

International Procurement

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This 2008 year-in-review article reviews the important work of Working Group I of the U.N. Commission on International Trade Law (UNCITRAL), including framework agreements, conflicts of interest, and the working group's closing agenda.

I. Reform of UNCITRAL Model Procurement Law

The working group tasked with updating the United Nations Commission on International Trade Law (UNCITRAL) 1994 Model Procurement Law,¹ Working Group I, is nearing the end of its project. The UNCITRAL Model Procurement Law is used as a model around the world, both in developing nations² and as an important template for

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1. The Model Procurement Law is formally the UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES, with Guide to Enactment (1994). The Model Law and its guide to enactment are available on the UNCITRAL website at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html. The working papers cited in this piece are also available on the UNCITRAL website at http://www.uncitral.org/uncitral/en/commission/working_groups/1/Procurement.html. Working paper A/CN.9/WG.I/WP.66 and its addenda, available at the referenced website, set forth the proposed revision to the model law which was discussed at the working group's February 2009 meeting, discussed below.

2. The UNCITRAL Secretariat reports that countries adopting legislation based on or inspired by the UNCITRAL Model Procurement Law include Afghanistan, Albania, Azerbaijan, Croatia, Estonia, Gambia, Kazakhstan, Kenya, Kyrgyzstan, Malawi, Mauritius, Moldova, Mongolia, Nigeria, Poland, Romania, Slovakia, Tanzania, Uganda, and Uzbekistan. See also Phoebe Bolton, *The Public Procurement System in South Africa: Main Characteristics*, 37 PUB. CONT. L.J. 781, 784 & 784 n.26 (2008) (comparing UNCITRAL Model Law); Melissa Cossio, *A Case of Study: Procurement by the Peruvian Electoral Agencies*, 37 PUB. CONT. L.J. 25, 55 (2007); Alejandro L. Sarria, *The Future of Public Procurement Law in Cuba: Why the UNCITRAL Model Law Is Havana's Best Option*, 37 PUB. CONT. L.J. 89 (2007); John Linarelli, *The WTO Agreement on Government*

reform in the industrialized nations.³ Working Group I met in February 2009 and plans to meet in May 2009 at the U.N. Headquarters in New York. The delegations to Working Group I hope to present the revised law to the U.N. Commission on International Trade Law for consideration at the Commission's forty-second session, which will be held in Vienna from June 29 to July 17, 2009.⁴

A. WORK TO DATE ON THE UNCITRAL MODEL PROCUREMENT LAW

The current round of reform began in 2004, when UNCITRAL directed Working Group I to begin its review of the 1994 Model Law.⁵ When Working Group I convened in Vienna, it decided to consider the following topics:

1. The use of suppliers' lists;
2. Framework agreements (generally known as "indefinite delivery/indefinite quantity" or IDIQ contracts in the United States);
3. Procurement of services;
4. Evaluation and comparison of tenders;
5. The use of procurement to promote industrial, social and environmental policies;
6. Remedies (generally known as "bid protests" in the United States) and enforcement;
7. Legalization of documents;
8. Alternative methods of procurement;
9. Community participation in procurement; and
10. The simplification and standardization of the Model Law.⁶

The Working Group later added two additional subjects: abnormally low tenders and conflicts of interest.⁷

Procurement and the UNCITRAL Model Procurement Law: A View from Outside the Region, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 317 (2006).

3. See, e.g., PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 21:3 (2002 & Supp. 2008) (citing UNCITRAL Model Law as one of several efforts to harmonize law internationally); Omer Dekel, *The Legal Theory of Competitive Bidding for Government Contracts*, 37 PUB. CONT. L.J. 237, 248 (2008) (citing normative goals under UNCITRAL Model Law); Martin Trybus, *Improving the Efficiency of Public Procurement Systems in the Context of the European Union Enlargement Process*, 35 PUB. CONT. L.J. 409, 418 (2006) (new member states often looked to UNCITRAL Model Law as a step towards ultimately using European directives); Daniel I. Gordon, *Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make*, 35 PUB. CONT. L.J. 427, 430 (2006).

4. Materials for the forty-second session of the Commission are being made available on the UNCITRAL website, at <http://www.uncitral.org/uncitral/en/commission/sessions/42nd.html>.

