A reform tool: the 2011 UNCITRAL Model Law on Public Procurement and its Guide to Enactment
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The Guide to Enactment is designed to complement the Model Law and assist enacting states in implementing the model into national law. It therefore explains the objectives of the Model Law and how its provisions are designed to achieve those objectives. The Guide also identifies regulations, rules and additional guidance to support legislation based on the Model Law, the main issues that should be addressed in those supplementary texts, and the legal and other infrastructure that will be needed to support the effective implementation of the law.

The Guide initially explains the two main purposes for which the Model Law was produced. First, it should serve as a model for all states for the evaluation and modernisation of their procurement laws and practices, and the establishment of procurement legislation where none currently exists. The second purpose is to support the harmonisation of procurement regulation internationally, and thereby to promote international trade.

This article will consider how to ensure that the Model Law is used to meet the needs of governments reforming their public procurement policies, drawing on the advice set out in the Guide to Enactment.
Employing the Model Law in a way that meets the needs of governments interested in reforming their procurement systems

The Model Law is intended to provide all of the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. In this regard, the Model Law is a “framework” law that does not in itself set out all the rules and regulations that may be necessary to implement those procedures in national laws. Accordingly, legislation based on the Model Law should form part of a coherent and cohesive procurement system that includes regulations, other supporting legal infrastructure, and guidance and other capacity-building tools as well as appropriate institutions.7

There are two main aspects of employing the Model Law standards: first, designing the public procurement law to suit the country’s needs without compromising its substance, and, second, ensuring its effective implementation and use. It is in this context that the Guide to Enactment plays a key role: it is in fact a guide both to the enactment and – although not intended to be comprehensive – use of the Model Law.

As regards designing the law itself, the importance of the country context has been well ventilated in the literature.8 The Preface to the Guide records that: “as there are wide variations among States in such matters as size of the State and the domestic economy, in legal and administrative traditions, in levels of economic development and in geographical factors, options are provided for in the Model Law to suit local circumstances, and the Guide explains the issues that may be taken into account in deciding how those options may be exercised, and indicates provisions of the Model Law that might have to be varied to take into account particular local circumstances.”

While it is therefore possible to “cherry pick” elements of the Model Law and to use them in domestic laws based on a different approach, if a domestic law is to fulfil the objectives of the Model Law, it should contain certain minimum provisions. The Guide explains that these, all provided for in the Model Law, are:

- the applicable law, procurement regulations and other relevant information are to be made publicly available
- requirements for prior publication of announcements for each procurement procedure (with relevant details) and ex post facto notice of the award of procurement contracts
- requirements for items to be procured to be described objectively, and without reference to specific brand names as a general rule, so as to allow submissions to be prepared and compared on a common and objective basis
- requirements for qualification procedures and permissible criteria to determine which suppliers or contractors will be able to participate, and the particular criteria that will determine whether or not suppliers or contractors are qualified in a particular procurement procedure to be advised to all potential suppliers or contractors
- a requirement for open tendering to be the recommended procurement method and for the objective justification for the use of any other procurement method
- the availability of other procurement methods to cover the main circumstances likely to arise (simple or low-value procurement, urgent and emergency procurement, repeated procurement and the procurement of complex or specialised items or services) and conditions for use of these procurement methods
- a requirement for standard procedures for the conduct of each procurement procedure
- a requirement for communications with suppliers or contractors to be in a form and manner that does not impede access to the procurement
- a requirement for mandatory standstill period between the identification of the winning supplier or contractor and the award of the contract or framework agreement, in order to allow any non-compliance with the provisions of the Model Law to be addressed prior to any such contract entering into force
• mandatory challenge and appeal procedures if rules or procedures are breached.9

This section of the Guide includes cross references to the provisions of the Model Law that contain these provisions, in order to assist the reader.

Within the flexibility that basing a text on these key provisions implies, there are several other major decisions that an enacting state needs to take in order to delineate the legal framework for the procurement system. A full examination of all such decisions is beyond the scope of this article, but some of the most critical are considered below. Others are discussed in the Guide.

