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## THE UNCITRAL MODEL LAW: A GUIDE FOR REFORMING THE LEGAL REGULATION OF PUBLIC PROCUREMENT

The article presents a General description of the regulation of public procurement by the UNCITRAL Model law on public procurement in 2011 as a tool for interstate integration in this area. Today, the issue of legal regulation of public procurement is relevant all over the world, and the direct subject is the state itself, which is interested in the maximum efficiency of this process. The aim of the authors is to analyze the above-mentioned document, which establishes common standards and norms in the field of regulation of public procurement. This paper presents a comparative analysis of the 1994 UNCITRAL Model law on procurement of goods, construction and services and the 2011 UNCITRAL Model law on public procurement. This article emphasizes the legal and economic significance of public procurement. The authors' conclusions are based on the work of foreign scientists and experts from international organizations. In conducting this study, the authors used such General scientific methods and techniques as the method of comparative analysis, scientific abstraction, qualitative expert assessments, quantitative assessments, and structural analysis. In their conclusions, the authors note that effective achievement of public procurement objectives can only be achieved through interrelated and consistent procedures based on the basic principles and conditions contained in the 2011 UNCITRAL Model law on public procurement.

**Key words:** UNCITRAL, public procurement, efficiency, transparency, model law.

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### ЮНСИТРАЛ Типтік заңы: мемлекеттік сатып алуларды құқықтық реттеуді реформалауға арналған бағдар

Мақалада мемлекеттік сатып алуларды 2011 жылғы мемлекеттік сатып алу туралы ЮНСИТРАЛ Типтік заңымен берілген саладағы мемлекетаралық интеграция құралы ретінде реттеудің жалпы сипаттамасы берілген. Бүгінгі таңда мемлекеттік сатып алуларды құқықтық реттеу мәселесі бүкіл әлемде өзекті болып табылады және мемлекеттің өзі бұл процестің максималды тиімділігіне мүдделі. Авторлардың мақсаты мемлекеттік сатып алу реттеу саласындағы бірыңғай стандарттар мен нормаларды белгілейтін жоғарыда аталған құжатты талдау болып табылады. Жұмыста 1994 жылы тауарларды (жұмыстарды) және қызметтерді сатып алу туралы ЮНСИТРАЛ Типтік заңына және 2011 жылы мемлекеттік сатып алу туралы ЮНСИТРАЛ Типтік заңына салыстырмалы талдау келтірілген. Бұл мақалада мемлекеттік сатып алудың құқықтық және экономикалық маңыздылығына баса назар аударылады, авторлардың тұжырымдары шетелдік ғалымдар мен халықаралық ұйымдар сарапшыларының жұмыстарына негізделген. Берілген зерттеуді жүргізу кезінде авторлар салыстырмалы талдау әдісі, ғылыми абстракция, сапалы сараптамалық бағалау, сандық бағалау және құрылымдық талдау сияқты жалпы ғылыми әдістер мен тәсілдерді қолданды. Өз тұжырымдарында авторлар мемлекеттік сатып алу саласындағы мақсаттарға тек 2011 ж. мемлекеттік сатып алу туралы ЮНСИТРАЛ Типтік заңындағы негізгі қағидаттар мен шарттарға негізделген өзара байланысқан және дәйекті рәсімдер арқылы қол жеткізуге болатындығын атап көрсетті.

**Түйін сөздер:** ЮНСИТРАЛ, мемлекеттік сатып-алулар, тиімділік, ашықтық, Типтік заң.

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### **Типовой закон ЮНСИТРАЛ: ориентир для реформирования правового регулирования государственных закупок**

