Public Procurement World - UNCITRAL

2. Application of the Statutory Procurement Laws

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# a. Which public agencies are covered by the laws?

The Model Law primarily covers the procurement of governmental organizations and other entities and enterprises within the public sector. Article 2 classifies "procuring entity" into two categories: Option I and Option II. The Option I category entails all governmental departments, agencies, organs or other unit, and subdivisions within the enacting State. Procuring entities that fall under Option II are composed of any department, agency, organ or other unity, or any subdivision with respect to organs of the national government.

In addition, the enacting state may include other entities or enterprises that are not part of the government and make determinations by considering the following factors:

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

Whether the entity is managed or controlled by the government or whether the government participates in the management or control of the entity;

Whether the government grants to the entity an exclusive license, monopoly or quasi-monopoly for the sale of the goods that the entity sells or the services that it provides;

Whether the entity is accountable to the government or to the public treasury in respect of the profitability of the entity;

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

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.

For more information, see the *Guide to Enactment of the UNCITRAL Model Law on Public Procurement.*

# b. Which private entities are covered by the laws?

Please see Section 2(a).

# c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

The Model Law does not address this.

# d. Which types of contracts are covered?

The Model Law covers all types of public procurement, which includes goods, construction, and services. UNCITRAL intended the Model Law to have a broad scope and wide application in order to address different types of situations in public procurement.

# e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

The Model Law is silent as to making changes to an existing contract.

# f. What is the applicable regime for framework agreements?

Under the Model Law, a procuring entity may engage in a framework agreement procedure if the need for the subject matter of the procurement is expected to arise on an indefinite or repeated basis during a given period of time (e.g., maintenance contracts) or by virtue of the nature of the subject of the procurement, the need for the subject matter may arise on an urgent basis during a given period of time (e.g., natural disasters, pandemics). The procuring entity is required to provide a statement of the reasons and circumstances to justify the use of a framework agreement procedure. There is no requirement for minimum and maximum number of suppliers and contractors parties to a framework agreement.

A framework agreement procedure is comprised of two stages. The first stage involves the selection of a supplier or a contractor to be a party to a framework agreement with the procuring entity and the second stage entails awarding the procurement contract under the framework agreement to the party. Conditions to conclude a framework agreement will be specified by the procuring entity at the soliciting stage.

There are also two types of framework agreements: open framework agreement and closed framework agreement. Open framework agreement involves more than one supplier or contractor, and remains open for new suppliers or contractors to become a party at any time of the operation of the agreement as long as they meet the qualification and responsiveness threshold. The solicitation to become a party to an open framework agreement must be open and international, applying the provisions of Article 33. The Model Law requires the open framework agreements to operate electronically and the procuring entity is required to maintain the agreement online.

A procuring entity engaging in a closed framework agreement is required to specify several key items such as the duration of the agreement, description of the subject matter, estimates of the terms and conditions, details of second-stage competition, and manner in which the procurement contract will be awarded.

Paragraph 3 of Article 58 provides that the agreement must contain all information necessary to facilitate an effective operation of the framework agreement. If the framework agreement involves more than one supplier or contractor, the agreement will generally be concluded as one agreement between all parties. In a closed framework agreement without second-stage competition, the submission by the supplier or contractor at the first stage is deemed final. In a closed framework agreement with second-stage competition, the first-stage is considered the initial stage and the final submission is submitted during the subsequent stage.

# g. What is the applicable regime for public-private partnerships (PPPs)?

The Model Law does not address this.

# h. How are concessions dealt with?

The Model Law does not address this.

# i. Are there anti-avoidance rules (including laws on bid rigging)?

The Model Law defers to the enacting state to provide proper and adequate institutional and administrative anti-avoidance measures. At the administrative level, the Model Law advises proper reporting and cooperation between agencies overseeing the public procurement process and promotes competition agencies to monitor collusion and bid-rigging. For example, Article 21 provides a rule to exclude supplier or contractor with a conflict of interest or unfair competitive advantage from the procurement proceedings.

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