



International Chamber of Commerce

The world business organization

The Secretary General

Jernej Sekolec
Secretary, UNCITRAL
Vienna International Centre
P.O. Box 500
A-1400 Vienna
Austria

25 January 2007 GS/EOC/ev

Re: ICC support for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

Dear Mr Sekolec,

The International Chamber of Commerce (ICC) is the largest, most representative business organization in the world with more than 8,000 member companies in over 140 countries. As the world business organisation, ICC takes a stand on the most relevant issues that affect its members across the world.

In 2005, the ICC Commission on Commercial Law and Practice (CLP) established a Task Force on Public Procurement. One of the principal objectives of the Task Force is to monitor the revision of the UNCITRAL Model Law on Public Procurement. On the basis of that work, the ICC welcomes the opportunity to provide the following comments.

The UNCITRAL Model Law and other instruments

ICC supports the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services. The Model Law serves as a model for recognised procurement procedures, in particular for economies in transition, together with the prerogatives of multilateral development banks.

The WTO Government Procurement Agreement (GPA) constitutes a legal framework for public procurement on an international level. The GPA is unfortunately not a multilateral instrument and is mainly adhered to by developed countries.¹ The revised EU directives on public procurement constitute another very important source of procurement law, but they are valid only within the EU legal sphere. The same goes for the procurement rules of other regional trade arrangements. In consequence, a

¹ At the moment the parties are the 25 Member States of the EU as of 31 December 2006, the US, Canada, Japan, Korea, Switzerland, Iceland, Norway, Israel, Liechtenstein, Singapore, Hong Kong and the Netherlands Aruba. The accession process is pending for Albania, Bulgaria, Georgia, Jordan, Kyrgyzstan, Moldova, Oman, Panama and Taiwan.



significant part of the world is not governed by sound international or supranational procurement rules. The UNCITRAL Model Law for government procurement is useful in filling this gap.

Despite the merits of the Model Law, the ICC is in favour of extending the binding commitments of the Government Procurement Agreement (GPA). The ICC would therefore like to see implementation of the revised Model Law to prepare the legal infrastructure of the countries concerned for political commitments with a view to allowing cross-border bidding on a non-discriminatory basis. The revision of the GPA text has been practically completed in December 2006, the bilateral market access negotiations still remaining to be conducted, whilst the revision of the Model Law should be completed by 2008 according to the present estimate. The Model Law should therefore accommodate to the extent reasonable and desirable the revised provisions of the GPA. Moreover, the EC Directives provide another useful benchmark and countries wishing to integrate with the EU and the Internal Market could adapt their legislation for that purpose by implementing the Model Law.

The Model Law could also represent a “restatement” of internationally accepted procurement practices particularly as regards electronic procurement, the facilitation of which is one of the principal objectives of the revision.

The ICC has reviewed the present drafting of the Model Law and would like to make the following observations.

Facilitating electronic public procurement

- Electronic methods of public procurement are often said to promote cost savings and efficiency in the procedures, add transparency and potentially lead to a broader supplier market, better monitoring possibilities and ultimately more public confidence in the procurement process. The development of good public procurement methods may be useful in developing efficient private procurement as well. At the same time, the potential benefits of automation can be detrimental to the basic objectives of enhancing competition, for instance by actually foreclosing the access of smaller companies to the procedures.
- It has been noted that the adoption of electronic public procurement techniques can stimulate a competitive local supply base by speeding up the adoption of modern public procurement practices and by promoting standardisation. New techniques such as reverse auctions are already used in private and, to some extent, public procurement contexts. It should be noted, however, that the use of reverse auctions in the *public* procurement context provides problems that have to be solved by careful drafting, which is already recognized by the Working Party. The European business community, for instance, has repeatedly pointed out that reverse auctions in public procurement might easily lead to inadequate price pressure on bidders and may even cause decreasing quality of supplies.
- The introduction of new electronic procurement techniques should go hand-in-hand with the development of a sound legal infrastructure in the relevant country to allow for the use of electronic communications in legal transactions in general. One particular aspect is electronic archiving. As the Working Group has noted, the



UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures establish good foundations for a legal framework in this respect. The EU directives on electronic signatures and electronic commerce (directives 1999/93/EC and 2000/31/EC) have also set an important framework for reliable and secure electronic commerce. Reference is also made to the work of multilateral development banks in the field of electronic authentication and electronic signatures.

