

2024

Achieving Effective Procurement During a Global Crisis: A Study of the UNCITRAL Model Law on Public Procurement and the WTO Agreement on Government Procurement

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Dmitri Goubarkov (2024) "Achieving Effective Procurement During a Global Crisis: A Study of the UNCITRAL Model Law on Public Procurement and the WTO Agreement on Government Procurement," *American University International Law Review*. Vol. 39: Iss. 1, Article 1.
Available at: <https://digitalcommons.wcl.american.edu/auilr/vol39/iss1/1>

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ARTICLES

ACHIEVING EFFECTIVE PROCUREMENT DURING A GLOBAL CRISIS: A STUDY OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT AND THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT

DMITRI GOUBARKOV*

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I. INTRODUCTION

The global nature of the COVID-19 pandemic presented unprecedented challenges for public procurement systems around the world. Governments everywhere faced an immense pressure to facilitate the rapid procurement of supplies and services needed to support overburdened health and social care systems. Speed and flexibility were needed to address the shortages of protective personal equipment, distribution of ventilators, and increased demand for medications, all of which required governments to forego traditional public procurement methods. Governments had to balance the underlying principles of their procurement systems—namely, competition, integrity, and transparency—against urgency, and do so in a way that does not erode public confidence in their ability to assure integrity and accountability of their respective procurement systems. As a result, the COVID-19 pandemic tested the adequacy of existing regulatory systems for urgent public procurement.

In this regard, a study of how international public procurement frameworks address urgent procurement provides invaluable insight into the ability of a public procurement system to tackle crises of the same magnitude as COVID-19. Both international frameworks analyzed in this paper aim at providing standards for good governance and effective procurement in national systems.¹ Both draw on the best

1. See G.A. Res. 66/95, U.N. Doc. A/66/17, annex, preamble, UNCITRAL Model Law on Public Procurement (July 1, 2011) [hereinafter UNCITRAL Model Law] (describing the objectives of the Model Law aimed at improving procurement processes); see also WORLD TRADE ORG., AGREEMENT ON GOVERNMENT PROCUREMENT 2012 AND RELATED WTO LEGAL TEXTS Preamble (2012), https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf [hereinafter GPA] (“recognizing the need for an effective multilateral framework for government

practices from around the world.² Both additionally influence national procurement systems either through acquiescence by member states to bind themselves by the terms of these frameworks³ or through voluntary incorporation in their national regulatory systems of the principles expressed in these frameworks.⁴

This paper will analyze the Model Law on Public Procurement adopted by the United Nations Commission on International Trade Law (“UNCITRAL”) in 2011 and the World Trade Organization’s Agreement on Government Procurement (“GPA”) adopted in 2012. The focus of this paper entails examination of the provisions that can be implemented for urgent procurement, regardless of whether these frameworks expressly designate these provisions as mechanisms to address urgency. Based on the analysis, this paper will suggest improvements to both frameworks to enhance their effectiveness during states of urgency.

Before proceeding with the analysis, the following assumptions and limitations need to be acknowledged. First, this paper discusses

procurement”).

2. See U.N. COMM’N ON INT’L TRADE L., GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT iii (Oct. 2014), <https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/guide-enactment-model-law-public-procurement-e.pdf> [hereinafter UNCITRAL Guide] (stating that UNCITRAL drew on the experiences of countries around the world with regulating public procurement when drafting the Model Law and Guide to the Model Law . . . “to ensure that the texts reflect best practice”); see also Robert D. Anderson et al., *The WTO’s Revised Government Procurement Agreement - An Important Milestone Toward Greater Market Access and Transparency in Global Public Procurement Markets*, 54 GOV’T CONTRACTOR 1, 3–4 (2012) (noting several improvements to the revised GPA text, including increased flexibility in the development of procurement best practices, an embrace of advancements in information technology, the promotion of good governance internationally, and better accommodations for the concerns of developing economies).