В статье представлена общая характеристика регулирования государственных закупок Типовым законом ЮНСИТРАЛ о публичных закупках 2011 года как инструмента межгосударственной интеграции в данной сфере. На сегодняшний день вопрос правового регулирования государственных закупок является актуальным во всем мире, и непосредственным субъектом является само государство, которое заинтересовано в максимальной эффективности данного процесса. Целью статьи является проведение анализа вышеназванного документа, который устанавливает единые стандарты и нормы в области регулирования государственных закупок. В работе представлен сравнительный анализ Типового закона ЮНСИТРАЛ о закупках товаров (работ) и услуг 1994 года и Типового закона ЮНСИТРАЛ о публичных закупках 2011 года. Данная статья подчеркивает правовую и экономическую значимость госзакупок, выводы авторов обоснованы работами зарубежных ученых и экспертов международных организаций. При проведении данного исследования авторы использовали такие общенаучные методы и приемы, как метод сравнительного анализа, научной абстракции, качественные экспертные оценки, количественные оценки и структурный анализ. В выводах авторы отмечают, что эффективное достижение целей в области осуществления государственных закупок может быть обеспечено только с помощью взаимосвязанных и последовательных процедур, основывающихся на базовых принципах и условиях, содержащихся в Типовом законе ЮНСИТРАЛ 2011 г. о публичных закупках.

**Ключевые слова:** ЮНСИТРАЛ, государственные закупки, эффективность, прозрачность, Типовой закон.

#### **Introduction**

Public procurement is a major economic activity for all States, and developing a legal regime that balances often conflicting considerations about competition policy, transparency measures, and performance requirements is an important task.

One of the documents that define the approaches recognized by the international community to the norms of public (public, government) procurement is the model law on public procurement, developed by the UN Commission on international trade law (UNCITRAL). Through the application of this document, States can form their national legislation. It serves as a model for national governments that want to adopt or reform public procurement legislation for their national markets, and provides all essential procedures and principles for conducting various types of procurement processes in the national system. This model law was adopted at the forty-fourth session of the UN Commission on international trade law in July 2011 (Model Law, 2011a).

#### **Relevance of the study**

Today, the issue of legal regulation of public procurement is relevant all over the world and the direct subject is the state itself, which is interested in the maximum efficiency of this process.

As Ballard notes, governments spend public money to secure inputs and resources to achieve their objectives and by doing so, create significant impact on key stakeholders and wider society. In addition, government purchasing impacts both domestic and international trade given that governments spend approximately 10 to 15 percent of their GDP in the procurement marketplace (Ballard, 2012: 2). Other experts agree that purchases can typically account for 45 percent of all government spending and up to 20 percent of GDP (Schapper, 2007: 6).

Unification of legal norms through the establishment of common standards and norms in a particular area of cooperation, the adoption of unified conventions, model treaties or other international legal acts is one of the most important elements of integration between States. The General desire to unify legal norms, both through the conclusion of international agreements of a universal and regional nature within the integration groupings of countries, and through the adoption of model laws by individual States, is characteristic of almost all States today.

The mandate of UNCITRAL is to modernise and harmonise international trade law, through the issue and use of legal texts such as the UNCITRAL Model Law on Public Procurement, with the aim of supporting economic and social development (Nicholas, 2013).

For many developing countries, government procurement reform is a key issue, high on the good governance agenda (Fenster, 2003: 65). Procurement policy is now one of the priorities of reform plans in a growing number of countries at different stages of economic development. This surge in interest in forming a “proper public procurement policy” is caused by a number of interrelated factors. One of them is the current huge and growing need for infrastructure investment in large countries with new and transitional economies. Another factor is the importance of avoiding the dispersion of scarce public resources due to illiterate procurement processes, corruption or collusion between suppliers during bidding. Another factor is the importance of this area as one of the areas where many governments are taking measures to stimulate recovery from the economic crisis and overcome its consequences.

### **Theoretical-methodological bases of the article**

The theoretical basis of the study was scientific research on the regulation of public procurement, General theoretical works of legal scholars on the theory of law, as well as on trade and international law. The research was based on the works of Nicholas, C., Schaper, P., Anderson, R., Kovacic, W., Müller, A. and other authors.

The study was developed using data taken from official websites of international organizations, texts of international legal acts, works of researchers in the field of public procurement, as well as law and Economics.

The methodological basis of the research is the methods and methods of scientific knowledge that established in science. In particular, such general scientific methods as logical, systematic, functional, method of analysis and synthesis, as well as the dialectical method as the fundamental general scientific method of cognition of processes and phenomena of the objective world and the private-scientific method based on ut are used: historical-legal, comparative legal, formally legal.

