Public Procurement World - UNCITRAL

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# 1. The Laws

## a. What is the applicable legislation?

The UNCITRAL Model Law on Public Procurement is guided by rules contained in the 1994 Model Law, international agreements (including the UN Convention against Corruption and the WTO Agreement on Government Procurement), and the laws of the enacting state.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

While the Model Law is chiefly aimed at helping states design legislation at the national level, it is also intended to harmonize with international agreements on procurement. UNCITRAL recognizes that the member states of the European Union are under the procurement regulations of the EU. Similarly, states that are parties to the WTO GPA are bound by transparency and competition requirements under the agreement. Article 3 provides that the requirements of the international treaty or agreements have general prevalence over the Model Law, but in all other respects, public procurement is to be governed by the Model Law.

## c. What are the basic underlying principles of the legal framework?

The Model Law is intended to serve as a model for all states for evaluation and modernization of their procurement laws and practices, cultivate harmonization of procurement regulation internationally, and promote international trade. To advance these objectives, the Model Law is grounded in principles of efficiency, accessibility, competition, fairness, integrity, and transparency as outlined in the preamble. These principles are facilitated by various safeguards and procedures in the Model Law intended to promote objectivity in the procurement proceedings and prevent abuse in public procurement.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

The Model Law treats defense procurement with general similarity to other types of procurement. Nonetheless, UNCITRAL recognizes that there may be instances where modification and flexibility to the transparency obligations of the Model Law are needed. First, given the classified nature of defense-related procurement, the Model Law permits modifications to ensure protection of the information that may be sensitive or confidential. For example, Article 25 (4) excuses the procuring entity from disclosing information from the record of the procurement proceedings if its non-disclosure is necessary for ensuring "protection of essential security interests of the state or if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition." In addition, Article 24 (4) allows the procuring entity to impose requirements to protect classified information on suppliers and contractors. Moreover, the Model Law allows the use of alternatives to open tendering as a means to accommodate the complexity and security of supply generally involved in the defense procurement. Alternative methods include request for proposals with dialogue, competitive negotiations, and single-source procurement.

To avoid abuse, the Model Law aims to balance the protection of sensitive information and the transparency requirements of public procurement. For example, the Model Law does not allow the procuring entity to expand the definition of "classified information." Additionally, according to Article 7, procuring entities must specify the measures and requirements needed to ensure the protection of classified information. These measures obligate the procuring entity to explicitly state the reasons and justifications for the exemptions. Furthermore, the Model Law preserves its transparency mechanisms in procurement that involves classified information by requiring the procuring entity to state the procurement regulations, other laws and regulations pertinent to the procurement proceedings, and the place where those laws and regulations can be found pursuant to Article 39(t).

# 2. Application of the Statutory Procurement Laws

## 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.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

As specified in Article 27, there are several different ways to award a contract. Contracting authorities may employ the following procedures:

Open tendering;

Restricted tendering;

Request for quotations;

Request for proposals without negotiations;

Two-stage tendering;

Request for proposals with dialogue;

Request for proposals with consecutive negotiations;

Competitive negotiations;

Electronic reverse auction; and

Single-source procurement.

The Model Law permits the enacting state to incorporate some or all of these methods into their national legislation, with a requirement that open tendering be included as an option.

## b. What status do electronic means/procedures have?

The use of electronic means/procedures is optional. UNCITRAL views e-procurement as a way to enhance value for money and optimize governance in the procurement system. The Model Law recognizes and addresses the potential benefits of e-procurement and encourages its use. The implementation of e-procurement depends on the availability of necessary e-commerce infrastructure and related resources in the enacting state. UNCITRAL recommends a general deference to the laws of the enacting States when integrating and utilizing e-procurement. The enacting states can also adapt a series of e-commerce texts, such as the Model Law on Electronic Commerce (1996), the Model Law on Electronic Signatures (2001), and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) as additional tools to implement electronic procedures.

## c. Where are contract notices, i.e. calls for bid, published?

The Model Law does not provide specific publication methods for notices. It is the responsibility of the enacting state to regulate the publication, which, as stated in Article 5, should be made available in a centralized manner at a common medium where the information is domestically and internationally accessible.