3. See, e.g., *Integrated Government Procurement Market Access Information (e-GPA) Portal*, WORLD TRADE ORG. <https://e-gpa.wto.org/en/GPAInBrief> (stating that the World Trade Organization’s Agreement on Government Procurement is a plurilateral agreement, binding only on those WTO Members who are party to it and have accepted to be bound by it).

4. See, e.g., *Status: UNCITRAL Model Law on Public Procurement*, U.N. COMM’N ON INT’L TRADE L. <https://uncitral.un.org/en/texts/procurement/model-law/publicprocurement/status> (listing twenty-six states with legislation based on or influenced by the Model Law).

procurement rules and not the performance of national procurement systems during the pandemic. Success of any regulatory framework depends on many factors and thus sound public procurement rules can only serve as a starting point. Corruption, national resources, expertise of procurement personnel, and cultural tendencies may all impact the practical application of even the best of public procurement regulations. Second, not all governments treat international rules as hard law. The provisions of the UNCITRAL Model Law explicitly incorporated in national procurement rules take the form of hard law. However, national jurisdictions amend and alter these provisions to fit within their understanding of or historical experience in public procurement. Somewhat similarly, GPA member states negotiate coverage schedules to define the scope of their commitment to the agreement. Thus, the effectiveness of the UNCITRAL Model Law and GPA depends on the willingness to support—and not substantially alter—the rules proposed by these frameworks at the national level. Third, the analysis below assumes that a sound set of procurement rules upholds the integrity, transparency, and competition to the maximum extent practicable even when a situation necessitates an expedient procurement of vital supplies and services. Fourth, the recommendations proposed below will only produce the desired result if governments implement the provisions of the UNCITRAL Model Law and GPA without significant changes. These recommendations build upon both frameworks. Any deviation may render these recommendations impracticable. Finally, this paper does not discuss small contracts. The UNCITRAL Model Law contemplates more flexible provisions for low-value procurements.⁵ The relevant thresholds for GPA-covered contracts tend to be large.⁶

5. See UNCITRAL Guide, *supra* note 2, at 37 (stating that “the procedures for low-value or simple procurement and for repeated or indefinite procurement . . . are procedurally simpler and may be quicker to operate, particularly when operated electronically, than open tendering”).

6. See Christopher Yukins & Johannes S. Schnitzer, *GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement*, 7 TRADE L. & DEV. J. 89, 117 (2015) (noting that procurements covered by the GPA are typically larger, above-threshold procurements).

II. UNCITRAL MODEL LAW

The UNCITRAL Model Law outlines procedures designed to assist countries with reforming procurement laws.⁷ These procedures aim to achieve transparency, competition, efficiency, and integrity in public procurement.⁸ The Model Law presupposes that facilitation of these objectives through procurement rules ultimately leads to realization of the Model Law's overall objectives: "value for money and avoidance of abuse in public procurement."⁹

Article 27 of the Model Law enumerates ten methods of procurement.¹⁰ Countries may choose to introduce into their national systems any of the methods listed in Article 27,¹¹ provided they identify open tendering—or full and open competition as a lawyer trained in the U.S. procurement system would refer to it—as a default procurement method.¹² Thus, open tendering serves as a starting point and countries may choose alternatives to accommodate situations for which open tendering might not be suitable.

Open tendering represents a highly structured, formalized, and time-consuming method of procurement.¹³ During the COVID-19 pandemic, however, governments faced competition for limited

7. UNCITRAL Guide, *supra* note 2, at 2–3 (clarifying that one of the two purposes of the Model Law is to serve as a model for all States for "the evaluation and modernization of their procurement laws and practices, and the establishment of procurement legislation where none currently exists").

8. *Id.* at 3 (tying these and other stated objectives into the Model Law's overarching aims of (1) generating value for money and (2) avoiding abuse in public procurement).

9. *See id.* (asserting that these objectives are, to a large extent, mutually supporting and reinforcing); *see also* Sue Arrowsmith, *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard*, 53 INT'L & COMPAR. L. Q. 17, 18–19 (2004) (discussing the role of the Model Law in encouraging sound policies, reducing the resources needed for implementation, and minimizing errors or other defects).