What procurement methods are most appropriate for the local market?

A key issue is the procurement methods that are to be enacted. The Model Law contains 10 procurement methods and three types of framework agreements, with further options available within some methods. Clearly, it will be unnecessary, in almost all cases, to enact all of them (and making such a large number of procedures available to procurement officials is likely to make decision-taking excessively complex and to compromise capacity-building).10 The Guide includes commentary aimed at enabling enacting states to decide whether or not each method is appropriate for their local circumstances.

In principle, open tendering must always feature in the procurement law: the procedures that this method entails are considered to be the “gold standard” for procurement without special features.11 Low value and simple procurement, emergency and other urgent procurement, and more specialised or complex procurement, among other situations, raise special features that can justify the use of other methods. The Guide observes that these situations can be considered likely to arise in all states, and therefore a method for all of them should be provided.

The Model Law’s procurement methods include both tendering-based methods (restricted tendering, two-stage tendering and open framework agreements within other procurement methods) and request for proposals methods (request for proposals without negotiation, request for proposals with dialogue and request for proposals with consecutive negotiations). Other methods in the Model Law include competitive negotiations, request for quotations, electronic reverse auctions and single source procurement. The Guide notes that in the Model Law a set of procurement methods and purchasing techniques, such as framework agreements, can be considered as a toolbox. The procuring entity should select the appropriate tool for the public contract to be awarded from those that are enacted as the toolbox in the state concerned.

In addition to selecting a reasonable number of methods, it is noted that the conditions for use and the functionality of certain methods overlap, so states are encouraged to select those that are most appropriate in their circumstances. Tendering-based methods, request for proposals-based methods and those involving negotiations require different skills and capacities. For example, in tendering-based methods, the procuring entity retains control of, and responsibility for, describing the solution that will meet its needs. On the other hand, in request for proposals-based methods, the procuring entity issues a description with minimum technical requirements and standards, and the suppliers or contractors are responsible for ensuring that their proposed solutions in fact meet the procuring entity’s needs. Tendering-based methods will then compare like with like, whereas in request for proposals-based methods, the procuring entity will compare different solutions. Assessing the solutions in the latter case will generally be more demanding than assessing the single solution in tendering procedures.12, 13

Even within tendering procedures, some methods are more complex to operate than others. Two-stage tendering, for example, allows the procuring entity to issue solicitation documents with a full or partially developed set of technical specifications and other terms and conditions, to examine responses to those specifications and to hold discussions on them with suppliers and contractors. Thereafter, the procuring entity refines and finalises the specifications and terms and conditions, and then invites tenders in the normal manner. Although these discussions do not involve price, operating this method requires skills that open tendering does not. Here, the Guide notes that, “in deciding whether to use open tendering, two-stage tendering or request for proposals with dialogue, the procuring
entity must assess whether it wishes to retain control of the technical solution in the procurement of relatively complex subject matter. Where it wishes to retain such control but also to refine the description and technical specifications issued at the outset of the procedure to achieve the best solution through discussions with suppliers or contractors, a two-stage tendering procedure, rather than an open tendering procedure, may be the appropriate approach. States will need to consider these capacity issues when deciding which methods are appropriate to enact. The extent to which the state wishes to impose standardisation (which indicates that it should require procuring entities to retain control over design and specifications) is another of the practical issues that should be taken into account.

Similarly, restricted tendering involves a more complex solicitation process than open tendering. In restricted tendering, the procurement official must ensure that either (a) s/he invites all potential suppliers or contractors for an item or service to be procured (where that item or service is complex or specialised and available in a limited market); or (b) s/he invites a sufficient number of potential suppliers or contractors to ensure effective competition, and selects them in a non-discriminatory way. The Guide comments on the difficulties associated with complying with these procedural, yet nonetheless key, requirements. The risks of failing to follow them include a possible challenge under Chapter VIII of the Model Law, which would remove the procedural time saving that using restricted rather than open tendering is designed to achieve, and – perhaps more importantly – compromising effective competition.

