. Nevertheless, it follows from the same provision that national law may provide for the retroactive cancellation of all contractual obligations or it may limit the measure to obligations which still have to be performed. Furthermore, recital 13 makes it clear that ineffectiveness essentially implies that "the rights and obligations of the parties under the contract should cease to be enforced and performed".

Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority, or that its ineffectiveness follows a decision of such a review body in the circumstances outlined in Article 2d(1) of the Remedies Directives, including direct illegal award. Article 2d(1) concerns in principle a duty to consider the contract ineffective. Article 2e(1) of the Remedies Directives requires less, as it establishes that the review bodies should have competence to provide for ineffectiveness or to impose alternative sanctions in certain situations.

Contracting entities can avoid the sanction of ineffectiveness by following a specific procedure outlined in the new provisions of the Remedies Directive. The latter stipulate in Article 2d(4) that Member States shall provide that ineffectiveness in the case of direct illegal award, cf. Article 2d(1) does not apply where the contracting authority considers that the award of the contract without prior notice in the Official Journal of the European Union is permissible, and has published a notice as described in Article 3a of the Remedies Directives, expressing its intention to conclude the contract. It is an additional condition that the contract must not have been concluded before the expiry of at least 10 calendar days counted from the day following the date of the publication of the notice.

At first sight this provision seems straightforward and it appears that you as a contracting entity can be sure that the far-reaching remedy of ineffectiveness is not applicable if you follow the procedure outlined in Article 3a. However, it is presumed in some Member States that the protection against ineffectiveness is not absolute and that there is a noteworthy exception in situations where the contracting authority has known or ought to have known that a tender procedure was necessary but was willing to take a chance and published a notice according to the procedure outlined in Article 3a.

#### **8.2.4 Preclusive time limits**

Preclusive time-limits are also a common part of enforcement systems in the field of public procurement. Typically the legislation sets time-limits for applications for review, with the consequence that any application that does not comply with the relevant time-limit is refused. These time-limits in particular take into consideration the interests of the contracting entities regarding avoiding delay in contracting and execution of the contract.

The UNCITRAL Model Law suggests that a complaint before a procuring entity<sup>34</sup> should be submitted within 20 days from the date when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or should have become aware of those circumstances. In addition, a 20 day time-limit is suggested for administrative review, cf. Article 54 of the Model Law.

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<sup>34</sup> It is presupposed in Article 53 that a complaint shall, in the first instance, be submitted to the head of the procuring entity, unless the contract has already entered into force.

Many Member States of the EU have had preclusive time-limits for several years in their legislation and the legality of such time-limits has been questioned before the Court of Justice in its case law. One of these cases was *Universale Bau*,<sup>35</sup> where a tenderer argued that a time-limit of 14 days did not allow tenderers, in particular those from other Member States, to elaborate an application for review, which could have some chance of success. The Court of Justice ruled that the Remedies Directive does not preclude such national legislation provided that the time-limit in question is reasonable. The Court then added that the time-limit in question appeared to be reasonable. Subsequently the European legislator has regulated preclusive time-limits in Remedies Directive 2007/66. It follows from Article 2c that the time-limit for an application for review in general shall be at least 10 calendar days or 15 days depending on the means of communication of the contracting authority's decision.

It can be added that these preclusive time-limits are very harsh on cross-border tenderers and it is submitted that it is not evident that they are striking a proper balance between the interests involved.<sup>36</sup> Public procurement law is complex and a tenderer will often need external legal advice in order to identify possible violations. When the violations are identified, it then has to be decided within the organization of the tenderer whether to complain or not and such a decision will frequently have to go through a number of levels in the internal hierarchy. Matters are further complicated by the considerable variations in the remedies systems of the Member States if the potential complainant is a cross-border tenderer. It would normally be necessary and very wise to make use of specialised legal counsel established in the same Member State as the contracting authority.

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<sup>35</sup> Case C-470/99, *Universale-Bau and others v Entsorgungsbetriebe Simmering* [2002] ECR I-11617

<sup>36</sup> See S. Treumer, "Discretionary Powers of Contracting Entities-Towards a Flexible Approach in the Recent Case Law of the Court of Justice?" (2006) 15 P.P.L.R. 71 (p. 80).

# Chapter 9: Social and environmental policies: a case study of EU Public Procurement Law

## 9.1 Introduction

This Chapter will focus on the question whether public authorities and economic participants have any rights and/or duties to take social, environmental or other policies into consideration when engaged in public procurement. These may include environmental considerations, considerations on social policy, non-discrimination on the basis of sex, ethnic or religious or other background and a positive enhancement of such policies. These various considerations for practical reasons will either be dealt with under a shortened version of "green" procurement (on environmental matters) or, as in other Chapters of this book, under "horizontal" policies<sup>1</sup>.

Such considerations might for instance come up where a contracting authority wants to favour companies with a "green" approach and experience when selecting companies under a prequalification procedure to take part in a procurement process. They may also occur where such authorities include "green" elements in the award criteria when awarding the contract, for instance where an authority would want to give additional points in the award process to offers which have included green elements, such as electricity made from sources not using coal but water energy, wind energy, or solar energy. There is a widely accepted urge all over the world, including the European Union, to enhance social and environmental policies where this can be done without further drawbacks, and this urge has increased considerably over the decades. From various legislations it is thus apparent that "horizontal policies" are acceptable or even welcomed. And for instance the UNCITRAL Model Law<sup>2</sup> in Article 34, on "Examination, evaluation and comparison of tenders" subparagraph 4(c), opened up the possibility for the procuring entity to take into consideration "(iii) The effect that acceptance of a tender would have on [...], the extent of local content, including manufacture, labour and materials in goods, construction or services being offered by suppliers or contractors, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand subparagraph (iii) by including additional criteria)]".

As for the European Union a recent report, the so called "Monti Report"<sup>3</sup>, has as one of the key recommendations to make public procurement work for "innovation, green growth and social inclusion" by imposing specific mandatory requirements<sup>4</sup>. And under the heading of "Harnessing public procurement for Europe's policy goals"<sup>5</sup> the Monti Report has stated that there is a mounting call for a review of public procurement policies, for different reasons and with different objectives, here pointing to whether public procurement policy should be reformed and whether such a review should lead to a greater integration of horizontal policy objectives into public procurement. The Report points out that a re-thinking of the policy seems well-warranted, first of all in order to simplify and continue to modernise and sharpen public procurement rules.<sup>6</sup>

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<sup>1</sup> See e.g. Chapter 1.4.7.

<sup>2</sup> See above Chapter 1.8.1. about the Model Law on Procurement of Goods, Construction and Services adopted by UNCITRAL (the United Nations Commission on International Trade Law).

<sup>3</sup> Mario Monti: A new strategy for the Single Market at the Service of Europe's Economy and Society, Report to the President of the European Commission José Manuel Barroso by Mario Monti, 9 May 2010.

<sup>4</sup> Monti Report at 78.

<sup>5</sup> Monti Report at 76.

<sup>6</sup> *Loc.cit.*

The Court of Justice of the European Union (CJEU) has in several judgments, as shall be seen below, acknowledged that a contracting authority may take into account criteria relating to environmental protection or to social considerations. On the other hand the CJEU has stated in a judgment<sup>7</sup> that although a contracting authority may take into account criteria relating to environmental protection at the various stages of a procedure for the award of public contracts and therefore, it was not impossible that a technical reason relating to the protection of the environment could be taken into account in an assessment of whether the contract at issue might be awarded to a given supplier, the procedure used in the case at hand had to comply with the fundamental principles of European Union law. That was in particular the case in relation to the principle of non-discrimination as it followed from the provisions of the Treaty on the right of establishment and the freedom to provide services. The risk of a breach of the principle of non-discrimination would be particularly high where a contracting authority would decide not to put a particular contract out to tender. In this instance, the Court noted, first, that in the absence of any evidence to that effect the choice of thermal waste treatment could not be regarded as a technical reason substantiating the claim that the contract could be awarded to only one particular supplier. Second, that the German Government's submission that the proximity of the waste disposal facility was a necessary consequence of a municipality's decision that residual waste should be treated thermally was not borne out by any evidence and could not therefore be regarded as a technical reason of that kind. More specifically, the German Government had not shown that the transport of waste over a greater distance would necessarily constitute a danger to the environment or to public health. Third, the fact that a particular supplier was close to the local authority's area could likewise not amount, on its own, to a technical reason for the purpose of a provision of the relevant Directive stating that "Contracting authorities may award public service contracts by negotiated procedure without prior publication of a contract notice in the following cases:[...] (b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services may be provided only by a particular service provider".<sup>8</sup> It followed that Germany had not established that the use of Article 11(3)(b) of Directive 92/50 was justified in this instance.

## 9.2 Social and environmental policies in all kinds of procurement situations

There is thus reason to stress the fact that social and environmental policies might be taken into consideration at various steps of a public procurement procedure such as at the stage of specification, including technical specifications, the selection stage, where interested companies are selected for a prequalification, the awarding stage and at the stage of fulfilling the contract. The law of the European Union here is illustrative and will be dealt with since here a strong development has been under way for some time.

At the step of *specification*, the EU Directive 2004/18 in its preamble, recital (29) points to the possibility for contracting entities to define environmental requirements for the technical specifications of a given contract. In that case they may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services. In the Directive 2004/18 itself the provision on "Technical specifications" in Article 23 in the chapter IV on "Specific rules governing specifications and contract documents", it is stated in paragraph 1 that "Whenever possible these technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users." In paragraph 3 of the same Article it is said that "Without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical

<sup>7</sup> Joined Cases C-20/01 and C-28/01, *Commission v Germany*, [2003] ECR I-3609.

<sup>8</sup> Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209/1, Article 11(3)(b).

specifications shall be formulated: either by reference to technical specifications defined in [...]; (b) or in terms of performance or functional requirements; the latter may include environmental characteristics [...]. In paragraph 6 of Article 23 the Directive prescribes that "Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements as referred to in paragraph 3(b) they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by and any other eco-label, provided that: [...]".

As to the selection stage, Directive 2004/18 provides in Article 48(2)(f), concerning the verification of the suitability and choice of participants, especially in relation to criteria for qualitative selection, when dealing with "technical and/or professional ability", that evidence of the economic operators' technical abilities may be furnished by one or more of the following means according to the nature, quantity or importance, and use of the works, supplies or services: "(f) for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract". Furthermore, Article 50 on "Environmental management standards" expands on this by requiring that if contracting authorities require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain environmental management standards, they shall refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators. Hereby it must be said to be clearly indicated in the Directive that social and environmental policies may be taken into consideration already at the prequalification phase.

At the awarding stage Article 53 of Directive 2004/18 on "Contract award criteria" includes a very important provision saying that "1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities shall base the award of public contracts shall be either:

- (a) when the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or
- (b) the lowest price only."

The Directive goes on saying in paragraph 2 that "[...] [I]n the case referred to in paragraph 1(a) the contracting authority shall specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings can be expressed by providing for a range with an appropriate maximum spread [...]".

This EU provision is not far from corresponding provisions of other legislation. Here, as an illustration, one could mention Article 34(4)(a) of the Procurement Act 2002 of The Republic of Kiribati stating on "Examination, evaluation and comparison of tenders" that "The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in paragraph (b) of this subsection, in accordance with the procedures and criteria set forth in the solicitation documents. [...]

- (b) The successful tender shall be:

- (i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to paragraph (d) of this subsection; or
- (ii) If the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of criteria specified in the solicitation documents, which criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable”.

As the case law of the CJEU has shown specifically, “green” or “horizontal” elements may be pursued also at the fulfilment phase.

### **9.3 The Case law of the Court of Justice of the European Union**

The Case law of the Court of Justice of the European Union is very illustrative regarding “horizontal” procurement since that topic has been dealt with in several judgments. On the other hand the provisions of the Directives from 2004 have been inspired to a great extent by the case law of the CJEU. This explains that specific attention should be devoted to this case law. At the same time it might be said that the EU case law has developed and set up some general requirements that are not necessarily linked to the EU situation and therefore are of a broader perspective.

It is said already in the preambles that the directives are based on Court of Justice case law, in particular case law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital (2).

The first case to be mentioned in this regard was the *Beentjes* judgment from 1988<sup>9</sup> where the CJEU was asked by a national, Dutch, court to deal with several questions that had come up during a public procurement dispute. Among these questions were problems about the examination of the suitability of contractors to carry out the contracts to be awarded and about inability of the contractor to employ long-term unemployed persons.

The CJEU’s answer<sup>10</sup> to the national court turned out to be that (i) the criterion of specific experience for the work to be carried out is a legitimate criterion of technical ability and knowledge for the purpose of ascertaining the suitability of contractors. Where such a criterion is laid down by a provision of national legislation to which the contract notice refers, it is not subject to the specific requirements laid down in the directive concerning publication in the contract notice or the contract documents; (ii) the criterion of “the most acceptable tender”, as laid down by a provision of national legislation, may be compatible with the directive if it reflects the discretion which the authorities awarding contracts have in order to determine the most economically advantageous tender on the basis of objective criteria and thus does not involve an element of arbitrary choice. It followed from the directive that where the authorities awarding contracts did not take the lowest price as the sole criterion for the award of a contract but have regard to various criteria with a view to awarding the contract to the most economically advantageous tender, they are required to state those criteria in the contract notice or the contract documents; (iii) the condition relating to the employment of long-term unemployed persons is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the European Union. An additional specific condition of this kind must be mentioned in the contract notice.

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<sup>9</sup> Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 4635.

<sup>10</sup> Paragraph 37.

The *Beentjes* judgment was thus important in stating that the award criterion of the most economically advantageous tender may include criteria other than purely economic elements. But it can hardly be read as an unconditional show of support for sustainable public procurement since the traditional concerns as to non-discrimination and free movement are very much at the heart of this judgment. It is, however, clear from the judgment that the interpretation made by the CJEU of the relevant directive gave full credit to the wording of the provisions laying down the possibilities for the contracting authorities to also take into consideration elements other than those purely economic. The focus of the Court was thus first of all to point to the possibility for the public entity to choose elements of other kinds than just money as their preference.

The next case to be mentioned in relation to the development of “green” procurement is the *Nord-pas-de-Calais* judgment from the year 2000<sup>11</sup>. Here the European Commission had received a complaint that led it to initiate proceedings against the Republic of France. The point of focus was a tendering procedure for a public works contract issued by open procedure and relating to the construction of a multipurpose secondary school in the Département du Pas-de-Calais. A contract notice had been published in the Official Journal of the European Communities in accordance with the former Directive. The Commission, however, took the view that the Directive had not been complied with.

The CJEU firstly noted that, by this complaint, the Commission had alleged that France had infringed Article 30(1) of the former Directive purely and simply by referring to the criterion linked to the campaign against unemployment as an award criterion in some of the disputed contract notices. And under Article 30(1) of that Directive, the criteria on which the contracting authorities were to base the award of contracts were either the lowest price only or, when the award was made to the most economically advantageous tender, various criteria according to the contract, such as price, period for completion, running costs, profitability, and technical merit. But the CJEU spelled out that nonetheless, the provision of the Directive did not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition was consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services<sup>12</sup>. Furthermore, even if such a criterion was not in itself incompatible with the Directive, it must be applied in conformity with all the procedural rules laid down in that directive, in particular the rules on advertising. It followed that an award criterion linked to the campaign against unemployment must be expressly mentioned in the contract notice so that contractors can become aware of its existence. As regards the Commission’s argument that the *Beentjes* judgment concerned a condition of performance of the contract and not a criterion for the award of the contract, the CJEU rejected that merely by observing that, as was clear from the *Beentjes* judgment, the condition relating to the employment of long-term unemployed persons, which had been at issue in that case, had been used as the basis for rejecting a tender and therefore necessarily constituted a criterion for the award of the contract. In the present case the Commission had only criticised the reference to such a criterion as an award criterion in the contract notice. The Commission did not claim that the criterion linked to the campaign against unemployment was inconsistent with the fundamental principles of European Union law, in particular the principle of non-discrimination, or that it was not advertised in the contract notice. In those circumstances, the Commission’s complaint relating to the additional award criterion linked to the campaign against unemployment had to be rejected.

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<sup>11</sup> Case C-225/98, *Commission v France* (“Nord-pas-de-Calais”) [2000] ECR I-7445.

<sup>12</sup> Here referring to Case 31/87, *Gebroeders Beentjes BV v Netherlands* (“Beentjes”) [1998] ECR 4635, paragraph 29.