10. UNCITRAL Model Law, *supra* note 1, art. 27(a)–(j).

11. *Id.* art. 27, n.4.

12. *See* UNCITRAL Guide, *supra* note 2, at 131–32 (clarifying that open tendering is considered under the Model Law to be the method of the first resort, or default procurement method, because its procedures most closely align with the objectives of the Model Law).

13. UNCITRAL Model Law, *supra* note 1, arts. 36–43 (detailing the various procedures and requirements involved in the open tendering process).

resources and dealt with contractors who had no incentive to participate in a competitive procurement because the demand for their supplies or services was extremely high.¹⁴ In these circumstances, traditional public procurement encountered multiple challenges. Competition between public buyers, limited availability of medical supplies, and disruptions in supply chains caused by the global nature of the pandemic called for accelerated purchasing.¹⁵

The Model Law provides several alternatives. These alternatives could potentially facilitate rapid procurement and serve as viable procurement methods during a crisis. These alternatives are grouped into two main categories below: (i) framework agreements—or indefinite-delivery/ indefinite-quantity contracts (the term most familiar to a U.S. practitioner), and; (ii) urgent procurement, which includes more than one method identified in Article 27.

A. FRAMEWORK AGREEMENTS

Chapter VII of the UNCITRAL Model Law includes framework agreement procedures. Framework agreements represent a two-stage procurement with one or more contractors signing a contract with an acquisition activity at the first stage and the acquisition activity issuing orders to contractors in the second stage.¹⁶ The Model Law expressly

14. See, e.g., Ben Smilowitz, *Congress Must Think Outside the Box on Addressing PPE and Test Shortages*, THE HILL (May 14, 2020), <https://thehill.com/blogs/congress-blog/healthcare/497700-congress-must-think-outside-the-box-on-addressing-ppe-and-test> (describing the dire financial straits that states faced while paying as much as fifteen times the normal cost for life-saving supplies during the prolonged high demand for PPE during mid-2020); see also Laurence Folliot Lallion & Christopher R. Yukins, *COVID-19: Lessons Learned in Public Procurement. Time for a New Normal?*, 3-2020 CONCURRENCES 46, 48 (2020) (detailing how the pandemic shifted the PPE market from one in which a multitude of suppliers competed for the “public bonanza” to one in which governments became competitors in purchasing the same products, allowing supplies to set higher prices and demand conditions normally prohibited by public procurement rules).

15. See *id.* at 47–51 (describing the various factors that led to accelerated purchase of PPE during the pandemic, including the collapse of traditional bidding procedures and timelines, the shift from a buyers’ market to a suppliers’ market, competition between public buyers, geographic sourcing disruption, and emergency trade controls on essential supplies).

16. See UNCITRAL Guide, *supra* note 2, at 253–54 (outlining the various steps involved in the framework agreement’s two-stage process).

describes two types of framework agreements: closed framework agreements and open framework agreements.¹⁷ In essence, however, the Model Law introduces three types of framework agreements. The closed framework agreement model includes agreements with no further competition and agreements that allow for further competition with the parties to the framework.¹⁸ The Model Law recommends using framework agreements when “a procuring entity has a need over a period of time or at a time in the future, but does not know the exact quantities, nature, or timing of its requirements.”¹⁹

The general structure of framework agreements will sound very familiar to a government procurement attorney in the U.S. A closed framework agreement calls for solicitation of proposals or quotes from one or multiple contractors.²⁰ After evaluating offers, an acquisition activity selects a contractor or multiple contractors to enter into a framework agreement.²¹ Once the framework agreement is established, the acquisition activity issues orders with the parties to the agreement.²²

An open framework agreement functions similar to multiple contractor closed framework agreements. The main distinction between the two, however, lies in the extent of competition and accessibility to the framework. An open framework agreement allows for competition among all the parties to the framework agreement.²³

17. UNCITRAL Model Law, *supra* note 1, arts. 58, 60.

18. *Id.* arts. 58–59.