- Given the specific preconditions of public procurement - especially the necessity of confidentiality of bids and the fight against corruption - it will be of utmost importance that the UNCITRAL provisions safeguard a high level of security and confidentiality of electronic communication in public procurement. Primarily this will be important with a view to electronic bids. Provision for the protection of tenderers' data in the hands of the contracting entity is necessary.
- The new UNCITRAL Convention on the Use of Electronic Communications in International Contracting has been written to cover transactions between private parties and not states.² The Convention contains, however, the most recent international governmental formulation of definitions, form requirements and other basic foundations of e-commerce law. Since companies use the same techniques for many purposes, the ICC considers that it would not be desirable to establish separate definitions and rules for public and private sector contexts, unless such differentiation is clearly motivated by the nature of the transaction. Therefore, the ICC welcomes the restrictive approach chosen by the Working Group in this respect.
- The Guide to Enactment to the Model Law should be sufficiently comprehensive on e-procurement and should encourage uniformity in the implementation of the legal rules to enhance interoperability in electronic signatures and encryption. The degree of encryption should be defined as a minimum-security requirement and this should be adapted to current technical developments from time to time. The Guide could advise how to use electronic data interchange arrangements to agree on the basic features of the electronic process.

Supplier lists and framework agreements

- ICC agrees that the use of optional supplier lists could be recognised in the Model Law considering, in particular, the use of electronic catalogues. However, the use of supplier lists has to be non-discriminatory and transparent. The use of mandatory lists runs counter these principles and is not permitted under the EC Classic Directive 2004/18/EC. The use of electronic catalogues should be allowed only in conjunction with recognized procurement procedures, for instance within framework agreements.
- Although the present text of the Model Law might be interpreted to allow for the use of framework agreements already, there is a need to add clarity to their legal status by allowing them expressly. The use of framework agreements in an unregulated manner is against the objectives of transparency and competition. Therefore, establishing a position on the issues of duration, exclusivity, types of contracts

² See doc. A/60/17, para 19.



allowed, whether multi-supplier or single-supplier arrangements are possible and the selection procedures at each stage could be useful.

Abnormally low tenders

- ICC regards the problem of abnormally low tenders as a crucial one and supports in principle amending Article 34 of the Model Law in this respect.

Domestic preferences

- ICC does not support the maintenance of the margin of preference for domestic tenders in the Model Law as this runs counter to the principle of non-discrimination and equal treatment. If domestic preferences are maintained, the approach chosen in the revised text of the GPA allowing preferential treatment for a transitional period should be mentioned as an alternative.

Fight against corruption

- ICC refers to its long-standing activity to fight corruption in international business transactions and considers the Model Law as an important instrument for that purpose. The ICC supports effective implementation of the UN Convention against Corruption.
- Although the Model Law tackles corruption in the selection and awarding phase, it should also address corruption in the execution of the contract. In order to safeguard the rights of companies as bidders, however, fraud should be taken into account only when it has been established by courts.

Remedies and enforcement

- Efficient remedies and enforcement mechanisms are vital in guaranteeing that public procurement laws are observed and applied correctly. They are also instrumental in the fight against corruption, which is recognized in Article 9 (1) of the UN Convention against Corruption. Therefore, ICC considers it important that the Model Law should be made more prescriptive in this respect by requiring the possibility of an independent review procedure. The cover of the review mechanism should be wide enough and cover e.g. the selection of the procedure.
- While respecting the procedural autonomy of each implementing country, the Model Law and the Guide should be sufficiently precise in stating what an effective mechanism could contain. A judicial or administrative procedure with the possibility to order sanctions and to make interim measures, such as suspension of procurement proceedings, is the best way to guarantee the observation of the rules, together with adequate training and assistance for those involved in procurement procedures. However, the use of informal or out-of-court remedies is practicable in some situations, e.g. in cross-border disputes.



Conclusion

ICC is in favour of the plans to revise the UNCITRAL Model Law on Procurement of Goods, Construction and Services to reflect current practices. ICC believes the Model Law has a role to play in harmonising public procurement laws and enhancing best practices in this field, and would like to contribute in its preparation by offering a business viewpoint.

The objectives of the Model Law can generally be achieved through a flexible method. As the ICC is a supporter of a multilateral trading system, the provisions of the GPA, a plurilateral agreement, which serves as a nucleus for a more general agreement, should be respected to the extent possible. It is the task of the ICC to promote free trade, competition and best business practices throughout the world. The revised UNCITRAL Model Law represents these matters.

Finally, public procurement is, in essence, a particular method of contracting. ICC would like to bring to the attention of governments and intergovernmental organisations that the ICC has created, during the past couple of decades, a volume of ICC model contracts and standard rules such as Incoterms and UCP, which are observed and recognized throughout the world as best practice standards. As the ICC membership comprises both the supplying and user sides, there is an objective to make the ICC documents neutral and balanced instruments. Therefore, the ICC model contracts and rules are, as a rule, equally useful in public and private contracts.

Kind regards,

A handwritten signature in black ink, appearing to read 'G. Sebban', written over a horizontal line.

Guy Sebban
ICC Secretary General