The next case, the *Concordia Buses* judgment from 2002,<sup>13</sup> was a full court judgment thus indicating a special importance to the issues under scrutiny. The Supreme Administrative Court of Finland had put questions to the CJEU regarding the Directive on procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>14</sup> and on the Directive relating to procedures for the award of public service contracts<sup>15</sup>. Those questions were raised in proceedings between Concordia Bus Finland and the City of Helsinki and HKL-Bussiliikenne concerning the validity of a decision of the commercial service committee of the City of Helsinki awarding the contract for the operation of a route in the urban bus network of Helsinki to HKL-Bussiliikenne.

The background was that the Helsinki City Council had decided to introduce tendering progressively for the entire bus transport network of the City of Helsinki, in such a way that the first route to be awarded would start operating from the autumn 1998 timetable. According to the tender notice for *i.a.* lot no 6, the contract would be awarded to the undertaking whose tender was most economically advantageous overall to the city. That was to be assessed by reference to three categories of criteria: the overall price of operation, the quality of the bus fleet, and the operator's quality and environment management. As regards, first, the overall price asked, the most favourable tender would receive 86 points and the number of points of the other tenders would be calculated by using the following formula: Number of points = amount of the annual operating payment of the most favourable tender divided by the amount of the tender in question and multiplied by 86. As regards, next, the quality of the vehicle fleet, a tenderer could receive a maximum of 10 additional points on the basis of a number of criteria. Thus points were awarded *inter alia* for the use of buses with nitrogen oxide emissions below 4 g/kWh (+2.5 points/bus) or below 2 g/kWh (+3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus). Finally as regards the operator's quality and environment programme, additional points were to be awarded for various certified quality criteria and for a certified environment protection programme.

The CJEU started by pointing to the fact that Article 36(1)(a) of Directive 92/50 provided that the criteria on which the contracting authority can base the award of contracts may, where the award is made to the economically most advantageous tender, include various criteria relating to the contract, such as quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, or price. It then continued by saying that in order to determine whether and under what conditions the contracting authority may, in accordance with Article 36(1)(a), take into consideration criteria of an ecological nature, it must be noted, first, that, as was clear from the wording of that provision, in particular the use of the expression "for example", the criteria which may be used as criteria for the award of a public contract to the economically most advantageous tender were not listed exhaustively. Second, Article 36(1)(a) could not be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It could not be excluded that factors which were not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion was also supported by the wording of the provision, which expressly referred to the criterion of the aesthetic characteristics of a tender. Moreover, the CJEU went on recalling its own previous practice by reminding that it already had held that the purpose of coordinating the procedures for the award of public contracts at Community level is to eliminate barriers to the free movement of services and goods<sup>16</sup>.

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<sup>13</sup> Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ("Concordia Buses") [2002] ECR I-7213.

<sup>14</sup> Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1993 L 199/ 84.

<sup>15</sup> Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ 1992 L 209/1.

<sup>16</sup> Referring here to, *i.a.* Case C-19/00, *SIAC Construction* [2001] ECR I-7725, paragraph 32.

This led the CJEU to a general conclusion saying that in the light of that objective and also of the wording of the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, transferred by the Treaty of Amsterdam in slightly amended form to Article 6 EC, which laid down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 did not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender.

The CJEU added, however, that this did not mean that any criterion of that nature may be taken into consideration by the contracting authority. While Article 36(1)(a) of Directive 92/50 left it to the contracting authority to choose the criteria on which it proposes to base the award of the contract, that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender. Since a tender necessarily relates to the subject matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject matter of the contract. The CJEU continued by recalling, first, that, as it had already held, in order to determine the economically most advantageous tender, the contracting authority must be able to assess the tenders submitted and take a decision on the basis of qualitative and quantitative criteria relating to the contract in question. Furthermore, the CJEU said, it also appeared from the case law that an award criterion having the effect of conferring on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer would be incompatible with Article 36(1)(a) of Directive 92/50<sup>17</sup>. Next, it should be noted that the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in Directive 92/50, in particular the rules on advertising. It followed that, in accordance with Article 36(2) of that directive, all such criteria must be expressly mentioned in the contract documents or the tender notice so that operators are in a position to be aware of their existence and scope. Finally, such criteria must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination as it followed from the provisions of the Treaty on the right of establishment and the freedom to provide services.

The conclusion from this was said to be that, where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50, it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination<sup>18</sup>.

Turning to the main proceedings of the case, the CJEU stated, first, that criteria relating to the level of nitrogen oxide emissions and the noise level of the buses, such as those at issue in those proceedings, could be regarded as linked to the subject matter of a contract for the provision of urban bus transport services. Next, criteria whereby additional points were awarded to tenders which meet certain specific and objectively quantifiable environmental requirements were not such as to confer an unrestricted freedom of choice on the contracting authority. And in addition the criteria at issue in the main proceedings were expressly mentioned in the tender notice published by the purchasing office of the City of Helsinki. Finally, whether the criteria at issue in the main proceedings complied in particular with the principle of non-discrimination fell to be examined in connection with the answer to the third question, which concerned precisely that point.

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<sup>17</sup> With reference *i.a.* to *Beentjes*, paragraph 26.

<sup>18</sup> Paragraph 64.

Consequently, in the light of all the foregoing, the answer to that question was that Article 36(1)(a) of Directive 92/50 was to be interpreted as meaning that where, in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination<sup>19</sup>.

The CJEU then turned to the third question and reformulated it to ask, essentially, whether the principle of equal treatment precluded the taking into consideration of criteria concerned with protection of the environment, such as those at issue in the main proceedings, because the contracting entity's own transport undertaking was one of the few undertakings able to offer a bus fleet satisfying those criteria. To this the CJEU stated that the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition. Thus the award criteria must observe the principle of non-discrimination as it follows from the Treaty provisions on freedom of establishment and freedom to provide services. But in a factual context, the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, was not in itself such as to constitute a breach of the principle of equal treatment. In those circumstances the principle of equal treatment did not preclude the taking into consideration of criteria connected with protection of the environment, such as those at issue in the main proceedings, solely because the contracting entity's own transport undertaking was one of the few undertakings able to offer a bus fleet satisfying those criteria.

The last case to be mentioned here is the *EVN and Wienstrom judgment* from 2003<sup>20</sup>. In this judgment the CJEU was further confronted with a green perspective. The contracting authority was the Austrian Republic, and the case stemmed from a tender procedure for the award of a public supply contract of electricity in respect of which the EVN AG and Wienstrom GmbH had submitted a tender. The invitation to tender included the following provision under the heading "Award criteria": "The economically most advantageous tender according to the following criteria: impact of the services on the environment in accordance with the contract documents." It was required from the contracting authority that the tender had to state the price in Austrian schilling (ATS), the Austrian currency at the time, per kilowatt hour (kWh). The electricity supplier had to undertake to supply the Federal offices with electricity produced from renewable energy sources, subject to any technical limitations, and in any case not knowingly supply those offices with electricity generated by nuclear fission. The supplier was not, however, required to submit proof of his electricity sources. The contracting authority had a right to terminate the contract and a right to punitive damages in the event of a breach of either of those obligations. It was stated in the contract documents that the contracting authority was aware that for technical reasons no supplier could guarantee that the electricity supplied to a particular consumer was actually produced from renewable energy sources but that the authority had nevertheless decided to contract with tenderers who could supply at least 22.5 gigawatt hours (GWh) per year of electricity produced from renewable energy sources, since the annual consumption of the Federal offices was estimated to be around 22.5 GWh. In addition, it was specified that tenders would be eliminated if they did not contain any proof that in the past two years and/or in the next two years the tenderer has

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<sup>19</sup> Paragraph 69.

<sup>20</sup> Case C-448/01, *EVN AG and Wienstrom GmbH v Austria* ("EVN") [2003] ECR I-14527.

produced or purchased, and/or will produce or purchase, and has supplied and/or will supply to final consumers, at least 22.5 GWh electricity per annum from renewable energy sources. The award criteria laid down were net price per kWh, with a weighting of 55%, and energy produced from renewable energy sources, with a weighting of 45%. It was stated in relation to the latter award criterion that "only the amount of energy that can be supplied from renewable energy sources in excess of 22.5 GWh per annum will be taken into account". The Austrian Bundesvergabebamt put several questions to the CJEU with relation to the case.

The CJEU chose to start its considerations by pointing to the fact that by referring to the lack of clarity of the expression "the most economically advantageous tender" used in Article 26 of Directive 93/36, the Bundesvergabebamt had first asked as a question of principle whether Community law allows the contracting authority to lay down criteria that pursue advantages which cannot be objectively assigned a direct economic value, such as advantages related to the protection of the environment. To this the CJEU noted that it already had the chance to rule on the question whether and in what circumstances a contracting authority may take ecological criteria into consideration in the assessment of the most economically advantageous tender. The CJEU hereby referred to its judgment in the *Concordia Buses* case<sup>21</sup>, where it had accepted that where the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria. The first part of this question in the *EVN AG and Wienstrom GmbH v Austria* case could therefore be answered by stating that Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, a criterion requiring that the electricity supplied be produced from renewable energy sources, provided that that criterion is linked to the subject matter of the contract, does not confer an unrestricted freedom of choice on the authority, is expressly mentioned in the contract documents or the contract notice, and complies with all the fundamental principles of Community law, in particular the principle of non-discrimination<sup>22</sup>.

The CJEU recalled that according to settled case law it was open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer<sup>23</sup>. And such criteria must be applied in conformity with both the procedural rules and the fundamental principles laid down in EU law<sup>24</sup>. It followed that provided that they comply with the requirements of EU law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the most economically advantageous tender.

As to the award criterion in the present case, the CJEU expressed the view that the use of renewable energy sources for producing electricity was useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Union and its Member States had pledged to combat. Having regard, therefore, to the importance of

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<sup>21</sup> Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ("Concordia Buses") [2002] ECR I-7213; see above

<sup>22</sup> Paragraph 34.

<sup>23</sup> The CJEU here referred to Case 31/87, *Gebroeders Beentjes BV v Netherlands* ("Beentjes") [1998] ECR 4635, paragraphs 19 and 26; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 36 and 37; and Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ("Concordia Buses") [2002] ECR I-7213, paragraphs 59 and 61.

<sup>24</sup> Here referring to Case 31/87, *Gebroeders Beentjes BV v Netherlands* ("Beentjes") [1998] ECR 4635, paragraphs 29 and 31, and Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ("Concordia Buses") [2002] ECR I-7213, paragraphs 62 and 63.

the objective pursued by the criterion at issue in the main proceedings, its weighting of 45% did not appear to present an obstacle to an overall evaluation of the criteria applied in order to identify the most economically advantageous tender.

As to using an award criterion which was not accompanied by requirements, which permit the accuracy of the information contained in the tenders to be effectively verified, the CJEU stated that it should be recalled that the principle of equal treatment of tenderers underlies the directives on procedures for the award of public contracts. This implied, first of all, that tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the contracting authority. That meant, more specifically, that when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers. Second, that the principle of equal treatment implied an obligation of transparency in order to enable verification that it has been complied with, which consists in ensuring, *inter alia*, review of the impartiality of procurement procedures. Objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria. It was thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure. An award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified was thus contrary to the principles of EU law in the field of public procurement.

The procedure for awarding a public contract must comply, at every stage, with both the principle of the equal treatment of potential tenderers and the principle of transparency so as to afford all parties equality of opportunity in formulating the terms of their tenders. More specifically, that meant that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way. Consequently, the fact that in the invitation to tender the contracting authority omitted to determine the period in respect of which tenderers had to state in their tenders the amount of electricity from renewable energy sources which they could supply could be an infringement of the principles of equal treatment and transparency were it to transpire that that omission made it difficult or even impossible for tenderers to know the exact scope of the criterion in question and thus to be able to interpret it in the same way.

The Court also held that an award criterion that related solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, could not be regarded as linked to the subject matter of the contract. The CJEU added to this that the fact that, in accordance with the award criterion applied, it was the amount of electricity in excess of the expected annual consumption as laid down in the invitation to tender which was decisive was liable to confer an advantage on tenderers who, owing to their larger production or supply capacities, were able to supply greater volumes of electricity than other tenderers. That criterion was thus liable to result in unjustified discrimination against tenderers whose tender was fully able to meet the requirements linked to the subject matter of the contract. Such a limitation on the circle of economic operators in a position to submit a tender would have the effect of thwarting the objective of opening up the market to competition pursued by the directives coordinating procedures for the award of public supply contracts.

The CJEU finally added, even assuming that that criterion was a response to the need to ensure reliability of supplies, it should be noted that while the reliability of supplies could, in principle, number amongst the award criteria used to determine the most economically advantageous tender, the capacity of tenderers to provide the largest amount of electricity possible in excess of the amount laid down in the invitation to tender could not

legitimately be given the status of an award criterion. It therefore followed that in so far as it required tenderers to state how much electricity they could supply from renewable energy sources to a non-defined group of consumers, and allocated the maximum number of points to whichever tenderer stated the highest amount, where the supply volume was taken into account only to the extent that it exceeded the volume of consumption expected in the context of the procurement, the award criterion applied in the case at issue was not compatible with the EU legislation on public procurement.

In the light of all the foregoing, the answer to the Austrian Bundesvergabebamt's question turned out to be that the EU legislation on public procurement did not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, an award criterion with a weighting of 45% which requires that the electricity supplied be produced from renewable energy sources. The fact that that criterion did not necessarily serve to achieve the objective pursued was irrelevant in that regard.

On the other hand, that legislation did preclude such a criterion where it was not accompanied by requirements which permit the accuracy of the information contained in the tenders to be effectively verified, or where it required tenderers to state how much electricity they could supply from renewable energy sources to a non-defined group of consumers, and allocated the maximum number of points to whichever tenderer stated the highest amount, where the supply volume was taken into account only to the extent that it exceeded the volume of consumption expected in the context of the procurement.

## **9.4 Concluding remarks**

Along with the development of worldwide overall "green" or "horizontal" policies it is easy to understand that this "green" approach has also found its way into public procurement. As has been seen already, the UNCITRAL Model Law from 1994 has been inclined in the direction of accepting "horizontal" policies in public procurement. And in the European Union, "green" considerations have found their natural way into the daily life of the Union. It is therefore of great value that *i.a.* the European institutions – the Council, the European Commission and the Court of Justice – have been vital participants in that development. Their common struggle for better working and living conditions must be seen together with their goal to support improved conditions on all levels of society. In this pattern the rules on public procurement are an important element.

# Chapter 10: Regulating Public Procurement in International Trade

## 10.1 Introduction

Since – as explained in Chapter 1 - public procurement accounts for a substantial value of commercial activities in most countries, the size of the procurement market represents considerable opportunities for international trade. However, as we also explained in Chapter 1, for various reasons, public procurement traditionally tends to favour the domestic industry. We also explained in Section 4 of that chapter that:

*"One of the most important developments in public procurement in the last 20 years has been the conclusion instruments - by groups of states or in regional and global organisations - that are designed to open up public procurement to international trade – that is, to provide for foreign suppliers, products and services to have access to the public procurement markets of other states. These instruments either require or encourage countries to implement measures to improve foreign access to their public procurement markets".*

We also saw that there are a number of different approaches adopted in regional, global and other instruments towards opening up markets to trade. In this present chapter, we will outline some of the instruments and agreements that currently exist to open up procurement markets to trade, in order to illustrate these different approaches and mechanisms for implementing them.<sup>1</sup> We have also explained in Chapter 1 that the UNCITRAL Model Law itself, which we have already considered in detail throughout this book, is designed for opening up trade, in particular through the harmonisation of national laws to make it easier for foreign suppliers to transact with the government in other jurisdictions.

We will first consider the initiatives to open up public procurement on a global basis through the World Trade Organisation, then some key initiatives on the regional level, and finally outline the OECD's work in foreign bribery and explain its relevance in opening up procurement to trade.

## 10.2 Procurement instruments/Initiatives within the WTO framework<sup>2</sup>

### 10.2.1 Multilateral rules and initiatives in the WTO<sup>3</sup>

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<sup>1</sup> For an analysis of procurement provisions in an extensive number of agreements notified to the WTO see R. D. Anderson, A.C. Müller, K. Osei-Lah, J. Pardo De Leon and P. Pelletier, "Government Procurement Provisions in Regional Trade Agreements: a Stepping Stone to GPA Accession?", Ch. 20 in S. Arrowsmith and R. D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (forthcoming CUP).

<sup>2</sup> See generally, S. Arrowsmith, *Government Procurement in the WTO* (London: Kluwer Law International 2003); Cameron May, *Business Opportunities and the GPA: a handbook for EU Companies* (London: Cameron May 1998); S. Evenett and B. Hoekman (eds.), *The WTO and Government Procurement* (Northampton: Edward Elgar, 2006) (a collection of previously published papers, many of which are listed separately below); B. Hoekman and P. Mavroidis (eds.), *Law and Policy in Public Purchasing: the WTO Agreement on Government Procurement* (Ann Arbor: University of Michigan Press 1997); A. Reich, *International Public Procurement Law* (1999) (The Hague: Kluwer Law International 1999); Arrowsmith and Anderson (ed.), above.