19. UNCITRAL Guide, *supra* note 2, at 253–54 (providing examples of the types of purchases procured under framework agreements, such as commodity-type purchases, where the market may be highly competitive, and purchases of items from more than one source, where the purchaser seeks to avoid excessively high prices and poor quality items).

20. *Id.* at 253–81 (describing the procedure, implementation, and use of framework agreements under the Model Law, starting with the solicitation of proposals).

21. *Id.* (indicating that the selection of a contractor or multiple contractors is based on an assessment of suppliers’ or contractors’ qualifications and an examination of their submissions against the terms and conditions of solicitations).

22. *Id.* (referring to this step as the “second stage” of the procurement).

23. UNCITRAL Model Law, *supra* note 1, arts. 61–62; *see also* UNCITRAL Guide, *supra* note 2, at 289–93 (noting that the requirement that only a party to the framework agreement can be awarded a contract underscores the importance of “swift examination of applications to join the framework agreement, and the utility

Additionally, an open framework agreement “accommodates additional vendors” by allowing them to join the framework.²⁴

Article 32 of the Model Law expressly recognizes that framework agreements may represent advantageous procurement vehicles for emergencies.²⁵ The accompanying commentary identifies administrative efficiency, short times for procurement once a framework is set up, supply chain management, and security of supply as key components of framework agreement arrangements.²⁶ These characteristics lend themselves to conducting rapid procurement and securing reliable delivery even if a framework agreement has not been specifically set up for an emergency. In fact, the commentary emphasizes that framework agreements may be employed when “a government agency is required to respond to natural disasters, pandemics, and other known risks.”²⁷

Agencies achieve administrative efficiency by aggregating procurement proceedings in framework agreements. As stated earlier, open tendering is the default position under the Model Law.²⁸ Framework agreements under the Model Law are open to all eligible contractors during the first stage.²⁹ In the second stage, however,

of relatively frequent and reasonable-sized second-stage competitions to take advantage of a competitive and dynamic market” in open framework agreements).

24. See Christopher R. Yukins & Caroline Nicholas, *The UNCITRAL Model Law on Public Procurement: Potential Next Steps*, ELGAR COMPANION TO UNCITRAL (forthcoming 2023) (manuscript at 6) (available in George Washington Law Faculty Publications & Other Works) (describing generally how the UNCITRAL Model Law newly addressed both closed and open framework agreements).

25. See UNCITRAL Model Law, *supra* note 1, art. 32(1)(b) (“By virtue of the nature of the subject matter of the procurement, the need for that subject matter may arise on an urgent basis.”).

26. UNCITRAL Guide, *supra* note 2, at 254–55 (summarizing the policy considerations referenced during the enactment of the Model Law).

27. *Id.* at 268 (noting that this condition will normally be, but need not be, cumulative with repeat purchases of relatively standard items or services).

28. *Id.* at 131–32 (clarifying that open tendering is considered under the Model Law to be “the method of the first resort”).

29. See *Application of the Statutory Procurement Laws*, BAKER MCKENZIE (last visited Oct. 12, 2023), <https://resourcehub.bakermckenzie.com/en/resources/public-procurement-world/public-procurement/uncitral/topics/2-application-of-the-statutory-procurement-laws> (noting that solicitation to become a party to an open framework agreement must be open to new suppliers and contractors so long as they meet the qualification and responsiveness threshold).

competition is conducted among the contractors who have been qualified for a closed or open framework agreement.³⁰ Rather than going through a series of steps inherent in a procurement every time a need arises, agencies generally conduct a narrow competition or issue orders with a single contractor, depending on the nature of a framework agreement.³¹

The Model Law applies the same time limits to both open and closed framework agreements.³² Once a framework has been established, an agency may solicit tenders—known as quotes or offers in the U.S. procurement system—from a contractor or multiple contractors admitted to the framework in “sufficient time to prepare second-stage submissions.”³³ This time limit may be very short, depending on the requirement. The “simpler the subject matter being procured, the shorter the possible duration” of soliciting second-stage tenders may be in a given set of circumstances.³⁴ Thus, agencies may conduct procurement very fast under framework agreements.