The Guide also suggests that governments may consider phasing in more complex procurement procedures to allow for capacity acquisition. For example, they may start by enacting “tendering methods for all other than urgent and very low-value procurement (for which less structured or regulated methods are presented in the Model Law); the capacity acquired in operating these methods will allow the introduction at a later stage of methods involving negotiations or dialogue, including request for proposals”. Concerning electronic reverse auctions and framework agreements, the Guide again encourages governments to consider a phased approach to the introduction of these relatively novel tools. In the case of electronic reverse auctions, the Guide suggests that states start with price-only auctions before considering more complex variants, where both quality and price are auctioned, again in order to develop the skills and capacity necessary to use more complex variants. The guidance on enacting and using framework agreements explains the complexity of the decisions required to realise the potential benefits of the three types of framework agreements permitted by the Model Law, given the multiplicity of structures and procedures that can be put in place to operate them, which again indicates that a phased approach is warranted.

**Challenge and appeal mechanisms**

A second key issue is to ensure that public procurement laws, including those based on the UNCITRAL model, fulfil the requirements in UNCAC for states to “establish an effective system of review”. However, as the Guide notes, the system needs to be “accommodated within the widely differing conceptual and structural frameworks of legal systems and systems of State administration throughout the world”. The Guide explains that key elements of an effective challenge mechanism include: “intervention without delay; the power to suspend or cancel the procurement proceedings and to prevent ... the entry into force of a procurement contract while the dispute remains outstanding; the power to implement other interim measures, such as giving restraint orders and imposing financial sanctions for non-compliance; the power to award damages if intervention is no longer possible; and the ability to proceed swiftly within a reasonably short period of time.” While the Model Law requires the challenge mechanism to encompass all of these elements, the Guide notes that the structure that will suit any enacting state will need to reflect its legal tradition in general and some specific features, such as: whether there are specialised bodies before which challenges to administrative acts can be filed, or specialist courts or tribunals for procurement matters; whether there are administrative sanctions for breaches of procurement law; whether challenges proceed by way of administrative review, or independent (and non-judicial) review, and/or judicial review of procurement decisions through the ordinary courts; and whether there is a mechanism to
allow for criminal proceedings for relevant violations of procurement laws by procuring entities.\textsuperscript{23}

In addition, the Model Law does not regulate court procedures. The Guide also notes that states may wish to address the question of sequencing – that is, whether, for example, judicial review may be sought only after opportunities for other challenges have been exhausted, or whether suppliers or contractors can elect to present their challenge to any of bodies in the state concerned. Given the general approach of deferring the structure of a challenge mechanism to the enacting state, the Guide does not discuss the merits and demerits of sequencing, beyond noting that parallel proceedings are discouraged.\textsuperscript{24}

A question that led to considerable debate while the Model Law was being developed by the UNCITRAL Working Group was that of financial compensation for breaches of the Model Law’s procedures as part of the challenge mechanism. The Guide notes that corrective action should be regarded as the “primary and most desirable remedy”.\textsuperscript{25} Where corrective action is no longer possible, the Guide suggests that financial compensation may be part of the appropriate remedy. The point of debate was whether financial compensation should extend to anticipatory losses, such as the profit expected under the contract concerned. The main arguments considered were: (a) that a system without provision for any financial compensation beyond the costs of filing a complaint would not be effective because adequate remedies would not be available in all situations (for example, where a contract had entered into force and it was not considered appropriate to interfere in the contract); and (b) preventing excess complaints that would unnecessarily disrupt the procurement process. In essence, the question was how to balance the interests of suppliers and contractors, with those of procuring entities; an additional consideration was the implications for the public interest in respect of how the question was resolved. After considerable debate, two options were set out in the Model Law, that enacting states could choose between. The first limits financial compensation to any reasonable costs incurred by the supplier or contractor in making a successful challenge; the second allows financial compensation for any loss or damage sustained for a breach that was successfully challenged, which might include the profits that the supplier or contractor would have made had it been awarded the contract concerned. The Guide explains the policy considerations summarised above, without taking a stance on which is preferable; the enacting state must therefore choose the option that reflects local circumstances; for example whether the key need in the state is (a) or (b) above.\textsuperscript{26}