5. The current reform agenda for the UNCITRAL Model Law was based, in part, on recommendations from Professor Sue Arrowsmith, of the University of Nottingham's School of Law. See Sue Arrowsmith, *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard*, 53 INT'L & COMP. L.Q. 17 (2004). For a summary of the reform initiative, see Caroline Nicholas, *The UNCITRAL Model Law on Procurement—The Current Reform Programme*, 15 PUB. PROC. L. REV. NA161 (2006).

6. See, e.g., UNCITRAL, Working Group I (Procurement), *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*, ¶ 4, U.N. Doc. A/CN.9/WG.I/WP.32 (June 25, 2004) (listing prospective topics for review).

7. The working group's concern for addressing conflicts of interest arose, in important part, because the U.N. Convention Against Corruption calls for states subscribing to the Convention to address potential conflicts of interest in procurement officials. See generally Christopher R. Yukins, *Addressing Conflicts of Interest in Procurement: First Steps on the World Stage, Following the UN Convention Against Corruption*, paper

Of these topics, items one (supplier lists), two (procurement of services), four (evaluation and comparison of tenders), five (use of procurement to promote industrial, social and environmental policies), seven (legalization of documents), eight (alternative methods of procurement), nine (community participation), and ten (simplification and standardization of the model law) have received relatively little attention by the working group. Based on the limited discussion of these topics, and input from experts, the UNCITRAL Secretariat has proposed changes to the model law to accommodate these issues, which were considered, in part, at the February 2009 meeting of the working group.⁸ Because of the press of time, the working group will have little opportunity to comment on these issues before the proposed revised language is finalized for possible presentation to the Commission in 2009. The working group's progress in the remaining areas—primarily frameworks (IDIQ agreements in the U.S. systems), remedies (bid protests), and electronic procurement—has been reviewed in detail in prior reports.⁹

At its September 2008 meeting at the U.N. headquarters in Vienna, Working Group I turned to the issue of remedies (or bid protests), long a source of concern in the UNCITRAL Model Law. The 1994 Model Law exempted many procurement decisions from review in the remedies process contemplated by Chapter VI. At the September 2008 meeting, however, Working Group I removed most of the barriers to remedies proceedings—an important step in ensuring accountability in procurement. The working group also agreed on other procedural reforms, including an important change that would allow interested parties to challenge unduly restrictive solicitation terms for longer than the twenty-day period normally allowed protests. Under the agreed approach, interested parties may challenge a solicitation's terms until the time that submissions (bids or proposals) are due. This change, which mirrors the practice in the United States, reflects a growing awareness that by opening the door to accountability through bid challenges, implementing states will reduce the risk that procuring officials will simply ignore important procurement rules.

Working Group I also took up a number of reforms regarding framework agreements, which (as noted) are often referred to as "IDIQ" agreements in the United States. These are typically master agreements, awarded to one or more contractors, against which orders can be made as requirements arise in the future. Although the most recent proposed revision of the World Trade Organization (WTO) Agreement on Government Procurement (GPA) does not address framework agreements,¹⁰ the UNCITRAL working group

presented at the *3rd International Public Procurement Conference* (Amsterdam, Aug. 28 2008), available at <http://www.ipppa.ws/IPPC3/Proceedings/Chaper%2061.pdf>.

8. One proposal would be to harmonize some elements—such as permitted procurement methods—between the UNCITRAL Model Procurement Law and another UNCITRAL text. UNCITRAL, MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (2003), http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2003Model_PFIP.html.

9. See, e.g., Paul M. Lalonde et al., *International Procurement*, 42 INT'L LAW. 479 (2008); Don Wallace, Jr., *UNCITRAL: Reform of the Model Procurement Law*, 35 PUB. CONT. L.J. 485 (2007); Christopher R. Yukins, *Case Study in Comparative Procurement Law: Assessing UNCITRAL's Lessons for U.S. Procurement*, 35 PUB. CONT. L.J. 457 (2006); Christopher Yukins et al., *International Procurement*, 40 INT'L LAW. 337 (2006).