## c. Can certain prospective bidders be excluded from the competition?

Yes. According to Article 21, the procuring entity must exclude a supplier or contractor from the procurement proceedings if (1) the supplier or contractor offers, indirectly or directly, to current or former officer or employee of the procuring entity any form of gratuity or other things of service or value to influence an act or decision of the procuring entity or (2) the supplier or contractor has an unfair competitive advantage or a conflict of interest. The Article's first prong is aimed at preventing corrupt practices such as bribery and other forms of inducements. Its second prong on unfair competitive advantage is an open-ended concept left to interpretation by the enacting state. It primarily addresses situations wherein the supplier or contractor is in possession of information that is not available to other bidders. An example of an unfair competitive advantage would be a case in which a subsidiary of the procuring entity participates in the procurement proceedings.

Under Paragraph 8 of Article 9, the procuring entity may disqualify a supplier or contractor if the information submitted concerning the qualifications was false or constituted misrepresentation; if the information was materially inaccurate or incomplete; if the supplier or contractor fails to remedy deficiencies promptly upon request by procuring entity; and if the supplier or contractor fails to demonstrate its qualifications again if requested to do so.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Under the Model Law, contracts are awarded to economic operators that are suitable with regard to the subject matter of the procurement. Paragraph 2 of Article 11 specifies general evaluation criteria, which includes price, cost of operating, maintaining and repairing goods or of construction, time for delivery of goods, completion of construction or provision of services, functional characteristics of goods or construction, environmental characteristics of the subject matter, and terms of payment. A bidder or an applicant respectively is suitable if he possesses experience, reliability, and professional and managerial competence. Additionally, the procuring entity may consider any other criteria that the procurement regulations or other provisions in the enacting state and evaluate the margin of preference, as specified in Paragraph 3(b).

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Prequalification is an option according to Article 18. Prequalification proceedings allow procuring entities to identify suppliers and contractors at an early stage and are particularly useful for the purchase of complex or high-valued goods. In a prequalification proceeding, the procuring entity is required to provide an open solicitation, such as a publication of the invitation to pre-qualify. The Model Law also requires that the invitation to prequalify should be published internationally. Paragraph 3 of Article 18 specifies the information that must be included in the invitation.

In a prequalification proceeding, the procuring entity provides a set of prequalification documents to each supplier or contractor that requests them and that pays the price charged for the documents. The prequalification documents must include:

Instructions for preparing and presenting prequalification application;

Any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;

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 prequalification proceedings without the intervention of an intermediary;

References to this law, the procurement regulations, and other laws and regulations directly pertinent to the prequalification proceedings, and the place where those laws and regulations may be found;

Any other requirements that may be established by the procuring entity in conformity with this law and the procurement regulations relating to the preparation and presentation of applications to prequalify and to the prequalification proceedings.

The procuring entity must apply only the criteria and procedures noted in the invitation to prequalify and in the prequalification documents in deciding the prequalified suppliers or contractors. Additionally, the Model Law requires that the procuring entities must respond to any requests by a supplier or contractor for clarification. Article 18 further requires the procuring entity to promptly notify each supplier and contractor whether or not they have been prequalified, and upon request, make available to any person the names of all suppliers or contractors that have been prequalified.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

While no "blacklist" formally exists, Paragraph (2)(f) of Article 9 establishes that suppliers and contractors that are debarred or suspended as a result of a past criminal offense are disqualified from participating in the procurement proceeding. The Model Law leaves it up to the enacting State to determine the period of time preceding the commencement of the procurement proceedings for which a criminal offense would disqualify the bidder from taking part in the procurement process.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

Yes. In order to prevent conflicts of interest, the party that participated in the set-up of a procurement procedure can be excluded from the same procedure pursuant to Article 26, if the party gained a competitive advantage from the involvement. The Article requires the procuring entities to enact a code of conduct and regulate matters to prevent conflicts of interest in procurement.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

The Model Law permits bidders to combine to submit a bid and form a bidder consortium. The combined entities will collectively be considered as a single "procuring entity." The Model Law, however, does not regulate bidder consortia in detail, and instead, leaves it to the enacting State to regulate and monitor the purchasing arrangement. Moreover, the formation of consortia is not simply limited to entities within the enacting state. The Model Law permits cross-border bidder consortia comprised of entities from different states, and in such instances, international agreements would have primacy in facilitating and regulating the purchasing arrangement.