<sup>3</sup> On the current position, see generally, S. Arrowsmith, *Government Procurement in the WTO* (London: Kluwer Law International 2003), Ch. 3; M. Dischendorfer, "The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO" (2000) 9 *P.P.L.R.* 1; S. Evenett and B. Hoekman, "Government Procurement of Services and Multilateral Disciplines", Ch. 6 in P. Sauvé and R. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Washington: Brookings Institution Press 2000).

The World Trade Organization (WTO) is a global international organization — also known as a multilateral trading system — which aims at liberalizing international trade. At its heart are the WTO agreements, negotiated, signed and ratified by the member states. These agreements are the legal ground-rules for international commerce, and their goal is to prohibit or restrict most types of trade barriers in order to facilitate the supply of goods and the provision of services among the participating countries.

The General Agreement on Tariffs and Trade (GATT) is an umbrella agreement for trade of goods within the WTO. This agreement spells out important rules, particularly on non-discrimination. Another main part of the WTO system is the General Agreement on Trade in Services (GATS), which applies to services the same principles of freer and fairer trade that GATT introduced for goods. Both these agreements include:

- a) A Most Favoured Nation (MFN) obligation – this requires states to treat the products, services and firms of one WTO member state no less favourably than those of another member state.
- b) A national treatment obligation – this requires states to treat the products, services and firms of other WTO member states no less favourably than domestic products/services/firms.
- c) Rules on transparency – these require states to publish their general measures on trade, such as legislation and administrative rules.

Public procurement is, however, largely outside the scope of the WTO multilateral trade rules for both goods and services under the General Agreement on Tariffs and Trade ('GATT') and the General Agreement on Trade in Services ('GATS'). The GATT Article III on national treatment includes an explicit exception regarding public procurement.<sup>4</sup> Meanwhile, it is widely believed that the Most Favoured Nations ('MFN') obligation is also not applicable to public procurement despite the fact that no similar exception can be found in Article I of GATT.<sup>5</sup> Similarly, government procurement has also been exempted from the main commitments of the GATS including national treatment and MFN.<sup>6</sup>

In contrast with the position regarding national treatment and MFN rules, however, certain general transparency obligations found in both the GATT (Article X) and the GATS (Article III) do apply to public procurement practice. Under these rules on transparency, states are mainly required to publish their general measures on trade which concern procurements, such as laws, regulations and administrative rules.<sup>7</sup> Also, Article XVII of the GATT presents another possibility for regulating procurement in the field of state trading.<sup>8</sup> This provision may have some potential role in regulating the procurement of state trading enterprises,<sup>9</sup> but there is no equivalent provision regulating procurement of other government bodies.

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<sup>4</sup> See the GATT, Article III: 8(a).

<sup>5</sup> Favoured by most scholars, for example, S. Arrowsmith, *Government Procurement in the WTO*, above, at pp. 61-63; Dischendorfer, above; 1 at pp. 15-17; Footer, 'International Developments: GATT: Development in Public Procurement Procedures and Practices' (1993) 6 *P.P.L.R.* 1 at pp. CS193-204. However, some commentators hold a different view that there is a limited and special application of MFN obligation in the GATT to government procurement policies, for instance, Reich, 'The New GATT Agreement on Government Procurement: the Pitfalls of Plurilateralism and Strict Reciprocity', (1997) 31 *Journal of World Trade* 1 at pp. 125-151.

<sup>6</sup> See the GATS, Article XIII(1). This provision mirrors GATT III: 8(a) and there is an explicit exception to MFN (Article II) and national treatment obligation (Article XVI) as regards government procurement.

<sup>7</sup> However, states are not required to publish any information on specific contracts, either in terms of ex ante publication of invitations to bid or ex post announcement of decisions. See S. Arrowsmith, *Government Procurement in the WTO*, above, at pp. 75-76; Low, Mattoo and Subramanian 'Government Procurement in Services' (1996) 20 *World Competition* 5 at pp. 8-10.

<sup>8</sup> It refers to the trading activities of companies that are either state enterprises, or enterprises granted exclusive or special privileges by the state that enable them to influence trade. The definition of state trading enterprise given by Article XVII:1 of GATT is not very precise. See Davey, 'Article XVII GATT: an Overview' in Cottier and Mavroids (ed) *State Trading in the Twenty-First Century* (the University of Michigan Press, 1998).

<sup>9</sup> For a detailed review on provisions on state trading and their implications for procurement, see P. Wang, Ch. 8 in 'The Procurement of State Trading Enterprises under the WTO Agreements - a proposal for a way forward', in Arrowsmith and Anderson (eds.), above; W. Davey, "Article XVII GATT: an Overview", Ch.1 in T. Cottier and P. Mavroidis, *State Trading in the Twenty-first century* (Ann Arbor: University of Michigan Press 1998); B. Hoekman and P. Low, "State Trading: Rule Making Alternatives for Entities with Exclusive Rights", Ch. 17 in T.

As explained above, government procurement still remains outside the scope of the major WTO multilateral rules. However, there have already been initiatives seeking to address government procurement at the WTO multilateral level: some of these initiatives are put on hold; some others are continuing.

The first multilateral initiative in the WTO to regulate government procurement can be found in the existing negotiating mandate on procurement under the GATS. While, as we have seen, the GATS exempts government procurement from its major disciplines, it requires multilateral negotiations to be held on procurement in services under the GATS.<sup>10</sup> The multilateral Working Party on GATS Rules ('WPGR') was established, among other purposes, to provide a forum for negotiations on government procurement of services as required under the GATS.<sup>11</sup> The issue of government procurement was first put on the agenda of the WPGR in 1995 and to date, limited progress has been made so far and the negotiations on procurement have remained 'dormant'.<sup>12</sup>

There has been another initiative, towards negotiations on a multilateral transparency agreement in government procurement.<sup>13</sup> The areas of possible future negotiations including government procurement were agreed at the 1996 Singapore Ministerial Conference,<sup>14</sup> and the 2000 Doha Ministerial Declaration took the issue of transparency agreement in procurement a step further, stating that negotiations regarding a multilateral agreement on transparency in government procurement would start after the fifth Ministerial Conference.<sup>15</sup> However, the Cancun Ministerial Conference ended in deadlock and the General Council Decision of 1 August 2004 finally concluded that the issue of transparency in procurement would not be taken forward in the Doha Work Programme,<sup>16</sup> and therefore no work towards negotiations on this issue would take place

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Cottier and P. Mavroidis, *State Trading in the Twenty-first century* (Ann Arbor: University of Michigan Press 1998); P. MacKenzie, "China's Application to the GATT: State Trading and the Problem of Market Access" (1990) 24 *Journal of World Trade* 133 ; A. Mattoo, "Dealing with Monopolies and State Enterprises: WTO Rules for Goods and Services", Ch. 2 in T. Cottier and P. Mavroidis, *State Trading in the Twenty-first century* (Ann Arbor: University of Michigan Press 1998); E-U. Petersmann, "GATT Law on State Trading Enterprises: Critical Evaluation of Article XVII and Proposals for Reform", Ch.3 in T. Cottier and P. Mavroidis, *State Trading in the Twenty-first century* (Ann Arbor: University of Michigan Press 1998).

<sup>10</sup> Article XIII:2 of the GATS stipulates that 'there shall be multilateral negotiations on government in services under this Agreement within two years from the date of entry into force of the WTO Agreement'.

<sup>11</sup> Another two mandated issues are the establishment of an emergency safeguard mechanism for services and disciplines on subsidies, *ibid*.

<sup>12</sup> The WPGR, '*Negotiations on Government Procurement*', reported by the Chairperson of the WPGR (2003) S/WPGR/11 available at [http://www.ictsd.org/issarea/stsd/Resources/Docs/WPGR\\_Report\\_on\\_GovProc.pdf](http://www.ictsd.org/issarea/stsd/Resources/Docs/WPGR_Report_on_GovProc.pdf).

<sup>13</sup> See generally, K. Abbott, "Rule-making in the WTO: Lessons from the Case of Bribery and Corruption" (2001) 4 *Journal of International Economic Law* 275; S. Arrowsmith, *Government Procurement in the WTO* (London: Kluwer Law International 2003), Ch. 13; S. Arrowsmith, "Towards a Multilateral Agreement on Transparency in Government Procurement" (1998) 47 *International and Comparative Law Quarterly* 793; S. Arrowsmith, "Transparency in Government Procurement: the Objectives of Regulation and the Boundaries of the World Trade Organization" (2003) 37 *Journal of World Trade* 283; CUTS (Centre for International Trade, Economic & Environment), *Unpacking Transparency in Government Procurement* (2004), Chs. 3 and 4; S. Evenett, "Is there a case for new multilateral rules on transparency in government procurement", Ch. 3 in the Swiss State Secretariat of Economic Affairs and S. Evenett (ed.), *The Singapore Issues and the World Trading System: the Road to Cancun and Beyond* (2003), available at <http://www.wti.org>; G. Fenster, "Multilateral Talks on Transparency in Government Procurement: Concerns for Developing Countries" (2003) 34(2) *IDS Bulletin* 65; M. Khor, "Government Procurement: the real aim of the majors", available at <http://www.twinside.org.sg>; M. Kinsey, "Transparency in Government Procurement: an International Consensus" (2004) 34 *Public Contract Law Journal* 155; J. Linarelli, "The WTO Transparency Agenda: Law, Economics and International Relations Theory", Ch. 13 in S. Arrowsmith and M. Trybus (eds.), *Public Procurement: the Continuing Revolution* (London: Kluwer Law International 2003); V. Mosoti, "The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?" (2004) 25 *University of Pennsylvania Journal of International Economic Law* 593; V. Rege, "Transparency in Government Procurement – Issues of Concern and Interest to Developing Countries" (2001) 35 *Journal of World Trade* 489.

<sup>14</sup> These issues are the so-called Singapore issues, including trade and competition; trade and investment; transparency in government procurement and trade facilitation.

<sup>15</sup> WTO, Ministerial Declaration, Ministerial Conference Fifth Session, 14 November 2001, WT/MIN(01)/DEC/1, para. 20-26. available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).

<sup>16</sup> See the Decision Adopted by the General Council on 1 August 2004 1 (g) para. 2. General Council-Doha Work Programme-Draft General Council Decision of 31 July 2004, WT/GC/W/533. Available at [http://www.wto.org/english/tratop\\_e/dda\\_e/draft\\_text\\_qc\\_dq\\_31july04\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/draft_text_qc_dq_31july04_e.htm).

within the WTO during the Doha Round. The main reason for the failed initiative to negotiate a multilateral transparency agreement in procurement has been explained as the fear shared by many developing countries that the proposed agreement would only be a first step towards addressing the questions of market access which only serve the export interests of the developed industries.<sup>17</sup> Although the Doha Mandate explicitly excludes the issue of market access for the proposed transparency agreement,<sup>18</sup> it has been made clear that the ultimate goal of major developed countries is to upgrade it into a full-blown agreement granting full access and national treatment for their companies to government procurement business.<sup>19</sup>

## 10.2.2 The Government Procurement Agreement ('GPA')<sup>20</sup>

### 10.2.2.1 Introduction, objectives and regulatory approach

The major WTO instrument on procurement is the Government Procurement Agreement ('GPA'). The first Agreement on Government Procurement<sup>21</sup> was originally signed in 1979 and entered into force in 1981, and was amended in 1987. In 1994, the current version of GPA was concluded. According to its 'built-in' commitment to conduct further negotiations,<sup>22</sup> the GPA has currently been undergoing a formal review to simplify and to improve its text. It has been provisionally agreed that a revised draft text will supersede the current GPA text.<sup>23</sup>

In essence, the GPA remains a plurilateral agreement, in that its disciplines apply only to those WTO Members that are Parties to it.<sup>24</sup> The GPA's membership is limited – only 40

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<sup>17</sup> Decker and Pries 'The WTO General Council Decision of 1 August 2004 – a Note on the Decision not to Launch Negotiations on Transparency in Government Procurement during the Doha Round' (2004) *P.P.L.R.* 2004, NAY.14 at pp. 17.

<sup>18</sup> WTO, Ministerial Declaration, Ministerial Conference Fifth Session, 14 November 2001, WT/MIN(01)/DEC/1, paras. 20-26, available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).

<sup>19</sup> The developed countries did not attempt to hide this goal, it is stated so candidly in their proposal that government procurement is considered to be a gigantic business which had hitherto remained outside the WTO's ambit and should be brought in through multilateral rules so that their companies could have full access to the developing countries markets. See Khor, 'The Real Aim of the Majors', available at <http://www.twinside.org.sg/title/real-cn.htm>.

<sup>20</sup> In addition to the books cited in note 3 above, see generally, A. Blank and G. Marceau, "The History of the Government Procurement Negotiations Since 1945" (1996) 5 *P.P.L.R.* 77; A. Brown and C. Pouncey, "Expanding the International Market for Public Procurement: the WTO's Agreement on Government Procurement" (1995) 1 *International Trade Law and Regulation* 69 ; P. Carrier, "Domestic Price Preferences in Public Procurement: an Overview and Proposal of the Amendment to the Agreement on Government Procurement" (1997) 10 *New York International Law Review* 59; C. Corr and K. Zisis, "Convergence and Opportunity: The WTO Government Procurement Agreement and US Procurement Reform" (1999) 18 *New York Law School Journal of International and Comparative Law* 306; G. de Graaf and M. King, "Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round" (1995) 29 *International Lawyer* 435 ; J. Hird, "Government Procurement", Ch. 10 in K. Anderson (ed.) *Strengthening the Global Trading System: from GATT to WTO* (Adelaide: University of Adelaide 1996) ; B. Hoekman and P. Mavroidis, "The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership" (1995) 4 *P.P.L.R.* 63 ; P. Low, A. Mattoo and A. Subramaniam, "Government Procurement in Services" (1996) 20 *World Competition* 1; A. Reich, "The New GATT Agreement on Government Procurement: the Pitfalls of Plurilateralism and Strict Reciprocity" (1997) 31 *Journal of World Trade* 125; C. Tiefer, "The GATT Agreement on Government Procurement in Theory and Practice" (1997) 26 *University of Baltimore Law Review* 31; D. Wallace and S. Sahayadachny, "Opening Government Procurement Markets", Ch. 19 in M. Mendoza, P. Low and B. Kotschwar (eds.), *Trade Rules in the Making* (Washington: Brookings Institute Press 1999).

<sup>21</sup> It is often referred to as the GATT Government Procurement Agreement/Code although it never formed strictly part of GATT. The agreement did not bind all GATT Parties, but only those countries which chose to sign it.

<sup>22</sup> See GPA Article XXIV:7(b).

<sup>23</sup> This is still subject to a legal check and a satisfactory outcome from negotiations on the expansion of coverage. The provisionally agreed revised GPA text can be found at [http://www.wto.org/english/tratop\\_e/gproc\\_e/negotiations\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm). See further, R. Anderson, "Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations" (2008) 17 *P.P.L.R.* 255; S. Arrowsmith, "The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions", Ch. 10 in S. Arrowsmith and R. D. Anderson (eds.), *The WTO Regime on Government Procurement: Challenge and Reform* (forthcoming 2011, CUP).

<sup>24</sup> The GPA is left outside of 'the single undertaking', which all states are obliged to assume as a condition for WTO membership, see Article II:2 of Agreement Establishing the World Trade Organization.

out of 153 WTO members have subscribed to it until now and most of its members are developed countries.<sup>25</sup> However, prospective new WTO members are often requested to undertake a commitment to join the GPA as a precondition for their WTO accession.<sup>26</sup> Currently, there are nine WTO members in the process of negotiating accession to the GPA, all of which are new members with a commitment for the GPA membership upon their accession to the WTO.<sup>27</sup>

As declared in its Preamble, the official objectives of the GPA are 'to contribute greater liberalisation and expansion of world trade; eliminate discrimination among foreign products, services or suppliers; and enhance the transparency of relevant laws and practices'. In other words, the main objective of the GPA is to open up procurement to international competition by ensuring effective market access to foreign bidders.

The principle objective of the GPA is connected with that of the WTO, the focus of which is different from domestic objectives for regulating procurement such as value for money, probity and implementation of horizontal policies. Such a difference in objectives can be reflected in the provisions under the GPA. For instance, procurements that are of a value below specified financial thresholds,<sup>28</sup> which are normally not of foreign interests, are not subject to any requirement under the GPA.