Agencies can also ensure better security of supply under existing framework agreements as compared to open solicitation. The Model Law does not impose any limitations on the extent of legally binding promises an agency may demand from a contractor under a framework agreement.³⁵ Even when market conditions or government regulations

30. See *Framework Agreements*, OPEN CONTRACTING DATA STANDARDS (last visited Oct. 12, 2023), <https://standard.open-contracting.org/latest/en/guidance/map/frameworkagreements> (reviewing the Model Law’s framework agreement procedure and distinguishing between open and closed framework agreements in terms of whether competition is permitted).

31. UNCITRAL Guide, *supra* note 2, at 258–63 (laying out guiding principles for the circumstances under which framework agreements may be appropriate and for the selection of the appropriate type of framework agreement).

32. UNCITRAL Model Law, *supra* note 1, art. 14; see also UNCITRAL Guide, *supra* note 2, at 289–93 (detailing the determination of timeframes, deadlines, and notice requirements for both open and closed framework agreements under the Model Law).

33. UNCITRAL Guide, *supra* note 2, at 293 (noting that the simpler the procurement’s subject matter, the shorter the possible duration).

34. *Id.* (stating that the time requirement will be “qualified by the reasonable needs of the procuring entity . . . which may in limited circumstances prevail over the other considerations, for example, in cases of extreme urgency following catastrophic events”).

35. See OECD, MANUAL FOR FRAMEWORK AGREEMENTS 11–12 (2014),

imposed in response to a crisis upset a supply chain, agencies may shield themselves from major disruptions by including provisions in framework agreements that require contractors to deliver at least a minimum quantity during an emergency.³⁶ Consequently, agencies are exposed to less risk and realize greater supply chain control when they rely on the supply chain created specifically to facilitate performance under a framework agreement.³⁷ This approach will require forward thinking and will likely be based on relatively predictable emergencies based on experience. Nevertheless, the Model Law allows for inclusion of quasi-advance arrangements for emergency situations in framework arrangements.

Another benefit of relying on framework agreements during an emergency involves flexibility that the Model Law provides for the second stage. The Model Law allows for adjustments of award criteria from the first stage if a framework agreement “specifies the permissible range.”³⁸ By implication, this provision allows agencies to assess delivery speed against price or other factors and adapt the second-stage procurement for urgent purchasing.

All these features of the Model Law demonstrate that agencies may employ framework agreements in a way that increases effectiveness of a public procurement response during a crisis or emergency. Framework agreements help facilitate a rapid response that balances the goals of a public procurement system and achieves the value for

<https://www.oecd.org/gov/ethics/manual-framework-agreements.pdf> (noting that in framework agreements where not all of the terms are laid down at the outset, the contracting authorities are left to define additional technical specifications and service-level agreement conditions, “such as delivery period, specific types of products or services, and the use of green/sustainable awarding criteria”).

36. See Shanker Lal, *How Framework Agreements are Useful for Emergency and Pandemic Response*, WORLD BANK BLOGS (July 2, 2021), <https://blogs.worldbank.org/governance/how-framework-agreements-are-useful-emergency-and-pandemic-response> (explaining how using framework agreements for purchasing emergency goods is more effective in securing the right price and guaranteeing the quality, quantity, and delivery terms, especially when mitigation measures are included).

37. See Folliot Lallion & Yukins, *supra* note 14, at 56–57 (considering the role of framework agreements in mitigating supply and price risk, particularly as agencies can pool purchases and optimize the strength of public acquisition).