## g. Can members of a bidder consortium be changed during a procurement procedure?

The Model Law does not address this.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

Please see Section 4(c).

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

There are no special statutory regulations for foreign entities to participate in a procurement proceeding. There are also no special requirements under the Model Law for the legal representative of a foreign company as this would lead to a restriction of competition.

# 5. Specifications

## a. Are there any rules on the specifications?

The Model Law does not contain any formal rules on specifications. In situations where a full description of technical specification of the subject matter is needed, a two-stage tendering or request for proposals with dialogue may be appropriate.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

The Model Law does not address this.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

The Model Law does not specifically address protections of small and medium enterprises.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

Generally, the contract has to be awarded to the most economic bid or offer. According to Paragraph 3 of Article 43, where price is the only award criterion, the lowest-priced tender will be awarded. Nonetheless, if there exists award criteria in addition to price, the successful tender will be the most advantageous bid. The most advantageous bid will be assessed on the basis of the criteria and procedures for evaluating tenders as specified in the solicitation documents. Moreover, if the tender prices are expressed in multiple currencies, the tender prices must be converted to the currency specified in the solicitation documents. The procuring entity has the authority to reject the successful tender if the supplier or contractor fails to demonstrate its qualifications upon the procuring entity's request. In such cases, the procuring entity will select the next successful tender among the remaining tenders.

## b. Are there any limitations regarding the offered bid price?

Pursuant to Article 20, the procuring entity may reject a submission if it determines that the offered bid price is abnormally low in relation to the subject matter of the procurement and raises concerns for the procuring entity.

## c. Are there any rules on alternative bids?

The Model Law does not address this.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

Single-source procurement is a method of last resort and is only available after the procuring entity has exhausted all other alternatives. As specified in Article 30(5), single-source procurement is available only if:

The subject matter of the procurement is available only from a particular supplier or contractor, or if the supplier or contractor has exclusive rights in respect of the subject matter of the procurement;

There exists an urgent need due to a catastrophic event and it is impractical to engage in other methods of procurement;

There is an urgent need for standardization of existing goods, equipment, technology or services;

The procurement deals with classified information and single-source procurement would serve the protection of security interests of the State; or

A procurement from a particular supplier or contractor is necessary to implement a socio-economic policy of the enacting State.

## b. What are the consequences for violation of the competitive bidding requirement?

The Model Law does not address this.

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

Yes. Under the Model Law, a supplier or contractor has the basic right to challenge an act or a decision of the procuring entity in the procurement proceedings. The article provides that any supplier or contractor participating in the procurement proceedings has the right to participate in the challenge proceedings under Article 66 (which deals with application for reconsideration before the procuring entity) and Article 67 (which deals with application for review before an independent body). The right to challenge includes:

The right to be present, represented and accompanied at all hearings during the proceedings;

The right to be heard;

The right to present evidence, including witnesses;

The right to request that any hearing take place in public; and

The right to seek access to the record of the challenge proceedings subject to the provisions of Article 69.

When a challenge application is filed, the procuring entity cannot award the contract unless an independent body or the court grants an exemption from the prohibition of Article 65 due to an urgent public interest. If not exempted, the procuring entity must publish a notice of the challenge application on an appropriate forum to ensure that all interested participants are informed. Within three days of the receipt of the challenge application, the procuring entity must perform several steps. First, the procuring entity must notify all parties in the procurement proceedings regarding the application and its substance. Subsequently, the procuring entity must determine whether it will dismiss or entertain the application. If it decides to dismiss the application, the procuring entity must notify the applicant about the dismissal within three days. If the procuring entity decides to engage with the application, the entity must determine whether it will suspend the procurement proceedings (which will halt all actions) and decide the duration of the suspension. Paragraph 8 provides that procuring entity must provide the independent reviewing body the access to all documents relating to the procurement proceedings in its possession.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

The Model Law does not address this.