However, as we have seen in Chapter 1, there exist close connections among some of these objectives. For example, the objective of 'value for money' will more likely be achieved if the goals of integrity and international competition are fulfilled. It can be argued that the similarity between the GPA and domestic regulation lies in the fact that the tool of transparency is used in both contexts instead of sharing common objectives.<sup>29</sup> Obviously, transparent procedures can contribute to all of the aforementioned objectives by making it more difficult not only to conceal discrimination, but also to conceal corruption, and at the same time achieving better value for money. However, it is also notable from this perspective that the preamble to the revised text of the GPA refers specifically to the need for "integrity" to ensure efficient and effective management of public resources<sup>30</sup> and to the role of transparency rules in preventing conflicts of interest and corrupt practices as an objective of the Agreement.<sup>31</sup> This indicates broader objectives for the Agreement, even if new substantive provisions to implement these objectives are limited.<sup>32</sup>

In order to achieve its objectives, the GPA lays down two basic principles prohibiting discrimination in procurement, namely the national treatment obligation and the MFN.<sup>33</sup> These are supported by detailed transparency procedural requirements governing the award of contract. These transparency procedures are mainly aimed at making it difficult to conceal discrimination and facilitating participation by suppliers who are unfamiliar with

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<sup>25</sup> See [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm#parties](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties).

<sup>26</sup> 21 out of 24 new WTO members, since 1995, have provisions in their respective Protocols regarding their commitments to accede to the GPA. They are Albania, Armenia, Cape Verde, China, Georgia, Estonia, the Former Yugoslav Republic of Macedonia, Georgia, Jordan, Kyrgyz Republic, Lithuania, Latvia, Moldova, Mongolia, Oman, Panama, Saudi Arabia, Chinese Taipei, Ukraine and Vietnam. There are only three new members left out: Ecuador did not mention the GPA membership issue in its Protocol, while Cambodia and Nepal expressly indicated their intention not to take part in the GPA in their Protocol. Protocols of accession for new members since 1995 are available at [http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm#arm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#arm).

<sup>27</sup> They are Albania, Armenia, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman, and Panama.

<sup>28</sup> The GPA applies only to procurements of value not less than relevant thresholds specified in Appendix I to the agreement, which are different depending on the level of government and type of procurement concerned.

<sup>29</sup> S. Arrowsmith, 'Reviewing the GPA: the Role and Development of the Plurilateral Agreement After Doha' (2002) *J.I.E.L.* at pp. 766.

<sup>30</sup> Third recital of the preamble to the revised text.

<sup>31</sup> Sixth recital of the preamble to the revised text.

<sup>32</sup> The main one being Article V:4 of the revised text which requires that procuring entities shall conduct covered procurement in a transparent and impartial manner that avoids conflicts of interest and prevents corrupt practices, which is inspired by obligations for states under Article 9(1) of the United Nations Convention Against Corruption.

<sup>33</sup> It should be noted that the national treatment obligation and MFN under the GPA is subject to any trade-restrictive rules to a member's market as a whole. See GPA Article III:3.

the system.<sup>34</sup> Under the GPA, the Parties are required to have in place domestic rules governing contract award procedures so as to give effect to their obligations under the GPA.

### 10.2.2.2 Coverage<sup>35</sup>

Regarding the coverage of the current GPA, whether a procurement contract is regulated depends on three basic parameters: the procuring entity, the type of contract and the contract value. The precise entity covered, the contracts covered and the thresholds at which the GPA applies are specified in each Parties' own coverage annexes, which vary from state to state.<sup>36</sup> This is because states are only willing to subject certain types of procurement to international competition, which are quite different according to their own particular considerations.

Furthermore, the differences in coverage for different Parties lead to the problem of 'reciprocity'.<sup>37</sup> Not surprisingly, states would probably hope to give market access concessions to other states only if comparable access is accorded to their own industry by those states in order to exclude 'free riders' benefiting from other Parties' bilateral bargains for free. Consequently, the agreement covering central government entities was reached on the basis of the MFN treatment, while at sub-central government level and in the utilities sectors, Parties departed from the MFN treatment and agreed coverage on the basis of strict reciprocity.<sup>38</sup> That is to say, most Parties have inserted specific derogations to exempt them from applying parts of the agreement to other Parties not offering reciprocal coverage. Under the principle of reciprocity, Parties are, in effect, invited to work out bilaterally the economic equivalence of concessions between themselves; the GPA thus only serving as a suggested framework within which such bilateral deals are concluded.<sup>39</sup> Under the current review on the GPA, Member States have been negotiating on the extension of coverage since 2004 but it is still not clear when the negotiations on coverage will be completed.<sup>40</sup>

De Graaf and King have argued that reciprocity-based derogations to MFN obligations are instrumental in helping to expand the coverage of the GPA, since offers would have been scaled down to the level of the lowest common denominator to achieve balance on the basis of the MFN treatment.<sup>41</sup> However, Reich has a different view, arguing that there are immense problems connected with this tit-for-tat approach based on the idea of 'fair trade' instead of 'free trade'. However, as pointed out by Arrowsmith, a precise assessment of whether the beneficial effects of reciprocal derogations from the MFN

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<sup>34</sup> S. Arrowsmith, *Government Procurement in the WTO*, at pp. 765.

<sup>35</sup> See further, S. Arrowsmith, *Government Procurement in the WTO* (London: Kluwer Law International 2003), Ch. 5 ; M. Bronckers, "The Position of Privatized Utilities under WTO and EU Procurement Rules" 1996/1 *Legal Issues in European Integration* 145 ; D. Collins, "Canada's sub-central coverage under the WTO Agreement on Government Procurement" (2008) 17 *P.P.L.R.* 21; A. Davies, "Korea – Measures Affecting Government Procurement: Some Critical Observations" (2001) 10 *P.P.L.R.* 229; D-H. Kim, "Political institutions and the Government Procurement Agreement of the WTO" (2009) 18 *P.P.L.R.* 1; P. Olivera, "Defining the Scope of Covered Entities under the WTO Agreement on Government Procurement" (1997) 6 *P.P.L.R.* 1 ; H-J. Priess and C. Pitschas, "Recent Developments within the WTO: Korea – Measures Affecting Government Procurement" (2000) 9 *P.P.L.R.* NA91; P. Wang, "Coverage of the WTO's Agreement on Government Procurement: Challenges of Integrating China and other Countries with a Large State Sector into the Global Trading System" (2007) 10 *Journal of International Economic Law* 887.

<sup>36</sup> The precise coverage for each Party is set out in Appendix I to the GPA, which contains a series of separate annexes on coverage for each Party.

<sup>37</sup> A major problem of reciprocity is asymmetry in the size of countries so that small countries have little to offer to large ones in terms of export potential. This could be an important reason for limited participation to the GPA by developing countries.

<sup>38</sup> De Graaf and King, above, at p. 446.

<sup>39</sup> A. Reich, *International Public Procurement Law* (1999) (The Hague: Kluwer Law International 1999), at p. 137.

<sup>40</sup> For more detailed information, see R. D. Anderson and K. Osei-Lah, 'The Coverage Negotiations under the Agreement on Government Procurement: Context, Mandate, Process and Prospects', in S. Arrowsmith and R. D. Anderson (eds.), above.

<sup>41</sup> Graaf and King, above.

treatment under the GPA outweigh their detrimental effects is difficult in the absence of empirical evidence on trade diversion and trade creation effects.<sup>42</sup>

### 10.2.2.3 Main features of rules

The GPA rules take legally binding form, as reflected by its negotiating history and overall context.<sup>43</sup> Moreover, its legislative language also implies that the instrument creates legally binding obligations. Article III (1) is illustrative of this point: it provides 'each Party *shall provide immediately and unconditionally* to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than...' (emphasis added).

The GPA, as mentioned in Section 2.2.1, contains two main types of rules: general non-discrimination principles and more detailed transparency rules. Article 3 sets out the basic principles of national treatment and MFN in a general manner to prohibit discriminatory practices. Meanwhile, the GPA contains minimum procedural requirements to govern the conduct of the contract award procedures, which mainly focus on the pre-contractual stage from invitation to participate to the award of contracts. It does not attempt to regulate the contract award process in an exhaustive manner, but merely lays down minimum procedural standards under which states have a significant discretion to tailor their own procurement rules to the needs of specific domestic needs. Under its provisions procuring entities are required to award contracts mainly through competitive tendering procedures. Minimum standards for the conduct of the competitive award procedures are elaborated including minimum time-limits for different stages of the procedures (Art. XI) and minimum information required in tender documentation (Art. XII). As defined in Article VII(3) of the GPA, open tendering procedures refers to procedures under which all interested suppliers may submit a tender, while selective tendering procedures are those procedures under which those suppliers invited to do so by the entity may submit a tender. Detailed procedural rules have been laid down in the GPA to govern both of these procurement methods: the contract has to be advertised; a competition must be held; and there are criteria and procedures for qualifying suppliers and for awarding the contract; rules on qualification of suppliers (Art. VIII); and rules on award criteria and the evaluation of bids (Art. XIII). However, in certain clearly defined and exceptional circumstances, the GPA also allows procuring entities to use a more informal procurement method without a competition, namely 'limited tendering'.<sup>44</sup> States are free to apply more stringent rules than the GPA rules. For example, states can require the use of open tendering as the sole procurement method, even where selective tendering or limited tendering is permitted under the GPA.

These requirements largely restrict the procuring entities' freedom to choose more informal procurement methods for a particular procurement. In view of the recent trend of many developed countries opting for more informal procurement methods,<sup>45</sup> the ability of states to pursue value for money can be limited by virtue of their constrained discretion over the choice of procurement methods. Although the use of formal competitive tendering may ensure transparency, promote competition and reduce the chance of corruption, it is time-consuming, costly and inflexible process. In the words of Arrowsmith, 'a state with professional officials buying in well-developed markets with little

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<sup>42</sup> S. Arrowsmith, *Government Procurement in the WTO*, above, at pp. 111-112.

<sup>43</sup> See Blank and Marceau, 'the History of the Government Procurement Negotiations since 1945' (1996) 4 *P.P.L.R.* 77 at pp. 86-91.

<sup>44</sup> Limited tendering procedures are defined in GPA Article VII(3) as 'those procedures where the entity contacts suppliers individually'. When limited tendering procedures are invoked, it is not necessary for procuring entities to follow most of the procedural rules governing open and selective tendering procedures. However, limited tendering procedures can only be allowed under exceptional circumstances specified in Article XV.

<sup>45</sup> Some developed countries, such as the US and the UK, have increasingly switched away from stringent transparency rules to greater reliance on the exercise of professional judgment of procuring officials. See S. Arrowsmith, 'Reviewing the GPA: The Role and Development of the Plurilateral Agreement after Doha', *J.I.E.L.* (2002) 761-790 at p. 773.

corruption might well find that the costs of open procedures (a kind of formal competitive tendering procedure) often outweigh the benefits'.<sup>46</sup>

Certain Special and Differential Treatment ('S&DT') provisions are also included in the GPA for developing countries members. For example, Article V.3 provides that 'developed countries, in the preparation of their coverage list under the provisions of this agreement, *shall endeavour to* include entities procuring products and services of export interest to developing countries' (emphasis added). However, these S&DT provisions arguably only state a possibility rather than an automatic right for developing countries to obtain such concessions. In the process of negotiation, developing countries have to bargain hard in order to benefit from such concessions and the effectiveness of these provisions depends very much on the willingness of the developed countries.

Nevertheless, it is worth noting that significant changes have been made to S&DT provisions under the provisionally agreed new text given the current priority to attract participation from developing countries.<sup>47</sup> For instance, Article IV:1 of the provisionally agreed new GPA text provides new transitional measures for developing countries acceding to the Agreement, and clearly spells out the circumstances in which such measures will be available. The new S&DT provisions in the provisionally agreed text have already been applied to pending accession negotiations, even though the new text as a whole has not yet entered into force.<sup>48</sup>

#### **10.2.2.4 Horizontal policies<sup>49</sup>**

The GPA provides its Members with some scope to pursue collateral policies. It seeks to strike an appropriate balance between free trade goals and the legitimate domestic policies concerned.

Due to its flexible approach to coverage as discussed in Section 2.2.2, states may exclude particular entities or types of contracts from the coverage of the agreement if they wish to utilise the procurement of those entities or contracts to promote industrial, social or environmental policies. It is also possible for states to negotiate specific derogations to cover certain programmes using procurement as a policy tool though it is envisaged that such derogations are temporary. Many Members such as the U.S., Canada and Japan

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<sup>46</sup> See S. Arrowsmith, 'Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization', (2003) *J.W.T.* 37(2) 283-303 at p. 299.

<sup>47</sup> For an evaluation and comparison on the S&DT provisions of the current GPA and those contained in the provisionally agreed revised GPA text, see A.C. Müller, 'Special and Differential Treatment and other Special Measures for Developing Countries under the Agreement on Government Procurement: the Current Text and New Provisions', in S. Arrowsmith and R. D. Anderson (eds.), above.

<sup>48</sup> Report (2006) of the WTO Committee on Government Procurement to the General Council (GPA/89, 11 December 2006), para. 20-21. Article IV of the revised text is expected to be renumbered as Article V of the revised GPA, without any changes in content.

<sup>49</sup> On horizontal policies and the GPA, see generally, S. Arrowsmith, *Government Procurement in the WTO* (London: Kluwer Law International 2003), Ch. 13; S. Arrowsmith, "Public Procurement as a Tool of Policy and the Impact of Market Liberalisation" (1995) 111 *Law Quarterly Review* 235; P. Kunzlik, "Environmental Issues in International Procurement", Ch. 11 in S. Arrowsmith and A. Davies (eds.), *Public Procurement: Global Revolution* (The Hague: Kluwer Law International 1999); P. Kunzlik (ed.), *The Environmental Performance of Public Procurement* (2003); (OECD publication); C. McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (Oxford: OUP 2007); C. McCrudden, "International Economic Law and the Pursuit of Human Rights: a Framework for Discussion of the Legality of "Selective Purchasing" Laws under the WTO Procurement Agreement" (1999) 2 *Journal of International Economic Law* 3; C. McCrudden, "Social Policy Issues in Public Procurement: a Legal Overview", Ch. 12 in S. Arrowsmith and A. Davies (eds.), *Public Procurement: Global Revolution* (The Hague: Kluwer Law International 1999); C. McCrudden and S. Gross, "WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: a Malaysian Case Study" (2006) 17 *European Journal of International Law* 151; H-J. Priess and C. Pitschas, "Secondary Criteria and Their Compatibility with EC and WTO Procurement – The Case of the German Scientology Declaration" (2000) 9 *P.P.L.R.* 196; A. Davies, "The National Treatment and Exceptions Provisions of the Agreement on Government Procurement and the Pursuit of Horizontal Policies", in S. Arrowsmith and R. D. Anderson (eds.), above.

have derogations for specific existing programmes. For instance, the agreement does not apply for the U.S. to set asides for small and minority businesses for all covered entities.<sup>50</sup>

However, the GPA rules significantly restrict its Member's ability to implement collateral policies for covered procurement practices. Firstly, such collateral use of procurement will be caught by the national treatment rule if it has a discriminatory effect. Apparently, measures supporting non-competitive domestic industries are prima facie prohibited for covered procurement. Secondly, even if there is no discrimination involved, the detailed rules on contract award procedures may affect a procuring authority's ability to use procurement for a collateral purpose. Taking qualification conditions as an example, Article VIII(b) expressly requires that conditions of qualification are limited to those 'essential to ensure the firm's capability to fulfil the contract', and thus, procuring entities would probably not be able to disqualify a firm which does not meet certain social or environmental criteria such as providing equal opportunity for women or having a good environmental record.<sup>51</sup>

Additionally, the GPA also expressly prohibits the use of offsets<sup>52</sup> subject to special provisions for developing countries. However, it is not always clear in terms of the compatibility of certain collateral use of procurement with the GPA. For example, it is unclear whether social or environmental considerations can be used as contract award criteria. Article XIII:4 allows a contract to be awarded to the tender which is the 'most advantageous' provided that the specific criteria for evaluation are set forth in advance, but there is no further indication on what kind of criteria may be used in this context.<sup>53</sup> Such uncertainties in the law create practical problems for purchasers and governments.

#### **10.2.2.5 Inter-governmental dispute settlement procedures<sup>54</sup>**

The WTO's general Dispute Settlement Mechanism ('DSM') is applicable if not superseded by certain special provisions contained in Article XXII of the GPA. The process for settling disputes starts with consultations between the Parties to the dispute to find a satisfactory solution. The non-judicial or diplomatic nature of such consultations is, however, shadowed by the availability of formal adjudications before the WTO Dispute Settlement Body ('DSB').<sup>55</sup>

The DSB serves 'to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions' and its recommendations and rulings 'cannot add to or diminish the rights and obligations provided in the covered agreements'.<sup>56</sup> By adhering to the DSB rulings to treaty texts, states choose to delegate the task of disputes settlement to third-party tribunals by applying the agreed rules instead of resolving disputes through institutionalised bargaining.