Enacting the Model Law into a national system

At the drafting level, the Guide addresses other options that may be exercised to reflect the legal tradition in an enacting state: the inclusion of a preamble, the extent of definitions in the law, the use of terminology when referring to procurement methods and stages in the procedure, and how to cross refer to other laws such as insolvency, e-commerce or banking law. Concerning terminology, UNCITRAL has issued a glossary of procurement terms to assist users of the Model Law.\textsuperscript{27}

Similarly, the administrative tradition in a state may require decisions of procurement officials to be justified in more detail than the Model Law requires. If so, the law or procurement regulations should address the relevant requirements. More generally, the legal tradition of an enacting state may require a more detailed code than a law based on the Model Law would give. Therefore the enacting state may choose to include items that could be addressed in the procurement regulations in its primary law.

Enacting states are encouraged to exercise caution in including provisions in their primary law that may need to be updated in the short-term, such as thresholds for low-value procurement and provisions involving technical aspects of e-procurement. Such provisions are more effectively set out in legal rules (often termed “regulations”) that can be updated at the administrative level. UNCITRAL has also issued a paper on the suggested contents of procurement regulations, which may assist enacting states in expanding the scope of the primary law, so that the regulatory framework is sufficiently detailed.\textsuperscript{28}
Effective development of national laws based on the Model Law

Three main supports are needed for the effective implementation and use of the Model Law:

- regulations and other laws required to support the primary procurement law
- additional guidance to support the legal structure in the national context
- institutional and administrative support for that legal structure.

Concerning the first support, the Guide discusses the necessary regulations and other laws, explaining that the Model Law is drafted on the assumption that certain other laws are in force or will be enacted. Such laws may include administrative, contract, criminal and judicial-procedure law, and anti-corruption provisions; provisions giving the authority to share information between agencies; provisions implementing international agreements; and provisions enabling e-government. For example, a public procurement law that allows for e-communications must be supported by an e-commerce law that ensures that these communications are legally recognised. The Model Law also requires that any socio-economic policies that may be pursued through public procurement be authorised in the procurement regulations or other laws, and that any legal requirements for tender securities are appropriately reflected in the procurement law.

The commentary in the Guide to Article 4 of the Model Law discusses procurement regulations, the main purpose of which is to enable an enacting state to tailor its detailed rules for procurement procedures to its own particular needs and circumstances within the overall framework established by the primary law. The commentary explains the main procedures in the Model Law for which regulations are anticipated, including: the manner of publication of the information that the procuring entity must publish; measures to secure authenticity, integrity and confidentiality of information generated and transmitted during the procurement process; the grounds for domestic-only procurement and the use of margins of preference; socio-economic policies that can or must be promoted through procurement; the duration of the standstill period, thresholds for request-for-quotations; and the maximum duration of framework agreements. Without such regulations, the Model Law cannot work as intended. For example, request-for-quotations under the Model Law cannot be used without a threshold set out in the procurement regulations. In addition, states implementing newer techniques, such as framework agreements, may wish to apply restrictions when they are first used, so as to allow for a phased introduction as discussed above. As also noted above, the Guide is supplemented by a paper discussing the regulations that are considered to be necessary to support the Model Law.

In respect of the second support – additional guidance to support the primary legal structure – the Guide states that the effective implementation and operational efficacy of the Model Law will be enhanced by the issue of internal rules, guidance notes and manuals. These documents may operate to standardize procedures, to harmonize specifications and conditions of contract and to build capacity. Standard forms and sample documents are also recommended: for example, those issued by the multilateral development banks and other agencies such as the OECD, FIDIC, etc.