## c. Is there a specific forum before which procurement disputes are heard?

The Model Law does not specify a forum before which procurement disputes are heard. Rather, the challenge proceeding articles require the enacting state to designate the appropriate independent body or court to serve as the forum.

## d. Are there any timing requirements for the review?

Under Article 66, a supplier or contractor has the right to apply to the procuring entity for a reconsideration of a decision or action taken by the entity within the following time periods:

An application for reconsideration of the terms of solicitation must be submitted prior to the deadline for presenting submissions; or

Application for reconsideration of other decisions or actions of the procuring entity must be submitted within the standstill period pursuant to Paragraph 2 of Article 22 or in cases where no standstill period has been applied, the application must be submitted prior to the entry into force of the procurement contract or the framework agreement.

A supplier or contractor may also apply to an independent body or court for a review of a decision or action taken by the procuring entity in the procuring proceedings within time periods specified in Article 67:

Applications for review of the terms of solicitation, prequalification or pre-selection or of decisions or actions taken by the procuring entity in prequalification or pre-selection proceedings shall be submitted prior to the deadline for presenting submissions;

Applications for review of other decisions or actions taken by the procuring entity in the procurement proceedings shall be submitted:

Within the standstill period applied pursuant to Paragraph 2 of Articles 22; or

Where no stand still period has been applied, within working days specified by the enacting state after which the applicant became aware of the circumstances giving rise to the application or when the applicant should have become aware of those circumstances.

## e. What are the main preconditions for review?

A bidder has standing to file a petition for review if it can claim that (1) it is a supplier or contractor and (2) its challenges relate to the procuring entity's decisions or actions in a given procurement procedure.

## f. What are admissible grounds for starting a review proceeding?

According to Article 64, a supplier or contractor may bring a challenge if it claims it has suffered or may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

Article 65 ensures that procurement contract cannot be awarded while a challenge is pending. When the procuring entity receives an application for reconsideration or notification of a challenge or appeal, the entity is prohibited from proceeding with the procurement process for a time prescribed by the enacting state.

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

Please see Section 8(a).

## i. How long does a judicial proceeding for review take?

The Model Law defers to the enacting state to determine the length of the judicial review.

## j. Must unsuccessful bidders be notified before the award? If so, when?

According to Article 22, unsuccessful bidders must be notified "promptly" upon procuring entity's decision to accept the successful submission at the end of the standstill period. Standstill period refers to "the period starting from the dispatch of a notice as required by paragraph (2) of Article 22 of this Model Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under Chapter VIII of this Model Law, the decision so notified." Article 2. The Model Law does not define "promptly" but it generally means as soon as reasonably possible after the procuring entity has made its decision.

## k. Are review proceedings common?

Because the Model Law was published in 2011, we have yet to see a major development to determine whether review proceedings are common.

## l. Are damage claims in relation with procurement procedures common?

Because the Model Law was published in 2011, we have yet to see a major development to determine whether damage claims in relation with procurement procedures are common.

## m. What are the leading court decisions involving procurement disputes?

The Model Law does not address this.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

Public agencies can refer to the laws of the enacting state and other international agreements such as the WTO GPA.

## b. Does a specific contract law apply for public contracts?

The Model Law does not indicate a specific contract law that applies to issues under public contracts. Instead, the Model Law provides that some contract issues may be regulated by the contract law of the enacting state.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

No.

## b. Are there any specific laws or practices that apply in the defense sector?

As discussed, the Model Law affords greater flexibility to procurement proceedings dealing with the defense sector due to confidentiality, complexity, and national security involved in such procurement.

## c. Are there any specific laws or practices that apply in the health care sector?

The Model Law's flexible approach dealing with public procurement in the defense sector may be similarly applied in the health care sector, given the sensitive medical information, research, and experiments.

## d. Are there any specific laws or practices that apply to any other particular industry sector?

The Model Law does not address this.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

The Model Law does not address this.

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