### **The content of the 1994 Model law and the 2011.**

#### ***(a) the UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994.***

The model law on public procurement of 2011 replaces the model law on the procurement of goods, construction and services of 1994 (Model Law, 1994). The purpose of the Model law of

1994 was to provide the most important rules and principles for the implementation of public procurement within the national system, it could be flexibly applied taking into account the specifics of a particular state and simultaneously obtain the desired results, i.e. in this regard, it was aimed more at harmonizing procurement laws, rather than introducing mandatory rules.

In the 2003 UNCITRAL Yearbook, the UNCITRAL model law on procurement of goods, construction and services reflects the various legal traditions of the broad membership of The United Nations Commission on international trade law, including States from all regions and all levels of economic development, and as a result is acceptable to many and different jurisdictions. As a “framework law”, the UNCITRAL model procurement law sets out the basic minimum content of an effective procurement system, but does not set out all the rules and regulations that may be required for the implementation of procurement procedures, since it is assumed that enacting States will issue procurement regulations that may take into account specific and possibly changing national circumstances. In addition, the inclusion of options in the UNCITRAL model law on procurement provides flexibility in addressing issues that are considered differently by different States in practice (Yearbook, 2003: 716).

The Commission initiated the development of the UNCITRAL Model law on procurement of goods, construction and services in 1994 due to the fact that some States ‘ procurement legislation was ineffective or outdated, resulting in inefficiency in the procurement process, abuse, and the inability of a public procurement organization to purchase goods of adequate value in exchange for public funds spent.

Public procurement is a powerful engine of development. In addition to providing the goods and services a country needs, the procurement act itself can strengthen the local economy, support marginalized groups, and increase local capacity for trade (ban Ki-moon, 2012).

The need for a Model law on the procurement of goods, construction and services was felt most acutely in developing countries and countries with economies in transition, and it was these countries that most actively used the text of this law. In States at these levels of development, most purchases are made by the public sector, and a significant share of gross domestic product also comes from public procurement. A significant portion of General procurement may be carried out within the framework of certain projects that

are implemented in the process of economic and social development, and the purpose of procurement may be to accelerate such development and build capacity. In countries with economies in transition, the adoption of procurement legislation is also part of the process needed to accelerate the transition to a market economy.

According to the website of the UNCITRAL Commission, laws based on the 1994 Model law on procurement of goods, construction and services have been adopted in about 30 States (Official website of UNCITRALa).

For developed countries, many of which had adopted procurement legislation prior to the development of the Model law, flexible, non-prescriptive provisions of the Model law could be used as a tool for evaluating and modernizing existing systems and previously adopted legislation, as well as for improving the effectiveness of public procurement (Пересмотренное Руководство).

Although the text of the 1994 law was recognized as an important international reference point for the reform of the legal regulation of procurement, in 2004 the Commission agreed that the law could be usefully updated to take into account new practices, especially those resulting from the use of electronic communications in public procurement, and the experience gained in using the Model law as a basis for law reform. Nevertheless, the principles and basic procedures set out in the 1994 text, which are the basis for its success, have remained unchanged (Official website of UNCITRALb).

***b) the UNCITRAL Model law on public procurement, 2011.***

As noted in the Guide to the adoption of the 2014 Model law on public procurement, in accordance with its general approach of intergovernmental consensus-building, UNCITRAL has drawn on the experiences of countries from around the world in regulating public procurement when drafting the Model Law and this Guide. This approach also serves to ensure that the texts reflect best practice, and that the provisions of the Model Law are universally applicable. (Guide to Enactment of the UNCITRAL Model Law, 2014: 3).

The new model law on public procurement responds more precisely to the realities of the time, introducing established new procurement technologies into the legal field, as well as improving relations between subjects in the field of procurement in accordance with current social trends. It notes the widespread use of the Internet, the development of

electronic forms of trade and automated electronic trading procedures.

Prepared to support the harmonization of international standards in the field of public procurement, the 2011 UNCITRAL model law takes into account the provisions of international documents such as the WTO agreement on government procurement (GPA) (Agreement on Government Procurement, 1994a), the European Union Directive (on procurement and appeal), the UN Convention against corruption (Convention Against Corruption, 2003a), and others.

