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The UNCITRAL Model Law on Public Procurement and participation in public procurement

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The UNCITRAL Model Law on Public Procurement and participation in public procurement

The UNCITRAL Model Law (2011)

- Template for *national* public procurement (PP) law
- Goals: harmonization and modernization of PP
- Link between international trade and development
- Takes account of context
 - UN Convention Against Corruption
 - International agreements with PP obligations
 - eg WTO GPA, EU Directives, MDB/IFI procedures

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Process for producing Model Law

- Supported by Guide to Enactment to explain policy issues and choices
- Developed through intergovernmental meetings over 7 years
 - Consensus-based decisions
- All regions/countries/IGOs shared experience
 - Law therefore suitable for all countries
 - Represents international best practice

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Participation in PP under the Model Law

- Policy approach: full and open (international) competition
- Objectives in the Preamble
 - Participation in procurement proceedings by suppliers ... regardless of nationality
 - Promoting competition
- Supporting overarching objectives: value for money and avoiding abuse in PP
- Opening PP to international competition supports trade and development – UNCITRAL's raison d'être

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Exceptions to fully open (international) competition

- Principle: suppliers may participate irrespective of nationality
- Article 8(1): participation may be limited to domestic suppliers
- *But only where laws or procurement regulations allow*
 - Approach promotes transparency
 - Avoids excessive/arbitrary restriction of foreign suppliers

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Provisions implementing fully open (international) competition

- Non-discrimination provision in article 8(2)
- Prohibition of discriminatory qualification criteria (article 9(6))
- Prohibition of descriptions that restrict participation (article 10(2))
- Rules on evaluation criteria – eg relevance
- Transparency provisions and mandatory international advertisements, notices

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Indirect limitations on fully open competition

- Through socio-economic policies/ margins of preference

Subject to article 8

- Article 9: allows environmental qualifications, ethical and other standards (eg fair trade requirements)
- Article 10: allows descriptions to accommodate economic, social, ethical and environmental factors

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Indirect limitations on fully open competition

Subject to article 8

- Article 11 allows evaluation criteria, where authorized by law/regulations:
 - To include economic, social, etc standards
 - To include margins of preference for domestic suppliers or domestically-produced goods
- Article 8-11 require disclosure of qualification, examination and evaluation criteria and the manner of their application (solicitation documents)

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The Model Law *does not*

- Restrict the type of socio-economic policies that can be pursued
 - Domestically or through international agreements
- Compromise international agreements:
 - Article 3 defers to international agreements
 - Any restrictions eg in WTO GPA therefore take precedence over domestic legislation based on the Model Law

Therefore an enacting State can implement article 8 exceptions very widely through its laws or procurement regulations

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Policy considerations under the Model Law

- Transparency rules allow impact to be assessed
 - Comparisons with established benchmarks
 - Identification of premium for policies
- Rules on record-keeping – including justification for restrictions allow benefits to be assessed
- Recommendation: empirical evidence/CBA should be assessed

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Other policy commentary in the Guide

- Restrictions on open participation are *exceptions and require justification*
- Socio-economic policies should be temporary, to promote capacity development
 - Suppliers capable of approaching international competition can be supported through margins of preference
 - A better approach than set-asides (protection from competition)
 - Set-asides can undermine capacity development
 - Best combined with direct support measures – eg cutting red tape, training SMEs, etc
- Costs of monitoring compliance with socio-economic policies should not be ignored

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Conclusions

- Flexibility on participation in Model Law
- Principle of full, open international competition
 - Unless justification for restrictions
- Recommendation: empirical evidence/CBA should be assessed

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Details of UNCITRAL's work on Procurement & Infrastructure Development:

**[http://www.uncitral.org/uncitral/en/commission/
working_groups/1Procurement.html](http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html)**

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THANK YOU