The recommendations or rulings adopted by DSB are binding upon the Parties concerned. The use of the term 'recommendations' by no means implies that the party is free to decide whether to follow them. As argued by Jackson, the general effect of an adopted dispute settlement report has 'by practice, the effect of providing an international legal

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<sup>50</sup> The GPA, U.S. Appendix 1, General Notes.

<sup>51</sup> See Article VIII of the GPA.

<sup>52</sup> For the meaning of offset under the GPA, see Article XVI footnote 7 of the GPA.

<sup>53</sup> As a result, it can be argued that collateral criteria can be considered, however the EC and Japan are arguing that this provision is limited to economic criteria. See the Massachusetts-Myanmar case, available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/disput\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/disput_e.htm).

<sup>54</sup> See S. Arrowsmith, *Government Procurement in the WTO*, above, Ch. 14; C. Schede, "The 'Trondheim' Provision in the World Trade Organisation Agreement on Government Procurement" (1996) 5 *P.P.L.R.* 161; F. Weiss, "Dispute Settlement under the 'Plurilateral Trade Agreements': The Case of the Agreement on Government Procurement", Ch. 15 in E-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (London: Kluwer Law International 1997).

<sup>55</sup> See Art. 2 of the DSU.

<sup>56</sup> See Art. 3.2 of the DSU.

obligation for disputants to obey'.<sup>57</sup> The DSB monitors the implementation of adopted recommendations or rulings, with the delegated power to authorise retaliation in the case of non-compliance.<sup>58</sup> A state that does not comply with the DSB recommendations or rulings risks serious consequences - it either has to provide compensation acceptable to the complainant or otherwise face retaliatory countermeasures.

Due to its inter-governmental nature, the parties in proceedings under the WTO DSM are its Member State governments. Private parties do not have direct access to the WTO DSM. In practice, individuals and groups may still exert influence on a state government with respect to the triggering of a dispute, but they must do so by convincing the government to support their claim as a state claim against another government.

#### **10.2.2.6 Bid challenge procedures**

Whilst suppliers do not, however, have direct access to the Dispute Settlement Mechanism, a requirement for establishing national review procedures<sup>59</sup> was included in the GPA to allow private bidders to challenge decisions taken in award procedures covered by the agreement before domestic review bodies and to seek redress for the infringement of rights. Under Article XX of the GPA, each signatory is required to provide in its domestic legislation for procedures before a national court or an independent review body to allow the aggrieved supplier to challenge the tender procedure or its award. By providing direct access for aggrieved suppliers to domestic legal adjudication, the GPA takes advantages of well-established national judicial systems to enforce its rules.

However, it is important to note that any remedies under national challenge procedures will only be available if the relevant state has incorporated the GPA rules into national law. In most national systems that do not give an international agreement direct effect, the agreement cannot be enforced unless the relevant national legislation has been adopted to implement it. Consequently, aggrieved suppliers would get no remedies by bringing GPA-inconsistent practices before their national review body unless such practices are prohibited under national law. For example, if a state maintains in its national legislation discriminatory measures that are inconsistent with the GPA and has no general recognition of the overriding effect of treaty rules over its national rules, there will be no remedies.

## **10.3 Regional Instruments Regulating Procurement towards Market Liberalisation**

### **10.3.1 Introduction**

Besides the WTO initiatives, the opening up of public procurement markets has increasingly been a target of regional trade arrangements (RTAs). By way of illustration, this section will examine several major procurement instruments with trade objectives at

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<sup>57</sup> See J. H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on treaty law and economic relations* (2000: Cambridge University Press) at p. 127. Another view, however, is that DSB rulings may only amount to mere recommendations as there is no obligation under the GATT to obey the results of the dispute settlement procedures.

<sup>58</sup> See Art. 22 of the DSU.

<sup>59</sup> For more detailed discussion on the national challenge procedure under the GPA, see S. Arrowsmith, *Government Procurement in the WTO*, above, at pp. 384-405; Footer, 'Remedies under the New GATT Agreement on Government Procurement' (1995) 4 *P.P.L.R.* 80; Reich, note 3 above, pp. 312-316; Dendauw, 'New WTO Agreement on Government Procurement: an Analysis of the Framework for Bid Challenge Procedures and the Question of Direct Effect' (2000) 18 *J.E.N.R.L.* 254; A. Davies, "Remedies for Enforcing the WTO Agreement on Government Procurement from the Perspective of the European Community: a Critical Analysis" (1997) 20 *World Competition* 113; M. Footer, "Remedies under the New GATT Agreement on Government Procurement" (1995) 4 *P.P.L.R.* 80.

regional level: the EU procurement rules; the NAFTA Chapter 10; the COMESA directives; and the APEC non-binding principles on government procurement.

## 10.3.2 The European Union ('EU') Procurement Regime<sup>60</sup>

### 10.3.2.1 Introduction, objectives and regulatory approach

The current EU Member States are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the Netherlands and United Kingdom. The EU procurement regime is a well-developed regional regime, which has to a large extent served as a model for subsequent procurement regimes, and has had a significant influence on the development of the current GPA.<sup>61</sup>

The main EU legal rules on procurement derive from two sources. The first one is the general free movement principles of the Treaty on the Functioning of the European Union, which forms a basis for the European procurement framework.<sup>62</sup> Another source of EU rules on procurement consists of a series of directives regulating award procedures for major contracts. The EU directives can be divided into two categories apart from the remedies directives: the public sector directives<sup>63</sup> and the utilities directive.<sup>64</sup>

The main aim of the EU procurement rules is to eliminate restrictive procurement practices so far as they affect trade between Member States and thus to realise the full benefits of a single market in those sectors affected by public procurement.<sup>65</sup> The EU directives, like the GPA, seek to ensure non-discrimination in award procedures by mainly requiring procuring entities to follow detailed transparency procedures so that it is more difficult to hide discrimination.

### 10.3.2.2 Coverage

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<sup>60</sup> See generally the Asia Link companion textbook *EU Public Procurement Law*; S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (London: Sweet & Maxwell 2005); P. Trepte, *Public Procurement in the EU: a Practitioner's Guide* (Oxford: OUP 2007); J. M. Hebly (ed.), *European Public Procurement: History of the 'Classic' Directive 2004/18/EC* (2007, Kluwer Law International); S.E. Hjelmberg and P.S. Jakobsen, *Public Procurement Law – the EU directive in public contracts* (Copenhagen: Djøf 2006); R. Nielsen and S. Treumer (eds), *The New EU Public Procurement Directives* (Copenhagen: Djøf 2005); L. Digings and J. Bennett, *EC Public Procurement: Law and Practice* (looseleaf) (London: Sweet & Maxwell 1992); C. Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford: OUP 2006); C. Bovis, *Public Procurement in the European Union* (Basingstoke: Palgrave MacMillan 2005).

<sup>61</sup> Gordon, Rimmer and Arrowsmith, 'The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO', in S. Arrowsmith and Davies (ed), *Public Procurement: Global Revolution* (Kluwer Law International Ltd, 1998) at p. 28.

<sup>62</sup> On the application of the Treaty to procurement see generally the Asia Link companion textbook *EU Public Procurement Law*, Ch. 3; S. Arrowsmith and P. Kunzlik, 'EC Regulation of Public Procurement', Ch. 2 (pp. 55-107) in Arrowsmith and Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009; CUP); S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (London: Sweet & Maxwell 2005), Ch. 4; P. Trepte, *Public Procurement in the EU: a Practitioner's Guide* (Oxford: OUP 2007), pp. 1-27; F. Weiss, *Public Procurement in European Community Law* (London: Athlone Press 1993), pp. 18-32; M. Krugner, 'The Principles of Equal Treatment and Transparency and the Commission Interpretative Communication on Concessions' (2003) 12 *P.P.L.R.* 181; F. Neumayr, 'Value for Money v. Equal Treatment: The Relationship Between the Seemingly Overriding National Rationale for Regulating Public Procurement and the Fundamental EC Principle of Equality of Treatment' (2002) 11 *P.P.L.R.* 215.

<sup>63</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 2004 O.J.(L 134)114.

<sup>64</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services, 2004 O.J.(L 134)1.

<sup>65</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2<sup>nd</sup> Edition 2005) at p. 48.

Different from the GPA's flexible approach to coverage, the coverage of the EU rules is the same for all Member States, ruling out any possibility of derogations for particular entities or sectors. As regards the bodies covered by the public sector directives,<sup>66</sup> the entities falling within the scope of the directives have been called 'contracting authorities', which is defined in Article 1 of the public sector directives.<sup>67</sup> Public bodies of a non-commercial nature are broadly covered by the public sector directives aiming at regulating authorities likely to be exposed to significant pressure to favour national industry.<sup>68</sup> Also, such directives apply only to 'contracts for pecuniary interest concluded in writing',<sup>69</sup> and the value of which is above certain financial thresholds.<sup>70</sup> Certain contracts are expressly excluded from the scope of the directives.<sup>71</sup>

Activities covered by the utilities directive,<sup>72</sup> are those in which there is limited competition and state influence plays an important part. With regard to entity coverage, a broad approach was adopted i.e. most entities operating in the relevant sectors are subject, prima facie, to the directive. Three groups of entities are covered pursuant to Article 2(1) of the new utilities directive:<sup>73</sup> 'contracting authorities';<sup>74</sup> 'public undertakings' and entities carrying out the covered activities on the basis of 'special or exclusive rights'. The meaning of 'special or exclusive rights' is also provided, which is very important in determining the scope of the directive. Like the public sector directives, the utilities directive also applies only to the contracts above certain thresholds<sup>75</sup> and a number of exemptions are excluded from its coverage.<sup>76</sup>

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<sup>66</sup> See generally, the Asia Link companion textbook *EU Public Procurement Law*, Ch. 4; S. Arrowsmith, "The Entity Coverage of the EC Procurement Directives and UK Regulations" (2004) 13 *P.P.L.R.* 59; E. Papangelis, "The Application of the EU's Works, Supplies and Services Directives to Commercial Entities" (2000) 9 *P.P.L.R.* 201; S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (London: Sweet & Maxwell 2005), Ch. 5; P. Trepte, *Public Procurement in the EU: a Practitioner's Guide* (Oxford: OUP 2007), Ch. 2; J. Garcia-Andrade and P. Athanassiou, "Reflections on the status of independent national authorities under Community public procurement law" (2007) 16 *P.P.L.R.* 305.

<sup>67</sup> According to Art 1 (9) of Directive 2004/18/EC, 'Contracting authorities' means the State; local and regional authorities; bodies governed by public law and association formed by, and the concept of 'bodies governed by public law' is further defined in detail to cover any body, 'established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character'; or any body has legal personality and either is financed for the most part by a contracting authority, or is subject to management supervision by a contracting authority, or has an administrative, managerial or supervisory board more than half of whose members are appointed by a contracting authority.

<sup>68</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement*, above, at p. 106.

<sup>69</sup> Directive 2004/18/EC, Art. 2(a).

<sup>70</sup> Directive 2004/18/EC, Art 7 specifies the different value thresholds for various kinds of public sector contracts. Moreover, Art 9 (3) expressly prohibits purchasers from splitting up purchases in order to bring the value of each contract below the specified threshold and thus circumvent the application of the directives. Art. 9 (4) also lay down 'aggregation rules' which makes it difficult to avoid the rules by contract splitting.

<sup>71</sup> Directive 2004/18/EC S.3 excluded contracts, Arts. 12-18.

<sup>72</sup> Directive 2004/17/EC S.2 sets out activities covered relating to the provision or operation of gas, heat, and electricity (Art. 3); water (Art. 4); transport services (Art. 5); postal services (Art. 6); the exploration for, or extraction of oil, gas, coal or other solid fuels, as well as ports and airports (Art. 7); and contracts covered several above activities (Art. 9). The non-exhaustive lists of contracting entities within the meaning of these directives can also be found in Annexes I to X. On the entities and activities covered by the utilities directive, see further, the Asia Link companion textbook *EU Public Procurement Law*, Ch. 7; A. Brown, "The Extension of the Community Public Procurement Rules to Utilities" (1993) 30 *C.M.L.Rev.* 721; S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (London: Sweet & Maxwell 2005), Ch. 15; P. Trepte, *Public Procurement in the EU: a Practitioner's Guide* (Oxford: OUP 2007), Ch. 3; T. Kotsonis, "The Definition of Special or Exclusive Rights in the Utilities Directive: *Leased Lines or Crossed Wires*" (2007) 1 *P.P.L.R.* 68; S. Arrowsmith, "Deregulation of Utilities Procurement in the Changing Economy: towards a Principled Approach?" (1997) 7 *EC.L.Rev.* 4; M. Bronckers, "The Position of Privatized Utilities under WTO and EU Procurement Rules" 1996/1 *Legal Issues in European Integration* 145.

<sup>73</sup> Directive 2004/17/EC Art. 2(1).

<sup>74</sup> Its meaning is the same as 'contracting authorities' under the public sector procurement directives. Most of the contracts of these entities are governed by the public sector directives, but their contracts in relation to utility activities are governed instead by the utilities directive.

<sup>75</sup> Directive 2004/17/EC Art. 16.

<sup>76</sup> Directive 2004/17/EC Arts. 18-26, such exemptions are based on the fact that the entity in question is subject to some form of competitive pressure which provides sufficient incentive for it to resist any governmental pressure to 'buy national'.

Meanwhile, all the contracts awarded by public bodies which are not regulated by the directives for various reasons will nevertheless be governed by the EU Treaty when they are of cross border interest.<sup>77</sup> It has long been recognized that these Treaty obligations require public bodies to refrain from discrimination in their public procurement against other Member States. More recently, the European Court of Justice has held that these non-discrimination obligations also imply an obligation of transparency which requires public bodies to advertise their contracts and award them in accordance with certain transparent procedures that the Court has developed, taking inspiration from the procurement directives.<sup>78</sup>

### 10.3.2.3 Main features of the rules

The EU Treaty obligations are legally binding on Member States and enforceable without the need for national implementing measures, while the directives define a legal framework within which each Member State is under a legally binding obligation to transpose the rules into national legislation in a specified period of time. According to the Article 249 of the Treaty, the directives are 'binding as to the result achieved' but 'leave to the national authorities the choice of form and methods'.

In the same way as the GPA sets minimum standards rather than a complete set of rules, the EU procurement regime was originally intended to be a broad framework, within which states enjoy discretion in adopting their own national legislation. The EU Treaty forms a basis for the European public procurement framework by setting out general principles, while the directives lay down detailed transparency rules in support of the Treaty's principles. However, the EU procurement rules represent a much more restrictive approach than the GPA in terms of states' discretion in implementation. Much more detailed obligations than those written out in the legal provisions have been developed by the CJEU's generous interpretation.<sup>79</sup> With the development of judicial interpretation, there is now in fact a huge difference between the GPA and the EU rules in the degree of detail and strictness though the provisions of the two regimes still look superficially similar with a bit more detail in the latter.

On the one hand, a higher level of precision in rules may not necessarily of itself imply greater constraints but merely greater clarity of treatment. For example, the new explicit provisions on framework, auctions and electronic communications in the EU directives serve to remove legal uncertainties rather than to limit states' freedom in using them. On the other hand, the precise feature of the EU rules especially the CJEU's broad interpretations on them does restrict states' discretion in many respects.

Taking the CJEU's interpretations on the principle of equal treatment as an example, this principle was first articulated by the Court in *Storebaelt*.<sup>80</sup> In this case, the Court held that *Storebaelt*, the procuring entity, infringed the principle of equal treatment by accepting a tender that did not comply with a fundamental requirement of the tender conditions. The Court also made it clear that the duty to observe the principle of equal treatment 'lies at the very heart of the directive',<sup>81</sup> although it was yet to be written into the explicit

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<sup>77</sup> For detailed information, see Braun, 'A Matter of principles- the Treatment of Contracts Falling outside the Scope of the European Public Procurement Directives' (2000) *P.P.L.R.* 2000, 1, pp. 39-48.

<sup>78</sup> On this development, including for critique, see Braun, above; S. Treumer and Werlauff, "The Leverage Principle: Secondary Law as a Lever for the Development of Primary Community Law" (2003) 28(1) *E.L.Rev.* 124; A. Brown, "Seeing Through Transparency: the European Court's Case Law on the requirement to Advertise Public; Contracts and Concessions under the EC Treaty" (2007) 16 *P.P.L.R.* 1; P. Horijk and M. Meulenbelt, "A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender outside the Scope of the Public Procurement Directives should be Dismissed" (2005) 14 *P.P.L.R.* 123; D. McGowan, "Clarity at Last? Low Value Contracts and Transparency Obligations" (2007) 16 *P.P.L.R.* 274.