38. UNCITRAL Model Law, *supra* note 1, art. 59(1)(d)(iii).

money.³⁹ They help reduce transaction costs, ensure speedy delivery of vital supplies and services, plan for emergencies, and allow agencies to negotiate better terms in advance contingent on their assumptions about future urgent situations.⁴⁰

However, the above-mentioned benefits of framework agreements are considered in the context of urgent public procurement. The risks inherent in framework agreements are not minimized in urgent situations. When governments must make quick decisions in a fast-paced environment, these risks are amplified. Reduced transparency and the possibility of price adjustment in the second stage might render open tendering during the first stage meaningless.⁴¹ Additionally, crises and emergency oftentimes turn the nature of public procurement upside-down, making public procurement a seller's market.⁴² In a closed framework, risks of collusion and price fixing are especially high because the incentive to "accommodate governments"⁴³ is no longer present. In an open framework, contractors might decide to sell most of its supplies elsewhere, as long as the framework agreement's minimum quantity delivery requirement, if applicable, is met.⁴⁴

39. *But see* Christopher R. Yukins, *Are IDIQS Inefficient? Sharing Lessons with European Framework Contracting*, 37 PUB. CONT. L. J. 545, 46–7, 68 (2008) (arguing that framework agreements gained popularity precisely because they allow procurement officials to evade the tightening of requirements for competition, transparency, and accountability in public contracting because the orders under the agreements are not subject to normal competition or transparency requirements).

40. *See* Jianfang Shao et al., *Designing a New Framework Agreement in Humanitarian Logistics Based on Deprivation Cost Functions*, 256 INT'L J. OF PROD. ECON. 1, 1–2 (2023) (noting that under framework agreements, relief organizations can use a fixed cost to transfer the burden of resource inventories to businesses, while businesses can consider the resource inventories in their daily production and inventory plans, allowing for both sides to benefit).

41. *See* WBG, *GUIDEBOOK FOR SETTING-UP AND OPERATING FRAMEWORK AGREEMENTS 20–1* (2021), <https://documents1.worldbank.org/curated/en/958921624026529503/pdf/Guidebook-for-Setting-up-and-Operating-Framework-Agreements.pdf> (cautioning that the second stage of framework agreements contains inherent risk of reduced pressure to compete, bid-rigging, and collusion that must be addressed).

42. *See* Lallion & Yukins, *supra* note 14, at 52 (noting that the COVID-19 pandemic transformed a buyer's public procurement market into a seller's market).

43. *See id.* at 48 (explaining that during the pandemic, governments no longer had the upper hand and sellers took advantage of the surge in demand from competing government buyers).

44. UNCITRAL Model Law, *supra* note 1, art. 60 ¶ 3, 7–8.

The Model Law Guide recognizes such risks.⁴⁵ The Model Law Guide encourages agencies to conduct a cost-benefit analysis and consider the goals of public procurement in their analysis.⁴⁶ The Model Law Guide also instructs agencies to consider alternative procurement procedures.⁴⁷ However, risks might be lower in a framework agreement arrangement as opposed to alternatives during an emergency or crisis because alternatives will likely be more restrictive than framework agreements.

B. URGENT PROCUREMENT

The UNCITRAL Model Law identifies two alternatives to framework agreements that expressly contemplate “urgency not caused by the conduct of the procuring entity.”⁴⁸ They represent exceptions to the other methods identified in Article 27 of the Model Law⁴⁹ because they provide governments with flexibility, allow for restricted competition, and let contracting officers choose less transparent procedures.⁵⁰ In fact, the Model Law Guide presents them as alternatives to each other, with one involving a lower degree of competition and the other encompassing procedures devoid of competition.⁵¹ These alternatives are competitive negotiations and single-source procurement.⁵²

45. See UNCITRAL Guide, *supra* note 2, at 259, 268–69 (describing the conditions for the use of a framework agreement procedure).

46. See *id.* at 269 (instructing procuring entities to engage in a cost-benefit analysis based on probabilities before beginning a framework agreement procedure).

47. See *id.* (warning procuring entities not to use framework agreements as an alternative to procurement planning).

48. See *id.* at 215 (referencing Article 30(4) which sets out the conditions for use of competitive negotiations).

49. See *id.* at 182 (explaining that competitive negotiations and single-source procurement should be used only in limited circumstances when there is a need for urgent procurement, a need to protect essential security interests of the enacting state, or some other exceptional circumstance).

50. See *id.* (explaining that competitive negotiations and single-source procurement are only available in limited circumstances and should not be considered alternatives to other procurement methods).

51. See *id.* (describing that competitive negotiations take place with many participants while single-source procurement has only one participant).