As noted by the Secretary of the UNCITRAL working group on procurement, K. Nicholas, the main thematic areas of the amendments to the law were as follows:

- 1) e-procurement;
- 2) obviously low prices in competitive bids;
- 3) framework and similar agreements, as well as the use of supplier lists;
- 4) evaluation and comparative analysis of applications, use of the procurement process for industrial, social and environmental policies;
- 5) services and alternative procurement methods;
- 6) simplification and standardization of the content of the Model law on procurement of goods (works) and services;
- 7) remedies and their application;
- 8) elimination of conflicts of interest (Nicholas, 2006).

As already noted, the model law allows purchasing entities to use modern commercial methods, such as e-procurement and framework agreements, to ensure maximum cost efficiency. It provides for procedures that allow for standard purchases, urgent or emergency purchases, simple and low-cost purchases, and large and complex projects. All these procedures are governed by transparency mechanisms and requirements in order to promote competition and objectivity. Potential suppliers may challenge decisions and measures taken during the procurement process.

Article 1 of the 2011 Model law specifies that the scope of the law applies to all public procurement (Model Law, 2011b). Article 1 of the 1994 Model law excluded defence procurement and allowed States to exempt other sectors of the economy from its application (Model Law, 1994b). Thus, the 2011 model law represents a significant achievement in terms of coverage. It allows the host state to carry out its internal political tasks, such as promoting economic development, to the extent permitted by the government's international obligations.

Since the adoption of the 1994 Model Law, other international instruments relating to public procurement have been adopted that establish obligations that have implications for national procurement legislation in States that are parties to the relevant acts. According to article 3, the operation of the Model Law is expressly subject to compliance with any international agreements concluded by the enacting state (Model Law, 2011c), and UNCITRAL has sought to ensure as much as possible compliance with these international texts and the General provisions of regional texts, so that the model law can be used by participants in these documents without the need for any significant amendments.

The effective functioning of public procurement markets necessitates a high degree of both transparency and competition (Anderson, 2011).

The United Nations Convention against corruption (Convention Against Corruption, 2003b) addresses the prevention of corruption by setting mandatory minimum standards for procurement in article 9, which requires each state party to take “the necessary measures to establish appropriate procurement systems that are based on transparency, competition and objective decision-making criteria and are effective, inter alia, in preventing corruption” (Convention Against Corruption, 2003c). Although the model law itself is not a document aimed at combating corruption, its procedures are intended, inter alia, to prevent abuse, which allows many enacting States, for which the Convention against corruption is binding, to meet their obligations under the Convention.

The model law includes procedures and guarantees aimed at promoting objectivity in the procurement process, which in turn contributes to increased participation, competition, fair treatment and transparency. These concepts are key principles that contribute to the basic objectives of the Model Law, which are to ensure that costs are justified and that abuse is not tolerated. Both the Convention against corruption (Convention Against Corruption, 2003d) and the GPA (Agreement on Government Procurement, 1994b) are also based on the Declaration of principles of the same high level: the Convention uses words such as transparency, competition and objective criteria for decision – making, while the GPA uses non-discrimination and transparency.

Broad participation of suppliers in procurement at both the domestic and international levels is a prerequisite for competition, and, accordingly, ensuring such international participation is a rule

for procurement under the Model Law, applied in a subsidiary manner in cases where otherwise is not explicitly specified. The Model Law sets out the circumstances in which international participation may be restricted, directly or indirectly. When incorporating these provisions into its domestic law, the enacting state may need to take into account any relevant international trade obligations in relation to international participation in their procurement.

The model law reflects the basic procedures, taking into account all possible circumstances arising in different procurement situations in States with different economic conditions. This document defines a broad framework for purchasing organizations and flexibility in the rules of their work, i.e. state customers.

This document as a legal act implements the budgetary efficiency of public procurement, taking into account such factors as the quality of the product, the service life of the purchased product, the cost of maintenance and, most importantly, the actual provision of the need that predetermined the purchase. This assumes that the purchase price is optimal.

Furthermore, UNCITRAL does not welcome following rules that could reduce the number of potential bidders.

The principle of public and unrestricted participation is implemented in the procedures for reviewing and evaluating tenders, according to which the procuring entity not only does not reject applications on formal grounds, but is obliged to correct their minor and minor (arithmetic) errors or shortcomings that can be corrected without affecting the substance of the tender.