Elsewhere, the Guide notes that developing procurement officials’ capacity to exercise the discretion that arises in the procurement process, such as in designing qualification, responsiveness and evaluation criteria, and in selecting the procurement method (and manner of solicitation in relevant cases), requires guidance and training – these issues are, by definition, incapable of resolution through regulation. Concerning the choice of procurement methods and solicitation, the commentary described above, as well as Chapter II of the Model Law generally, highlights issues that may usefully form the subject of guidance. In addition, procuring entities may need to be directed to take account of and apply employment and equality legislation, environmental requirements, and other requirements in the procurement process.

An example of a capacity-related issue discussed in the Guide is whether or not the law should require major procurement decisions – such as on the use of a procurement method other than open tendering – to be subject to a prior approval mechanism. The Guide explains that cited advantages of prior approval mechanisms include allowing for
the detection of errors and problems at an early stage, enhancing uniformity and supporting capacity development through the justification and consideration of the actions or decisions concerned when seeking approval. It adds that the main reasons cited against the use of a prior approval system are that it may prevent the longer term acquisition of decision-making capacity, and may dilute accountability.35

The Guide notes that the use of this type of control – obtaining approval from outside the procuring entity – is generally decreasing. Many donor agencies now promote an approach that leaves decisions to officials in procuring entities themselves, with control being provided through a requirement to justify the decisions concerned in a mandatory record of the procurement, and by conducting audits and evaluations both of the records maintained and of outcomes.36 The Model Law therefore no longer contains prior approval provisions, other than as options for the use of single source procurement to promote socio-economic policies, for the use of request for proposals with competitive dialogue and for actions bringing the procurement contract into force.

The guidance set out above, discussing the relevant articles of the Model Law, is intended to allow states to decide whether to include these options for a prior approval method or, indeed, for further approval requirements – depending on the circumstances, such as existing capacity – in the country concerned. The guidance also explains that any such requirement should be in the procurement law (to avoid the corruption risk of “unofficial” requirements for approvals, and to promote transparency, among other things, and advises on structural and procedural requirements). It emphasises the need for independence on the part of approving bodies (not just from the procurement officials in the relevant departments, but also from bodies that might sit in judgment on the procurement procedures if a challenge is filed).37

For the third support, the Guide discusses administrative issues that have a practical bearing on public procurement, such as the interaction of procurement and public financial management and budgeting systems, the need for coordination between the procurement authorities and competition authorities to evaluate the impact of the public procurement system on competition within the state, and ensuring appropriate due process protections in sanctions and debarment actions.

The Guide also recommends the establishment of a public procurement agency (PPA) or similar body to oversee the implementation of rules, policies and practices for procurement to which the Model Law applies.38 As is the case with all institutional questions under the Model Law, the structure and composition of the body concerned is left to the enacting state, with the caveat that there should be separation of policy-making and advisory bodies and those handling challenge mechanisms. Suggested functions of a PPA include ensuring an appropriate regulatory framework, standardisation of procedures, monitoring the outcomes and performance of the public procurement system, providing training and other capacity-building measures, and providing an advisory function to procurement officials.

The above measures address implementation at the national level. In addition, enacting states are likely to have requirements for their procurement systems imposed by regional or international bodies or agreements. For states that have ratified UNCAC, no amendment to the Model Law is necessary to accommodate the UNCAC requirements: as noted above, the Model Law has been designed to fulfil those requirements. Other relevant agreements and bodies include the WTO Agreement on Government Procurement (GPA) and regional free trade agreements,39 the EU Procurement Directives and the procurement rules and policies of the multilateral development banks. The provisions of all of these texts were taken into account when the Model Law was being developed, and the Model Law was drafted to maximise consistency with the WTO GPA in particular.40

The Guide operates as a tool to allow a fuller understanding of the policy considerations and choices made in the Model Law, and how they were arrived at, but it cannot operate so as to answer every variable encountered in every national system. Successful procurement reform depends both on those drafting the national procurement law and on those implementing, guiding and using that law. The critical difference between the law and the system should be re-emphasised. It is well accepted that countries with good
procurement laws will not always have good procurement systems. For example, it has been observed that: “There are few countries in the world with procurement law systems as detailed and as developed as the U.S. has – and yet the U.S. is plagued with persistent weaknesses in procurement planning and contract oversight, and even conducting competitions for award is often challenging.”