<sup>79</sup> For detailed discussion, see S. Arrowsmith, "The Past and Future Evolution of EC Procurement Law: from Framework to Common Code?" (2006) 35 *Public Contracts Law Journal* 337.

<sup>80</sup> Case C-243/89, *Commission v Denmark* [1993] E.C.R. I-3353.

<sup>81</sup> *Ibid.* para. 33.

provisions. Since then, the Court applied this principle to several cases without clarifying its precise meaning.<sup>82</sup>

In the case of *Fabricom*, the Court stated that 'the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified'.<sup>83</sup> In so defining the principle, the Court is left with a broad discretion in determining the meaning of 'comparable' or 'different' situations and the justifications for departing from this requirement.<sup>84</sup>

Arrowsmith, in a recent article,<sup>85</sup> demonstrates how states' discretion has increasingly been reduced by the CJEU's case law in deciding under what circumstances the procuring entity may treat two suppliers in a different way. In *Fabricom*, the Court held that the Belgian law prohibiting all persons involved in preparatory work from tendering contravened the directives because it was not proportionate. As explained by the Court, the rules went 'beyond what is necessary to attain the objective of equal treatment for all tenderers', and the principle of equal treatment could be achieved by a less restrictive measure. Consequently, the proportionality test stated in *Fabricom* further constrains states' discretion in implementing the principle of equal treatment.

Furthermore, even in the absence of explicit legislation and case law, states' discretion could also be affected by the vagueness of these widely-interpreted principles. For instance, there are neither legislative provisions nor judicial interpretations expressly dealing with the issue of 'late tenders' under the EU regime. The rules on time-limit<sup>86</sup> is to ensure that suppliers have sufficient time to prepare and submit their tenders, which should by no means restrict states' discretion to accept later tenders as the deadline is set by the procuring entity only for its own convenience.

However, whether the procuring entity is allowed to freely accept late tenders still depends on how the Court applies the principle of equal treatment here. It can be interpreted to allow the procuring entity to accept late tenders so long as it gives other suppliers equal opportunities to improve their tenders during the extended period it gives to a particular supplier; but the principle of equal treatment can, however, be interpreted alternatively to require that the procuring entity adheres to any rules set by itself and not to accept late tenders— failing to apply them to one supplier involves the unequal treatment of others.<sup>87</sup> Because of the unclear implication of this principle, states' discretion in deciding whether to accept late tenders can be constrained for the fear of being caught by this principle, especially taking into account the CJEU's restrictive approach to interpretations. It can be argued that the CJEU's expansive judicial interpretations may risk undermining the carefully achieved regulatory balance between the free trade goal and other domestic concerns.

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<sup>82</sup> For example, Case C-87/94, *Commission v Belgium* [1996] E.R.C. I-2043; Case C-16/98, *Commission v French Republic* [2000] E.R.C. I-8315.

<sup>83</sup> See Case C-21/03, *Fabricom v Etat belge* [2005] E.R.C. I-1559, para. 27.

<sup>84</sup> See Arrowsmith, 'The Past and Future Evolution of EC Procurement Law: from Framework to Common Code?', above, at p. 41.

<sup>85</sup> *Ibid.*, at pp. 41-46.

<sup>86</sup> See Art. 38(1) of the Public Sector Directive.

<sup>87</sup> See S. Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2<sup>nd</sup> Edition 2005) at pp. 458-459.

#### 10.3.2.4 Horizontal policies<sup>88</sup>

Under the EU procurement regime, many horizontal uses of procurement are prohibited: the implementation of any collateral policy is restricted by the non-discrimination principle derived from the EU treaty. Most use of procurement to promote domestic industry or regional development would inevitably involve discrimination against foreign suppliers and thus be prohibited by the EU treaty. For example, in the *Du Pont de Nemours* case,<sup>89</sup> the CJEU ruled that Italian legislation reserving to undertakings established in a particular region a proportion of public supply contracts was incompatible with Article 28 since such a preferential system constituted discrimination against products originating in other Member States.

Meanwhile, the use of procurement to pursue collateral objectives is also largely restricted by the detailed rules on award procedures laid down by the directives. Unlike the position under the GPA, the EU Member States are not permitted to exclude certain entities or types of procurement from the coverage of the EU rules for implementing collateral policies due to the EU's uniform coverage to all Members. The EU rules largely reflected a restrictive approach in terms of the use of procurement to promote collateral policies on the basis that such policies may involve discrimination as well as damage transparency and competition.<sup>90</sup> For example, it is not generally permitted to consider social or environmental criteria in awarding contracts, unless such criteria are 'linked to the subject-matter of the contract in question' as explicitly stated in the new directives,<sup>91</sup> which arguably represents a more stringent requirement than that under the GPA.<sup>92</sup>

The EU rules in this area have attracted criticism for their restrictive nature as well as bringing about a number of uncertainties in the law.<sup>93</sup> Given the EU's restrictive approach to its member's use of procurement to support national policies, it is interesting to note that a different approach was applied as with the use of procurement to promote the EU's policies. For example, under the new directives, Member States are obliged to exclude firms convicted of participation in criminal organization, corruption, fraud, money laundering, as defined in relevant EU instruments, to support the European criminal policy.<sup>94</sup>

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<sup>88</sup> See generally, S. Arrowsmith and P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directive and New Directions* (2009; CUP); R. Caranta and M. Trybus (eds), *The Law of Social and Green Procurement in Europe* (Djof publishing; 2010); C. McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP; 2007); S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (London: Sweet & Maxwell 2005), Ch. 19 ; J. Arnould, "Secondary Policies in Public Procurement: the Innovations of the New Directives" (2004) 13 *P.P.L.R.* 187; S. Arrowsmith, "An Assessment of the New Legislative Package on Public Procurement" (2004) 41 *Common Market Law Review* 1277, Section 12; P. Trepte, *Public Procurement in the EU: a Practitioner's Guide* (Oxford: OUP 2007), pp. 63-87; J.M. Fernandez Martin, *The EC Public Procurement Rules: A Critical Analysis* (Oxford: Clarendon Press 1996), Chs. 2 and 3.

<sup>89</sup> Case C-21/88, *Du Pont de Nemours Italiana SpA v. Unita Sanitaria Locale No.2 di Carrara* [1990] 1 ECR 899. In contrast, the EU Member States are, subject to certain controls, allowed to promote regional development through subsidies which are considered more efficient and less trade-distorting means.

<sup>90</sup> S. Arrowsmith, 'An Assessment of the New Legislative Package on Public Procurement', (2004) 41 *C.M.L.R.* at pp. 1306-1307.

<sup>91</sup> See Directive 2004/18/EC Art. 53(1) and Directive 2004/17/EC Art. 55(1). Also, the directives provide an illustrative but non-exhaustive list to illustrate the requirement.

<sup>92</sup> As previously mentioned, the GPA allows a contract award to the tender which is considered to be the 'most advantageous' and it does not expressly refer to the most 'economically' advantageous tender. Therefore, it is not clear either whether non-economic criteria can be considered or whether the award criteria must be related to the subject matter of the contract as required under the EU rules.

<sup>93</sup> S. Arrowsmith, 'the Past and Future Evolution of EC Procurement Law: from Framework to Common Code?', above, at p. 44.

<sup>94</sup> See Directive 2004/18/EC Art. 45(1) as well as Directive 2004/17/EC Art 54 (4) by cross reference to the public sector rules. For utilities, the obligation only applies to utilities that are also contracting authorities; other utilities merely have the option to exclude on these grounds. On this mandatory exclusion see S. Williams, "The Mandatory Exclusions for Corruption in the New EC Procurement Directives" (2006) 31 *European Law Review* 711.

### 10.3.2.5 Dispute settlement procedures: inter-governmental and centralized enforcement<sup>95</sup>

The EU procurement rules have an advanced centralised enforcement regime, under which the CJEU is delegated with the power to adjudicate disputes, to elaborate the agreed rules and to authorise coercive measures. The prominent place occupied by the CJEU in the EU regime finds little parallel with other international arrangements where judicial organs are generally confined to a relatively modest role.

The CJEU rulings are binding upon parties to the dispute. If the CJEU finds a breach of rules by an institution for which the relevant Member State is held responsible, the state is obliged to take 'necessary measures' to comply with the judgment.<sup>96</sup> If the state fails to do so, it can be brought before the CJEU again for failure to redress the breach, and then penalty payment can be imposed. During the process of proceedings before the CJEU, interim measures are available to suspend a concluded contract.

The proceedings before the CJEU can be brought either by the European Commission<sup>97</sup> or by other Member States.<sup>98</sup> In practice, the institution of proceedings has been largely left to the Commission, as the guardian of the European rules.<sup>99</sup> Like most of other inter-governmental DSM, there is no right for private parties to bring a proceeding against governments directly. The only avenue of legal redress open to private parties is to present their complaints to the Commission in the hope that it will initiate legal proceedings. The Commission may consider breaches brought to its attention by private parties but can refuse or take up a case with its sole discretion.<sup>100</sup>

The essential role that the Commission plays in pursuing breaches of EU law can be regarded as one of the most novel features of the EU enforcement system. As for other procurement regimes involving the delegation of formal adjudication power such as the GPA, for the task of detecting and correcting non-compliance, the institution of challenge proceedings is largely relied upon by one state against another, which may probably be motivated by their own political interests rather than appreciations of the value of the whole system. In contrast, the Commission, an institution largely independent from Member governments, is in a better position to act in the general interest of the Community.

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<sup>95</sup> See the Asia Link companion textbook *EU Public Procurement Law*, Ch. 11; A. Delsaux, "The Role of the Commission in Enforcing EC Public Procurement Rules" (2004) 13 *P.P.L.R.* 130; S. Arrowsmith, "Enforcing the Public Procurement Rules: Proceedings in the Court of Justice and the National Courts", S. Arrowsmith, *Remedies for Enforcing the Public Procurement Rules* (Winteringham: Earls Gate 1993), pp. 4-43; J. M. Fernández Martín, "The European Commission's Centralised Enforcement of Public Procurement Rules: a Critical View" (1993) 2 *P.P.L.R.* 40; D. Pachnou, "Factors influencing bidders' recourse to the European Commission to enforce EC procurement law" (2005) 14 *P.P.L.R.* 91; S. Arrowsmith, "The Community's Legal Framework on Public Procurement; the Way Forward at Last?" (1999) 36 *Common Market Law Review* 13, Section 4; S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (London: Sweet & Maxwell 2005), pp. 1444-1464; P. Trepte, *Public Procurement in the EU: a Practitioner's Guide* (Oxford: OUP 2007), Ch. 7.

<sup>96</sup> Article 260 TFEU (ex Article 228 TEC).

<sup>97</sup> Article 260 (2) TFEU (ex Article 228 TEC).

<sup>98</sup> Article 259 TFEU (ex Article 227 TEC).

<sup>99</sup> Article 258 TFEU (ex Article 226 TEC).

<sup>100</sup> This position has been confirmed by the CJEU, see Case C-191/95 *Commission v Germany*, judgment of 29 September 1998; Case 247/87 *Star Fruit v Commission* [1989] ECR 291.

### 10.3.2.6 Remedies for suppliers<sup>101</sup>

Nevertheless, the enforcement by suppliers at the national level is considered the primary enforcement mechanism. The EU Members are required to make the EU procurement rules enforceable by affected parties in their national courts. General Treaty principles require effective remedies to be made available, for all violations of EU public procurement rules, but there is also a very specific set of requirements for government remedies in the case of contracts covered by the procurement directives.<sup>102</sup> As with the GPA approach, Member States enjoy the freedom of designing their own remedies system provided that certain minimum standards set by the directives are met – but these minimum standards are stringent ones, particularly following a recent revision of these remedies provisions in 2006.<sup>103</sup> They include requirements for review before a judicial type body, specific remedies (including suspension, the setting aside of unlawful pre-contract decisions, and damages) and a requirement for a standstill period between informing participants of the contract award decision and actually concluding the contract, in order to allow suppliers time to mount an effective challenge to the award decision before a contract is concluded.<sup>104</sup> In certain cases, including cases violating the standstill rules and unlawful single-source awards without a pre-award notice in the EU's Official Journal, a contract awarded in violation of the rules must be rendered ineffective by the national courts.<sup>105</sup> In contrast with the position under the GPA, national review bodies may independently seek a preliminary ruling of the CJEU on the interpretation of the EU rules if they do not feel competent to resolve it on their own. Such a link between the ECJ and national review bodies helps to ensure a consistent interpretation of the EU rules.

Furthermore, the concept of direct effect represents one of the most remarkable features of the EU rules, referring to the capacity of EU rules to confer rights on individuals which can be enforced by the national courts. The doctrine of direct effect was firstly established by the CJEU in *Van Gend en Loos*,<sup>106</sup> which has the effect of putting the enforcement of the EU law on a dual level: at inter-governmental level, the Commission is delegated with the power to take a non-complying state before the CJEU; meanwhile, it gives private individuals, at national level, rights to enforce EU law before national courts, even if not properly transposed by the national legislator. The Court also made it clear that not every EU rule has direct effect and laid down a test for Treaty provisions to be held as having direct effect<sup>107</sup> and the EU directives were not initially considered as having direct effect. The CJEU, however, held in the case of *Van Duyn* that the directives could be directly effective if the criteria for direct effect are satisfied.<sup>108</sup> As for the procurement directives, it has now been ruled by the Court that most of the substantive rules governing contract

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<sup>101</sup> See the Asia Link companion textbook *EU Public Procurement Law*, Ch. 11; S. Arrowsmith, *The Law of Public and Utilities Procurement* (2<sup>nd</sup> ed) (London: Sweet & Maxwell 2005), pp. 1435-1441; A. Brown, "Effectiveness of Remedies at National Level in the Field of Public Procurement" (1998) 8 *P.P.L.R.* 9; J.M. Fernandez Martin, *The EC Public Procurement Rules: A Critical Analysis* (Oxford: Clarendon Press 1996), Chs. 7-10; D. Dingel, *A Harmonization of the National Judicial Review of the Application of European Community Law* (The Hague: Kluwer Law International 1999); A. Cox, *Public Procurement in the EEC: the Single Market Rules and the Enforcement Regime after 1992* (Winteringham: Earls Gate 1993), pp. 241-254; S. Arrowsmith, "Public Procurement: Example of a Developed Field of National Remedies Established by Community Law", in H-W. Micklitz and N. Reich (eds) *Public Interest Litigation before European Courts* (Baden-Baden: Nomos Verlagsgesellschaft 1996); D. Pachnou, "Bidders' Use of Mechanisms to enforce EC Procurement Law" (2005) *P.P.L.R.* 256; D. Pachnou, "Enforcement of the EC Procurement Rules: The Standards Required of National Review Systems under EC Law in the Context of the Principle of Effectiveness" (2000) 9 *P.P.L.R.* 55; D. Pachnou, "Direct and Indirect Effect of Directives and State Liability: Their Applicability in Relation to Procurement Remedies" (2000) 9 *P.P.L.R.* 251.

<sup>102</sup> See Directive 89/665/EEC, [1989] O.J. L395/33.

<sup>103</sup> Directive 2007/66/EC, [2007] OJ L335/31. See J. Golding and P. Henty, "The new Remedies Directive of the EC: standstill and ineffectiveness" (2008) 17 *P.P.L.R.* 146; Clifton, M.-J. "Ineffectiveness-The New Deterrent: Will the New Remedies Directive Ensure Greater Compliance with the Substantive Procurement Rules in the Classical Sectors?" *P.P.L.R.* 2009 4 165.

<sup>104</sup> See the Asia Link companion textbook *EU Public Procurement Law*, Ch. 11; Golding and Henty, above.

<sup>105</sup> See, in particular, the Asia Link companion textbook *EU Public Procurement Law*, Ch. 11; Clifton, above.

<sup>106</sup> See Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Balastingen* [1963] E.C.R. 1 para. 3.

<sup>107</sup> *Ibid.*

<sup>108</sup> Case 41/74 *Van Duyn v Home Office* [1974] E.C.R I-1337.

award procedures have direct effect.<sup>109</sup> This means that if a state fails to take implementing measures or adopts measures which do not conform to such a directive with direct effect, affected parties will have the right to rely on the directive against the defaulting state. This direct link between the directives and domestic laws found in the EU is unique among international organisations. Most international agreements such as the GPA, as we have seen earlier, can only take effect or be relied upon in domestic legal system through legal incorporation or statutory recognition.

### **10.3.3 North American Free Trade Agreement ('NAFTA')<sup>110</sup>**

#### **10.3.3.1 Introduction, objectives and regulatory approach**

The NAFTA is a regional free trade agreement between Canada, the U.S., and Mexican, which was signed in 1992 and entered into force in 1994. The issue of public procurement is dealt with in NAFTA Chapter 10, which is regarded as one of the most outstanding achievements of NAFTA as well as one of the most difficult to accomplish.