In addition, UNCITRAL applies anti-dumping rules, according to which dumping is considered a violation of the principles of fair competition, and dumping organizations are expelled from the public procurement market, and their submissions are subject to unconditional rejection.

Another important principle of the Model Law, which is intrinsically linked to the principle of promoting competition, is the application by UNCITRAL of the concept of fair, equal and impartial treatment of all suppliers and their subcontractors by the procuring entity. In combination with the principle of objectivity of the procurement process, exclusion and prevention of conflicts of interest - these principles of the Model Law form the most important quality required of all national procurement systems – the quality of public confidence in these systems (Volkov, 2002: 4).

The UNCITRAL model law on procurement

contains procedures aimed at ensuring competition, transparency, fairness, economy and efficiency in the procurement process, and is an important international reference point for reforming the legal regulation of procurement. The use of the Model law has led to a broad unification of procurement rules and procedures. In this regard, the Commission's attention was drawn to the experience of legal reform based on the UNCITRAL model law on procurement, as well as to the problems encountered in its practical application.

## **Conclusion**

The purpose of the 2011 Model law is to assist States in developing modern procurement legislation. Through the adoption of the Model law, there is an integration of States pursuing these goals, which consider it desirable to regulate the procurement of goods and services.

If all groups of States use the model law, its potential as a tool for harmonization in international trade can be fully realized. Its text was not intended for any particular group of countries or countries at any particular level of development; nor is it intended to promote the dissemination of experiences and approaches used in any one region.

The concept of cost justification in procurement includes both savings (in the sense of the reasonableness of transactional and administrative costs for procurement and the operation of procurement systems) and efficiency (in the sense of the optimal ratio between costs and other factors, which include the quality of the object of procurement). Depending on the nature of specific purchases, the only or main criterion for selecting a winning offer may be the price, or quality factors or other considerations may play a major role. In assessing which costs will be justified for a particular purchase, the procuring entity can use a wide range of elements, such as life-cycle costs (which may include the cost of final disposal of property (sale or write-off)) and the consequences of agreed changes during the administration of the procurement contract. Concepts such as sustainability – costs and benefits for society as a whole, not just for the procuring entity itself, which may include social and environmental aspects of procurement-may also be considered appropriate.

Since decisions on behalf of the government at all levels are taken at their own discretion in public procurement, the nature of procurement necessarily includes the risk of abuse, and the size of the market shows that potential losses can be significant, but

procurement also involves the implementation of important projects in the field of health, education and infrastructure development, and all this has a great impact on the economy and development of the country. Therefore, achieving an optimal price-quality ratio in the field of procurement and avoiding abuse is crucial. The UNCITRAL model law is an instrument of inter-state integration that has accumulated all available international experience and practical experience in the field of public procurement in a market economy.

## **Results**

Differences in the laws of individual countries are due to the priorities of economic policy. At the same time, the degree of centralization of the economy has a significant impact. At the level of national legislation, international regulations are clarified and specified, taking into account the specifics of the state's economic policy. In a number of countries, industry regulations are issued that allow for the formulation of specific provisions that reflect the specifics of a particular industry on the basis of General national legislation.

Inadequate legislative regulation of procurement at the state level creates obstacles to international trade, as a significant share of it is accounted for by procurement. The ability of governments to take advantage of the advantages that competitive prices and quality benefits create in the case of international procurement may be partially limited by differences in national legal regimes governing procurement and uncertainty about such regimes. At the same time, the lack of adequate national procurement legislation in many countries and discrepancies in legal regulation present obstacles to the ability and willingness of suppliers and contractors to sell their products to foreign governments.

The effective achievement of public procurement objectives can only be achieved through interrelated and consistent procedures based on these basic principles, in an environment where compliance with these procedures is assessed and, if necessary, enforced. By incorporating the procedures described in the Model law into its national legislation, the enacting state will create an environment in which the public is assured that government procurement organizations will spend public funds responsibly and responsibly. The cost of money will be justified as a result. These conditions will also contribute to the confidence of parties offering their goods and services to the government that they will enjoy fair treatment in the absence of any abuse.

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