10. See, e.g., World Trade Organization [WTO], Committee on Government Procurement, *Revision of the Agreement on Government Procurement*, GPA/W/297 (Dec. 11, 2006), available at www.wto.org; Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 GEO. J. INT'L L. 529, 529 (2007).

decided to address these agreements, which are increasingly common in procurement around the world. The working group's rigorous work on frameworks—recognizing, for example, that different types of framework agreements (“open” agreements which can be joined at any time, versus “closed” agreements that are awarded to a comparatively small group of vendors simultaneously) mean that agencies have to pursue very different strategies to ensure reasonable pricing—arguably marks an important advance in international policymaking on this topic.¹¹

B. WORKING GROUP MEETING IN 2009

When Working Group I convened in New York in February 2009, it addressed a number of issues. The working group reviewed substantial proposed revisions to the Model Law, drafted by the UNCITRAL Secretariat in accordance with the many prior meetings of the working group. For the administrative reasons outlined above, the working group had little opportunity to make extensive changes to the proposed text, for the revised model law may go the U.N. Commission on International Trade Law in mid-2009. The working group was, however, able to address a number of specific issues, including proposed limitations on the damages allowed in remedies (bid protest) proceedings.

To allow for additional review and discussion before the Commission meeting in June - July 2009, the working group scheduled an additional meeting in New York in late May 2009. When it reconvenes in May, the working group will need to address open issues that have not yet been addressed in any detail, including improvements to provisions governing competitive negotiations. The working group may also consider potential next steps in international procurement reform, once the current round of reform of the UNCITRAL Model Law is concluded.

C. FUTURE PATH OF REFORM

Perhaps the hardest question facing the international procurement law community will be how future reform should proceed once the UNCITRAL reform process closes. A number of observers have argued that the WTO's GPA is the best vehicle for future reform.¹² The problem is that many developing nations have been reluctant to join the GPA, largely because doing so means opening domestic procurement markets to foreign competition—a sensitive topic in both developed and developing nations.¹³ For many developing nations, joining the GPA and throwing their domestic procurement markets open to international competition is politically untenable.

The question is whether there are alternative pathways to procurement reform internationally once the UNCITRAL process winds down. In assessing that question, we must

11. See, e.g., Christopher R. Yukins, *Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting*, 37 PUB. CONT. L.J. 545 (2008).

12. See, e.g., Sue Arrowsmith, *Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha*, 5 J. INT'L ECON. L. 761 (2002); see also Christopher R. Yukins & Steven L. Schooner, *supra* note 10 (discussing GPA and other possible vehicles for reform).

13. See generally Victor Mosoti, *The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?*, 25 U. PA. J. INT'L ECON. L. 593 (2004); Jean Heilman Grier, *Recent Developments in International Trade Agreements Covering Government Procurement*, 35 PUB. CONT. L.J. 385 (2006).

be mindful of the several, sometimes conflicting, goals of international procurement reform. The first goal is to make it easier for procuring entities to purchase best value—that is the core goal, to serve the citizens, the ultimate stakeholders in the procurement process. International reforms that harmonize procurement rules across borders can make it easier for agencies to purchase “best value,” because harmonized rules reduce barriers to competition and can, at their best, in effect allow nations to import sound procurement practices from other nations.¹⁴ And harmonized systems that ensure accountability—systems that incorporate, for example, rigorous means of enforcing procurement rules through a bid protest, or “remedy” process—mean that reforms will have real meaning.

At the same time, international reform efforts must recognize the corruption that continues to dog procurement, and must understand that rules meant to curb corruption (highly structured requirements for competition, for example) may, in practice, hamper procuring entities’ ability to gain best value. Because anti-corruption efforts are gaining momentum internationally, this tension between efficient procurement and corruption will be an important part of future reform initiatives.¹⁵ The way forward in international procurement reform must, therefore, accommodate these many goals—best value, accountability, harmonization, and fighting corruption—while remaining sensitive to the political pressures that invariably play such an important part in public procurement.

14. The United States, for example, has declined to regulate electronic reverse auctions directly. Should U.S. regulators change direction and decide to regulate reverse auctions, the provisions on electronic reverse auctions developed for the UNCITRAL Model Procurement Law will serve as a ready model for regulation. See, e.g., Christopher R. Yukins, *Case Study in Comparative Procurement Law: Assessing UNCITRAL’s Lessons for U.S. Procurement*, *supra* note 9.

15. In the U.S. federal procurement system, the acquisition regulations were recently changed to require that contractors mandatorily disclose any fraud or criminal behavior, and that contractors establish sophisticated compliance systems to identify and report any such misconduct. See Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,074, 67,074-75 (Nov. 12, 2008) (codified at 48 C.F.R. pts. 2, 3, 9, 42, and 52). This new rule, which will almost certainly discourage new competitors from joining the federal marketplace, is an example of the common tension between curbing corruption and enhancing competition.