In the light of these considerations, the UNCITRAL Secretariat is supporting an initiative led by the European Bank for Reconstruction and Development, which aims to promote and support public procurement reform by implementing the Model Law in the Commonwealth of Independent States (CIS) countries and Mongolia. This project applies in-depth analysis of existing procurement systems using local knowledge prior to making recommendations on revisions to particular legal frameworks and other elements, thus putting into practice the principles of national ownership in aid effectiveness and the recommendations of the Guide.

Thus, for states attempting to ensure that their procurement laws operate to produce effective procurement systems, it is necessary – as the explanation above highlights – to base enactment decisions on practical issues. Using the procurement law to its full extent will then require capacity development and robust political commitment to support the changes needed for effective implementation.

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1 Secretary, UNCITRAL Working Group I, and a member of the UN Secretariat staff. The opinions expressed in this paper are personal and are not to be viewed as representing official views of the United Nations.


4 The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations (see A/59/17, paras 80-2, available at http://www.uncitral.org/uncitral/en/commission/sessions/37th.html).


8 An early example is Arrowsmith, Linarelli and Wallace (eds), 2000, Regulating Public Procurement: National and International Perspectives, Kluwer Law International.


The Guide describes the key features of open tendering as “the unrestricted solicitation of participation by suppliers or contractors; a comprehensive description and specification in the solicitation documents of what is to be procured, thus providing a common basis on which suppliers and contractors are to prepare their tenders; full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender; the strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; the public opening of tenders at the deadline for submission; and the disclosure of any formalities required for entry into force of the procurement contract.” See Guide, Chapter III, Open tendering, Introduction, para. 1, at p. 128.

This analysis is, in many ways, an over-simplification, in that functional specifications are becoming more common even in tendering procedures, and as expert advice (usually external) will be required to draft the specifications for more complex items in any event. Nonetheless, the point is that the procedural aspects of running the procedures are more demanding in request for proposals methods than for other procurement methods.

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See the Guide, Part II, Chapter II, Enactment: policy considerations, at p. 116, and the commentary to Article 28 of the Model Law. See also General rules applicable to the selection of a procurement method, para. 6, at p. 120.

See the Guide, commentary to Article 28 of the Model Law, para. 6, at p. 119.

See, further, Chapter IV. Procedures for restricted tendering, etc, Issues regarding implementation and use, paras 17-23, at pp. 147-9.

Maximising competition in the circumstances is one of the main requirements when selecting a procurement method: see Article 28 of the Model Law.

See the Guide, Part II, Chapter II, Enactment: policy considerations, para. 6, at p. 100.


UNCAC, Article 9(1)(d).


Ibid., para. 8.


See Guide, Part II, Chapter VIII, Challenge proceedings, Article 67: Application for review before an independent body, para. 27, at p. 294.


The paper, entitled “Guidance on procurement regulations to be promulgated in accordance with article 4 of the UNCITRAL Model Law on Public Procurement”, document A/ CN.9/770, is at the time of writing (October 2013) available at http://www.uncitral.org/uncitral/commission/sessions/46th.html.

See Guide, Part I, Implementation and use of the UNCITRAL Model Law on Public Procurement, Regulations and other laws required to support the Model Law, paras 60 et seq at p. 15.


Footnote 43, supra.

See Guide, Part I, Additional guidance to support the legal structure, at p. 16.

Ibid.

Open tendering is described below, and in footnote 24.


The Model Law requires such a record: see Article 25.


The text of the GPA and other explanatory information are available on the WTO website at http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.

See further, commentary on the international context of the Model Law, at p. 9.
43 For an introduction to this project, along with background documents, see http://www.oecd.org/dac/effectiveness/.