The main objective of NAFTA Chapter 10 is to liberalise procurement measures to create balanced, non-discriminatory, predictable and transparent government procurement opportunities for firms from all Member States.<sup>111</sup> Like the approach adopted by the EU and the GPA, detailed minimum procedural rules for the award of contracts have been set out to support its general principles of national treatment, non-discrimination and transparency. Also, the obligations contained in NAFTA Chapter 10 clearly reflect the influence from the EU procurement rules and GATT Government Procurement Code ('the GATT Code').

#### **10.3.3.2 Coverage**

Similar to the GPA's approach, and in contrast with the EU rules, NAFTA Chapter 10 does not include a uniform coverage for Member States, and it simply lists covered entities in Annex 1001.1a in a schedule for each party, including federal government entities and enterprises. As for state and provincial government entities, the negotiation failed to include any of such entities under the regime and thus the list for state and provincial government entities is currently left blank. However, the three parties are committed to commence further negotiations in order to eventually subject them to this agreement.<sup>112</sup>

NAFTA Chapter 10 takes the 'negative' list approach, where in principle all goods and services are covered unless specifically exempted.<sup>113</sup> In general, the NAFTA's approach to coverage are similar to that of the GPA (see Section 2.2.2): the coverage offered by the parties is largely based on the principle of reciprocity in terms of market opportunities, which eventually ends up with non-MFN treatment among parties of the same agreement. For instance, Canadian firms (but not Mexican firms) are denied access to most of the

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<sup>109</sup> These mainly include most of the rules of the public sector directives and the utilities directives such as the obligations for advertising, conducting the competition, criteria and evidence for qualification and award criteria. Many rules of the remedies directives which give states discretion over how to give effect to their obligations, however, do not have direct effect. See S. Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2<sup>nd</sup> Edition 2005) at p. 1393.

<sup>110</sup> See also, for example, S. Greenwold, "The Government Procurement Chapter of the North American Free Trade Agreement" (1994) 3 P.P.L.R. 129; C. Bovis, "Liberalising Public Markets in America: The North American Free Trade Agreement (NAFTA) Government Procurement Code" (1993) 2 P.P.L.R. CS 115; K. Troy, "NAFTA Chapter 10: New Opportunities in North American Government Procurement Markets" in *The North American Free Trade Agreement* (Bello, Holmer and Norton eds.); A. Reich, *International Public Procurement Law: the Evolution of International Regimes on Public Purchasing* (1999), passim.

<sup>111</sup> C. Bovis, 'Liberalising Public Markets in America: the North American Free Trade Agreement (NAFTA) Government Procurement Code' (1993) 12 P.P.L.R. 115.

<sup>112</sup> See NAFTA Annex 1001.a3.

<sup>113</sup> Exceptions could be found in the areas of transportation, public utilities, research and development etc. See 'NAFTA Annex 1001. b1 and b2.

government enterprises listed in the U.S. schedule until Canada opens procurement by its provincial hydro utilities to U.S. firms.<sup>114</sup>

Also, like most of international procurement regimes, the value of procurement contracts will need to be above certain financial thresholds in order to trigger the application of the NAFTA rules,<sup>115</sup> and the rules for valuation of contracts are also in place to prevent parties from splitting contracts to avoid obligations under the agreement.<sup>116</sup>

### **10.3.3.3 Main features of the rules**

NAFTA is a legally binding instrument. It provides that states 'shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement'.<sup>117</sup> The NAFTA rules are very similar, if not identical, to those of the GPA on nearly every aspect. For example, like the GPA, the NAFTA also allows states a free choice between open and selective tendering for normal contracts, with the exception of limited tendering in specific circumstances, which are defined almost identically to those under the GPA with some additions.<sup>118</sup>

Similar to the GPA, the NAFTA includes S&DT provisions to Mexico, its only developing country member. NAFTA Annex 1001.2a sets out transitional provisions to provide special market concessions to Mexico for the gradual opening of its procurement market on one hand, and to temporarily soften certain procedural requirements for Mexico on the other.

### **10.3.3.4 Horizontal policies**

Both Canada and the U.S. have many existing programmes or legislations concerning the use of procurement as a policy tool, while the Mexican government enjoys extensive control over its national key industries. Consequently, the issue of collateral use of procurement has received particular attention under NAFTA Chapter 10.

Like the GPA or the EU procurement rules, the implementation of any collateral policies can be affected by the national treatment and non-discrimination rule<sup>119</sup> as well as its transparency rules on award procedures. Article 1006 of the NAFTA explicitly prohibits the use of offsets in the qualification and selection of suppliers, goods or services and evaluation of tenders.<sup>120</sup> Offset measures are considered to produce trade-distorting effects and NAFTA is the first international procurement agreement that provides a clear prohibition against such measures.<sup>121</sup>

As discussed above, the GPA has also incorporated a similar prohibition subject to special provisions for developing countries. Different from the position under the GPA, Mexico, as a developing country is not entirely exempted from this prohibition, but only permitted to impose a limited local content requirement under certain circumstances.<sup>122</sup> Canada and the U.S. are allowed to continue the existing set-asides programmes for small and minority business,<sup>123</sup> while Mexico, which does not have parallel programmes, has been permitted to allocate a non-specific sector set-aside subject to specified restrictions.<sup>124</sup>

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<sup>114</sup> See NAFTA Annex 1001.1a Schedule of the United States, Note, and NAFTA Annex 1001.1a-1 Schedule of the United States, para. 6.

<sup>115</sup> The thresholds are set to rise in relation to the rate of inflation. See NAFTA Art. 1001.

<sup>116</sup> See NAFTA Art. 1002.

<sup>117</sup> See NAFTA Art. 105.

<sup>118</sup> See NAFTA Art. 1016.2 and GPA Art. XV.1.

<sup>119</sup> See NAFTA Art. 1003.

<sup>120</sup> See NAFTA Art. 1006.

<sup>121</sup> Reich, note 3 above, p. 268.

<sup>122</sup> See NAFTA Annex 1001.2b Schedule of Mexico para. 6.

<sup>123</sup> See NAFTA Annex 1001.2b Schedule of Canada, para. 1(d); and Schedule of the United States, para. 1.

<sup>124</sup> NAFTA Annex 1001.2b Schedule of Mexico, para. 3.

Furthermore, it is interesting to note that there are joint programmes for small business under Article 1021 of NAFTA, which call for the establishment of the Committee on Small Business to facilitate procurement policies in each country for small businesses. In view of the free trade objective of NAFTA Chapter 10, it seems a bit odd to include such programmes under the regime since they are discriminatory, despite the fact that the promotion of small businesses may in itself be well worthy of the Member countries' own domestic concerns. It can be argued that such programmes would be better justified if they are required to be conducted in the way that each Member's set-asides procurement opportunities are equally opened to small and minority businesses from all three parties.<sup>125</sup>

### **10.3.3.5 Dispute settlement procedures and bid challenge**

Chapter 20 of the NAFTA provides a means for resolving disputes<sup>126</sup> over the NAFTA agreement including Chapter 10. Like the WTO DSM, the NAFTA DSM encourages states to make every attempt to arrive at a mutually satisfactory solution of any dispute, if at all possible.<sup>127</sup> If such a solution cannot be reached, any consulting party may request the establishment of an ad hoc arbitral panel. The panel shall present the disputing parties with a final report containing a determination as to whether the measure at hand is, or would be inconsistent with the Agreement as well as any recommendations to resolve the dispute.

The arbitral decision is, however, not automatically applicable and binding upon the parties. Rather, it is in the nature of a strong recommendation: upon receipt of the final report, the disputing parties shall agree on a resolution which should 'normally' conform to the panel recommendations.<sup>128</sup> If mutual agreement has still not been reached at this stage, the complaining party may retaliate with the suspension of trade benefits of equivalent effect.<sup>129</sup> Then, while the disputant is entitled to turn to a panel to determine whether the level of suspension is 'manifestly excessive', it is not clear what are the choices available to the disputant even if the panel concludes that this is the case.<sup>130</sup>

Compared with those of the GPA and the EU, the NAFTA's DSM reflects a more informal arrangement, under which the dispute resolution process involves political bargaining to reach a 'mutually satisfactory resolution' and disputing parties can accept or depart from an arbitral decision without legal justification. Thus, it represents a DSM that blends legalistic and political elements. Furthermore, the NAFTA's DSM clearly manifests a preference for reaching political solutions by leaving the implementation of the panel's decision solely to the disputing parties themselves without legalistic supervision. Such a system may arguably discriminate in favour of more powerful states against weaker ones owing to the power asymmetry, under which the latter are more vulnerable to the former's greater penalties.

Again, like most inter-governmental DSMs, no right of action for private parties is provided under the NAFTA's DSM. Private suppliers have to lobby its government in order to initiate the NAFTA's DSM machinery. Apart from the inter-governmental DSM, like the GPA, the NAFTA requires Member States to adopt and maintain a bid challenge system which allows aggrieved suppliers to challenge any aspect of the procurement process.<sup>131</sup>

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<sup>125</sup> See Reich, *International Public Procurement Law: the Evolution of International Regimes on Public Purchasing* (1999), p. 267.

<sup>126</sup> Except for the matters covered in Ch. 19 (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in the Agreement.

<sup>127</sup> See NAFTA Art. 2006 & Art. 2001.

<sup>128</sup> See NAFTA Art. 2018.

<sup>129</sup> See NAFTA Art. 2019.1.

<sup>130</sup> See NAFTA Art. 2019.3.

<sup>131</sup> See NAFTA Art. 1017.

## **10.3.4 Common Market for Eastern and Southern Africa ('COMESA')<sup>132</sup>**

### **10.3.4.1 Introduction, objectives and regulatory approach**

There are many African initiatives aimed at liberalising the regional public procurement market, such as the Common Market for Eastern and Southern Africa (COMESA); the Arab Maghreb Union (AMU) and the West African Economic and Monetary Union (UEMOA). This section will look at the COMESA but no others, as it is an important regime and moreover, the only regime which has the English version of relevant documents available.

COMESA was established in 1994<sup>133</sup> with the aim to fully integrate the countries of eastern and southern Africa into an economic union through trade and investment.<sup>134</sup> In the particular area of procurement, the COMESA Public Procurement Reform Project ('PPRP') was launched to liberalise the procurement market in the region through harmonised and improved domestic systems.<sup>135</sup> In contrast, the main objective of the GPA, the EU and NAFTA procurement rules is not to harmonise procurement laws of member states, but rather to liberalise and expand trade in procurement mainly through non-discrimination rules and transparency requirements.<sup>136</sup> Under the PPRP, the COMESA public procurement framework was approved in 2003. It is a set of public procurement directives, setting out the main principles and essential components of modern national legal frameworks.

### **10.3.4.2 Coverage**

With regard to Part A of the COMESA directives, it contains core contents of an appropriate national procurement law rooted on the principles of good governance and therefore, it states that it should be apply as widely as possible.<sup>137</sup> As with the principles set forth in Part B aimed at enhancing regional integration, it was agreed that certain thresholds should be set to define the applicability of certain parts of the reform initiative, such as region-wide advertisement of bidding opportunities.<sup>138</sup> Also, certain types of procurement are expressly excluded from Part B application including defence related procurement and donor-funded procurement.

### **10.3.4.3 Main features of rules**

The COMESA directives are non-binding in nature. Member States are expected to voluntarily adopt relevant national legislation to give effect to such directives. Because the COMESA directives were mainly developed on the basis of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the UNCITRAL Model Law), states which adopted their procurement legislations according to the UNCITRAL Model Law such as Zimbabwe, would be fully consistent with the COMESA Directives.

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<sup>132</sup> See also, E. Nwogwugwu, "Towards the Harmonisation of International Procurement Policies and Practices" (2005) 14 P.P.L.R. 131.

<sup>133</sup> The 19 Member states of COMESA include Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe. See COMESA official website <http://www.comesa.int>

<sup>134</sup> Karangizi, *Regional Procurement Reform Initiative* 10 (2003) (Paper presented at Joint WTO-World Bank Regional Workshop on Procurement Reforms and Transparency in Public Procurement for English Speaking Africa Countries), available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/wkshop\\_tanz\\_jan03/karangizi1\\_e.doc](http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/karangizi1_e.doc).

<sup>135</sup> Ibid.

<sup>136</sup> However, it can be argued that the EU has resulted in significant de facto harmonisation in practice. Reich even argued that the GPA also had an important harmonising effect on its Member States' laws: Reich, 'The WTO as a Law-harmonizing Institution' (2004) 25 U. Pa. J. Int'l Econ. L.321 at pp. 333-336.

<sup>137</sup> See the COMESA Directives: Essential Components of National Legal Frameworks, para. 1.

<sup>138</sup> See the COMESA Directives: Essential Components of National Legal Frameworks, paras. 13- 14.

The COMESA directives are much more skeletal than other procurement regimes despite the fact that the COMESA seeks harmonisation as an objective per se. Unlike the GPA, the EU directives or the NAFTA, the COMESA regime does not include detailed procedural rules on the award of contracts. Instead, it lays down main principles and essential components of modern national legal frameworks in a general manner. For instance, the COMESA directives contain no rules specifically addressing the issues of minimum time-limits for tendering, as we can normally find in other procurement regimes.

The COMESA directives set out a broad framework under which states have very broad discretion in implementing their obligations. By looking at the rules on procurement methods again, the COMESA directives, as a general rule, require contracting authorities to use 'tendering' as the normal method for procurement of goods or construction, and request for proposals for procurement of consultant services. It provides that national law shall specify the types of situations in which methods other than any of the above methods can be used, but there is no guidance at all on what kind of situations could justify alternative methods or how these contract award procedures should proceed. As a result, unlike the restrictive approach adopted by other regimes such as the GPA and the EU, the COMESA allows states to freely formulate their own requirements on the derogations from formal competitive tendering.

#### **10.3.4.4 Horizontal policies**

Under Part A of the COMESA, there are no explicit rules restricting the implementation of horizontal policies in procurement. On the contrary, measures to promote participation by small and medium-sized enterprises are identified as a core element of national procurement law. In this regard, it also provides many examples for measures favouring small business, such as establishing small-enterprise set-asides and making awards first to small enterprises in the event of equal low bids.

However, Part B includes the principles of national treatment and non-discrimination. Consequently, the implementation of horizontal procurement policies with a discriminatory effect will be caught by the above principles. For example, it is required that any use in individual state of a preference in favour of domestic bidders should be replaced by a regional preference with regard to procurement above the COMESA thresholds. Also, it is stated that bidders from other COMESA Member States should not be barred from participation even for procurement contracts below the thresholds. Nevertheless, different from the position under the GPA or the EU rules (see Section 2.2.3 and Section 3.2.3), horizontal uses of procurement without discrimination will not be affected in any way due to the absence of detailed rules on contract award procedures.

#### **10.3.4.5 Dispute settlement procedures**

Unlike the GPA, the EU and the NAFTA, the COMESA regime does not have an inter-governmental body to adjudicate disputes or to authorise coercive measures. The compliance with the rules largely depends on states' attitude towards it. Nevertheless, the Technical Committee of Procurement Experts<sup>139</sup> is delegated with the authority to keep constant reviews on states' implementation of the directives. Meanwhile, given the fact that most participating states are least developed countries<sup>140</sup> and their lack of capacity has constituted a major deterrent to the compliance, the COMESA Secretariat has

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<sup>139</sup> The Committee is made up of the Heads of national procurement agencies and will be meeting on a regular basis to provide strategic and tactical guidance to the reform. See Karangizi, above, at p. 9.

<sup>140</sup> 13 out of 19 participating states are on the World Bank's list of least developed countries.

established a Regional Public Procurement Centre to provide capacity building for member states.<sup>141</sup>

The availability of national challenge procedures is mentioned both in Part A as an essential element for modern national procurement law, and in Part B as an important factor to ensure national compliance.<sup>142</sup> However, no further guidance is given on the detailed requirements of such national challenge procedures.

### **10.3.5 Asia-Pacific Economic Cooperation Forum ('APEC')<sup>143</sup>**

#### **10.3.5.1. Introduction, objectives and regulatory approach**

APEC was established in 1989 to promote, as its name suggests, economic co-operation within the Asia-Pacific Region.<sup>144</sup> In 1995, the Government Procurement Expert Group ('GPEG') was set up to achieve voluntary liberalisation of procurement markets throughout the Asia-Pacific region.<sup>145</sup> The GPEG has developed a set of Non-Binding Principles (NBPs) on procurement.<sup>146</sup> Among these NBPs, it is interesting to note that the principles of Value for Money, Fair Dealing and Accountability and Due Process also assist individual governments to achieve the objectives of 'best value for money' and 'integrity' in procurement, which are normally addressed by national procurement regulation.

In view of the APEC's trade goal, the principle of 'Value for Money' might be justified by the concept that foreign suppliers may be more willing to compete for government contracts in a system in which value for money is effectively implemented. Similarly, principles of 'Fair Dealing, Accountability and Due Process' could guide states to address corrupt procurement practices as a trade barrier. In essence, the APEC NBPs promote trade through measures improving states' domestic procurement systems in which foreign suppliers are assumed to be more willing to compete for government contracts.

#### **10.3.5.2 Coverage**

The APEC NBPs does not contain specific rules concerning types of entities and contracts covered. Individual Member countries can freely decide how to implement the APEC principles in their own systems including the coverage issues.

#### **10.3.5.3 Main features of rules**

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<sup>141</sup> COMESA, Public Procurement Rules and Regulations Harmonised. Available at <http://www.comesa.int/trade/issues/procurement/MS-Office-Documents/2004-06-04.5502/view>.

<sup>142</sup> See the COMESA Directives on Public Procurement Reform: Essential Components of National Legal Frameworks, para. 5 (h)(v).

<sup>143</sup> See also S. Arrowsmith, "Public Procurement within the Asia Pacific Economic Co-operation Forum" (1996) 5 P.P.L.R. CS7; S. Arrowsmith, "The APEC Document on Transparency in Government Procurement" (1998) 7 P.P.L.R. CS38 ; S. Brown, "APEC Developments – Non-binding Principles on Value for Money and Open and Effective Competition"; (1999) 8 P.P.L.R. CS16.

<sup>144</sup> The APEC's 21 Member Economies are Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; The Republic of the Philippines; The Russian Federation; Singapore; Chinese Taipei; Thailand; United States of America; Viet Nam. Its observer organisations are the Association of South-East Asian Nations (ASIAN), the Pacific Economic Cooperation Council (PECC), and the Pacific Islands Forum (PIF). See [http://www.apec.org/apec/about\\_apec.html](http://www.apec.org/apec/about_apec.html).

<sup>145</sup> See Government Procurement Expert Group at [http://www.apec.org/apec/apec\\_groups/committees/committee\\_on\\_trade/government\\_procurement.html](http://www.apec.org/apec/apec_groups/committees/committee_on_trade/government_procurement.html).

<sup>146</sup> The original set of NBPs comprised of Transparency; Value for Money; Open and Effective Competition; Fair Dealing; Accountability and Due Process; and Non-Discrimination. The principle of Transparency has now been subsumed into the APEC Transparency Standards on Government Procurement.

Like the APEC's usual approach, the NBPs is a non-binding instrument that explicitly negates any intent to create legal obligations. This is clearly indicated by the very title of this instrument — 'APEC Government Procurement Experts Group Non-Binding Principles on Government Procurement'. The non-binding nature is further confirmed in its introduction by expressly saying that 'the principles developed by the GPEG are non-binding'.<sup>147</sup> Undoubtedly, the NBPs are merely an informal understanding instead of legal commitments in an international treaty.

Compared with procurement regimes like the GPA or the EU, the APEC NBPs are much less detailed and prescriptive. The NBPs only generally identify basic elements and state possible ways to give effect to them in practice. It is explicitly pointed out that 'individual members economies are in the best position to decide on the applicability of individual elements to them, taking into account the specific characteristics of their economy and the costs and benefits of adopting specific measures'.<sup>148</sup> That is to say, states have absolute freedom in practice to implement or depart from the NBPs. Even if an APEC economy decides that certain NBPs should apply, it will still enjoy a very broad discretion over how to achieve the principles. The APEC NBPs accord states a greater discretion in their implementation, which can be demonstrated by reference to the issue of procurement methods.

One element of the 'Transparency' principle requires 'making open and competitive tendering the generally preferred method of tendering' with the possibility of using other procurement procedures. However, similar to the COMESA directives, it does not define specific circumstances under which other less competitive procedures can be used. Despite its indicated preference for open and competitive tendering, it is clarified under the principle of 'Value for Money' that the procuring entity should choose an appropriate procurement method in consideration of achieving the best value for money.<sup>149</sup> This position is also confirmed under the principle of 'Open and Effective Competition', which states that 'procurement methods should suit market circumstances and facilitate levels of competition commensurate with the benefit received'.<sup>150</sup>

Consequently, states have a very wide discretion in formulating their own rules on procurement methods. Some may require the use of open tendering for most procurements followed by detailed transparency rules to limit the exercise of discretion by procurement officers, while other states with professional officials buying in well-developed markets with little corruption may prefer leaving a broad direction with procurement officials by using the less competitive procedures.

#### **10.3.5.4 Horizontal policies**

According to the principle of 'Non-discrimination', national procurement laws, regulations and policies should not favour or discriminate against the goods, services or suppliers from any particular Member economy.<sup>151</sup> It also illustrates several ways through which non-discrimination can be achieved, one of which requires that criteria for qualification of suppliers, evaluation of bids, and award of contracts should be based solely on the suppliers' ability to meet the procurement requirements such as technical competence and value for money considerations.<sup>152</sup> In this regard, states' implementation of horizontal policies with discriminatory effects could be largely restricted.

However, these illustrative practices included in NBPs were never intended to be prescriptive or exhaustive. In practice, the APEC members could always balance the non-

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<sup>147</sup> See APEC GPEG, Non-Binding Principles on Government Procurement, para. 2.

<sup>148</sup> Ibid, para. 2.

<sup>149</sup> Ibid, para. 22.

<sup>150</sup> Ibid, para. 34.

<sup>151</sup> See APEC GPEG, Non-Binding Principles on Government Procurement, para. 70.

<sup>152</sup> Ibid, para. 72.

discrimination principle with other domestic concerns, and then find appropriate ways to give effect to the elements of this principle, or even depart from this principle where they feel it is necessary. As a result, the APEC Member countries' ability to employ procurement as a policy tool remains unaffected.

#### **10.3.5.5 Dispute settlement procedures**

Like the COMESA directives, the APEC does not have an independent dispute settlement body in enforcing its NBPs. Instead, a voluntary policy review — a type of soft law mechanism, has been utilised to induce compliance. It is a process where members conduct a voluntary review of their procurement systems against the NBPs. Such policy reviews and assessments are not primarily accusatory or adversarial, the object of which is to discover how the systems of individual economies can be improved. Although this procedure may lack coercive force, it would still exert significant pressures on economies to comply. For the most part, it relies on persuasion, but frequently the threat of exposure or public shaming is a powerful spur to action towards compliance.

Also, the GPEC has been working on capacity building and dissemination of procurement information within the APEC region. For example, workshops, seminars and training courses have been held for educational purposes, and a large amount of information has been made available at its official website including information on specific procurement opportunities voluntarily offered by members.

Meanwhile, the availability of a channel for domestic review of complaints was agreed to be an element of the 'Transparency' as well as 'Accountability' and 'Due Process' principles. However, the APEC NBPs only provide very broad guidance on this issue, without setting out any procedural rules on exactly how such a challenge system should work. It is generally stated that such mechanisms should provide independent, impartial, transparent, timely and effective procedures for the review of complaints. Certain examples are also provided to illustrate some of the possible ways to give effect to the above principles, but they are not intended to be prescriptive or exhaustive. Member countries have absolute freedom over how to put in place their own national challenge procedures. Even Member States which reject the fundamental idea of such a system would not feel compelled to establish one owing to the optional nature of the NBP.

## 10.4 The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('the Convention')<sup>153</sup>

### 10.4.1 Introduction, objectives and regulatory approach

In the field of public procurement, the impact of non-discrimination rules can be significantly limited by the existence of corrupt procurement practices. The Convention was adopted in 1997<sup>154</sup> with the aim of preventing countries which are lax on foreign bribery from gaining a competitive advantage in international trade. It represents the first successful effort to establish between major exporting countries a set of binding commitments targeting trans-national corruption.<sup>155</sup> Unlike the instruments previously mentioned, the convention contains no provisions on procurement procedures. However, it has general provisions requiring states to adopt legislation to criminalise 'bribery of a foreign public official', which have a significant impact on corruption in public procurement.

### 10.4.2 Main features of rules

The OECD Convention is an international treaty of a binding nature. It is vaguely formulated as general 'standards' which are only meaningful with reference to specific situations. For example, Article 1 provides that 'each party shall take such measure as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer promise or give any undue pecuniary or other advantage...in order to obtain or retain business or other improper advantage in the conduct of international business'. This provision only establishes a sort of 'standard', under which states are not required to use its precise terms in defining the offence under their domestic laws.

In order to assist the interpretation of the Convention's vague standards, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transaction ('the Commentaries') were adopted to serve the function of

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<sup>153</sup> See further, for example, B. Earle, "The United States Foreign Corrupt Practices Act and the OECD Anti-bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument" (1996) 14 *Dickinson Journal of International Law* 207; N. Ehlermann-Cache, "Fighting Corruption in International Business Transactions; Impact on Public Procurement" (2006) 15 *P.P.L.R.* NA195; K. Elliott (ed.), *Corruption and the Global Economy* (Washington: Institute for International Economics 1996); D. Gantz, "Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus" (1998) 18 *Northwestern Journal of International Law and Business* 457; B. Harms, "Holding Public Officials Accountable in the International Realm: a New Multi-layered Strategy to Combat Corruption" (2000) 33 *Cornell International Law Journal* 159; M. Murphy, "International Bribery: An Example of an Unfair Trade Practice?" (1995) 21 *Brook Journal of International Law* 385; P. Nichols, "Are Extra-territorial Restrictions on Bribery A Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?" (1999) 20 *Michigan Journal of International Law* 451; P. Nichols, "Regulating Transnational Bribery in Times of Globalization and Fragmentation" (1999) 24 *Yale Journal of International Law Journal* 257; P. Nichols, "The Myth of Anti-bribery Laws as Transnational Intrusion" (2000) 33 *Cornell International Law Journal* 627; S. Salbu, "A Delicate Balance: Legislation, Institutional Change and Trans-national Bribery" (2000) 33 *Cornell International Law Journal* 657; S. Salbu, "Extra-territorial Restriction of Bribery: A Premature Evocation of the Normative Global Village" (1999) 24 *Yale International Law Journal* 223; S. Salbu, "The Foreign Corrupt Practices Act as a Threat to Global Harmony" (1999) 20 *Michigan Journal of International Law* 419; K. Surjadinata, "Revisiting Corrupt Practices from a Market Perspective" 12 *Emory International Law Review* 1021; R. Zedalis, "How does the New OECD Convention on Bribery Stack up Against the Foreign Corrupt Practices Act?" (1998) 32 *Journal of World Trade* 167; R. Zedalis, "Internationalizing Prohibitions on Foreign Corrupt Practices" (1997) 31 *Journal of World Trade* 45; N. Zucker Boswell, "An Emerging Consensus on Controlling Corruption" (1997) 18 *University of Pennsylvania Journal of International Economic Law* 1165.

<sup>154</sup> The signatories include all of the OECD 30 members and 5 non-members. See the OECD official website at [http://www.oecd.org/document/12/0,2340,en\\_2649\\_34855\\_2057484\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/12/0,2340,en_2649_34855_2057484_1_1_1_1,00.html).

<sup>155</sup> The signatories to the Convention represent collectively over 70% of export worldwide and over 90% of foreign direct investment. See M. Pieth, 'Taking Stock: Making the OECD Initiative Against Corruption Work', available at <http://www.oas.org/juridico/english/pieth2000.htm>. Also see Zedalis, 'How Does the New OECD Convention on Bribery Stack Up Against the Foreign Corrupt Practices Act' (1998) 32 (3) *J.W.T.* 167 at pp. 167-168.

clarifying the intended meanings of Convention provisions. Although the Commentaries are not legally binding, they constitute an extremely important document to be referred to in case of divergent interpretation. Consequently, the Commentaries may, to some extent, make the ambiguous Convention principles more precise. Regarding the previous example raised, the Commentaries further define the meaning of vague terms like 'other improper advantage'<sup>156</sup> and clarify if certain conduct shall fall within the meaning of the offence under Article 1.<sup>157</sup>

The OECD Convention allows states a substantial discretion in implementation, which is reflected by the vague and discretionary wording of its provisions. For example, Article 2 provides that Member States shall 'take such measures *as may be necessary, in accordance with its legal principles*, to establish the liability of legal persons for the bribery of a foreign public official'. The language used such as 'as may be necessary' and 'in accordance with its legal principles' imply that states are left with a broad discretion in implementing the rules.

Although the clarification provided by the Commentaries can sometimes curtail states' discretion for reasonable interpretation, it may not necessarily impose more constraints on the states' discretion but just provide a greater clarity of the rules or even an emphasis on the states' discretion. For example, regarding Article 2, the Commentaries make it clear that a state shall not be required to establish criminal responsibility if criminal responsibility is not applicable to legal persons under the legal system of that state.<sup>158</sup>

### 10.4.3 Dispute settlement procedures

There is no judicial or quasi-judicial body under the OECD regime to interpret and enforce the agreed rules. Instead, "peer review"<sup>159</sup> is used extensively to monitor the states' compliance with its conventions and recommendations. As for the Convention, this peer review process is divided into Phase 1 and Phase 2. The purpose of Phase 1 is to evaluate the adequacy of a country's legislation in implementing the Convention.

The evaluation is conducted under a rigorous system of peer review. Each signatory is required to produce a report against a questionnaire drawn up by the Secretariat, and the Secretariat then drafts a descriptive text.<sup>160</sup> Two lead examiner countries chosen from a delicately balanced rota are assigned to give their opinions on the standard of implementation of the examined country.<sup>161</sup> This process is followed by two hearings.<sup>162</sup> The first one begins with a presentation by the examined country of the measures it has taken to comply with the rules, upon which the two examining countries present their evaluation, and then there are discussions - each signatory is allowed to ask questions and express opinions. The next hearing concentrates on finalising the evaluation and in this phase, a final report is written up and submitted to the OECD Ministerial Council for formal adoption and then de-restricted for public availability.

Although any adopted final report is non-binding, this peer review process can give rise to peer pressure, i.e. a means of soft persuasion which can become an important force in

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<sup>156</sup> See the Commentaries, para. 5.

<sup>157</sup> See the Commentaries, para. 4.

<sup>158</sup> The term 'peer review' has been described as 'the systematic examination and assessment of the performance of a state by other state, with the ultimate goal of helping the reviewed state improve its policy making, adopt best practice and comply with established standards and principles'. See the Commentaries, para. 20.

<sup>159</sup> See F. Pagani, 'Peer Review: a Tool for Cooperation Change: an Analysis of an OECD Working Method', (2002). Available at <http://www.oecd.org/dataoecd/33/16/1955285.pdf> at p. 1.

<sup>160</sup> See OECD, *Bribery Convention: Procedure of Self- and Mutual Evaluation-Phase1*, available at [http://www.oecd.org/document/21/0,2340,en\\_2649\\_37447\\_2022613\\_1\\_1\\_1\\_37447,00.html](http://www.oecd.org/document/21/0,2340,en_2649_37447_2022613_1_1_1_37447,00.html).

<sup>161</sup> Ibid.

<sup>162</sup> M. Pieth, above, at pp. 7-8.

stimulating countries to make changes and meet standards. As described above, the process contains a mix of informal dialogues and formal recommendations, inevitably involving comparisons or even ranking between member countries. More importantly, all members' implementing reports are published on the OECD website. This can alert national authorities, their trading partners and the public as to whether the national implementing legislation meets the agreed rules or whether there are particular aspects that the examined country may consider improving. Consequently, states are likely to respect their legal obligations out of the fear of ruining their trustworthy reputation.

Meanwhile, the peer review process performs the function of fostering information sharing and mutual learning. The process is not only an exercise of evaluating whether the examined countries comply but also a chance for all other participating countries to learn. The translation and adaptation of foreign experience can be an important capacity-building instrument for all participating states. In this regard, the value of the involvement of the Secretariat cannot be ignored. The Secretariat consisting of neutral experts has the expertise needed to produce documentations, to stimulate discussions and to uphold quality standards in this learning process.

Phase 2 of the monitoring process examines the actual performance of national systems in implementing the Convention from an informal exchange of views with key representatives from Member States. Accordingly, teams of international experts are sent to each Member State to meet with its political, administrative, police, customs, judicial authorities etc. and discuss the actual implementation of the agreed standards.<sup>163</sup> Therefore, the focus of the Convention monitoring process is not only on the examination of national laws and court cases, but also on the actual performance of domestic implementing legislations adopted by the states.

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<sup>163</sup> See Wehrle, Frédéric, 'Making Sure that International Anti-corruption Standards are Enforced: the OECD Convention Monitoring Mechanism', (2002). Available at [http://www.transparency.org/global\\_priorities/international\\_conventions/readings\\_conventions](http://www.transparency.org/global_priorities/international_conventions/readings_conventions) , p. 2.