52. See *id.* (emphasizing that these methods should not be considered alternatives but instead rare exceptions to be used for urgent and extremely urgent procurement circumstances).

1. *Competitive Negotiations*

For an attorney versed in FAR-based acquisition rules, the Model Law's term "competitive negotiations" might sound misleading. Unlike FAR Part 15 negotiated procurement in the U.S., competitive negotiations under the Model Law do not involve a public solicitation.⁵³ Acquisition activities choose contractors and negotiate with them directly.⁵⁴ Competitive negotiations are also applicable only in a limited set of circumstances.⁵⁵ Essentially, the Model Law Guide puts competitive negotiations slightly above single-source procurement.

Article 34(3) directs acquisition activities to "negotiate with a sufficient number of contractors to ensure effective competition."⁵⁶ The Model Law Guide implies that at least five contractors should be invited to participate in procurement.⁵⁷ The Model Law and its accompanying guide do not elaborate on whether general urgency or extreme urgency may justify negotiations with a smaller number of contractors. Considering that the reference to the minimum number of contractors is made in the context of Chapter IV and the Model Law Guide does not establish an express minimum for competitive negotiations, an argument can be made that governments may select less than five contractors during urgency.

The Model Law does not identify criteria to base contractor selection on. However, the Model Law Guide states that direct solicitation is inherent in competitive negotiations.⁵⁸ The mention of direct solicitation in the context of competitive negotiations raises an

53. See UNCITRAL Guide, *supra* note 2, at 216 ("Direct solicitation is an inherent feature of" competitive negotiations).

54. See *id.* at 216-17 ("The solicitation in this procurement method is addressed to a limited number of suppliers or contractors identified by the procuring entity.").

55. See *id.* art. 30, ¶ 4 (enumerating the three circumstances, arising from either an urgent need for the procurement or essential security interests, in which competitive negotiations may be employed).

56. *Id.* art. 34, ¶ 3.

57. See UNCITRAL Guide, *supra* note 2, at 165 ("Many commentators consider that a minimum of five invited participants is a reasonable number to avoid in most circumstances collusion and the ability to direct the procurement towards a favored supplier or contractor.").

58. See *id.* at 216-17 (describing direct solicitation as the process of addressing a limited number of suppliers or contractors identified by the procuring entity).

interesting issue. The Model Law suggests that when acquisition activities use direct solicitation, contractors should be selected in a non-discriminatory manner.⁵⁹ Does this mean that the Model Law excludes from competitive negotiations during states of urgency the selection of contractors based on limited available information with a preference for local contractors, or based on a pre-existing relationship with a government? The Model Law likely does not intend such an interpretation. The Model Law Guide does not reference non-discrimination in the context of competitive negotiations.⁶⁰ The inclusion of provisions on limited competition by itself presumes that equal treatment is not an absolute concept under the Model Law. Additionally, the Model Law does not require advance disclosure of selection criteria for competitive negotiations, which is a characteristic of non-discrimination.⁶¹ Thus, disparate treatment based on substantiated limitation of a competition pool is consistent with the Model Law.

Competitive negotiations can be used in general urgency and urgency based on a catastrophic event.⁶² During general urgency (without a catastrophic event), governments may employ competitive negotiations when other competitive procurement methods are “impractical, provided that the circumstances giving rise to the urgency were neither foreseeable nor the result of dilatory conduct.”⁶³ This provision indicates that at least two conditions must be satisfied in order to use competitive negotiations. First, the other procurement methods in Article 27 must be impractical.⁶⁴ This approach should not be surprising considering a presumption in favor of open tendering

59. See, e.g., UNCITRAL Model Law, *supra* note 1, art. 34, ¶ 1 (referring to restricted tendering, which involves direct solicitation).

60. See UNCITRAL Guide, *supra* note 2, at 214–19 (noting that Section 4 of the Model Law titled “Competitive Negotiations” does not mention non-discrimination).

61. See, e.g., *id.* at 169 (suggesting that a statement of reasons and circumstances is not required in order to avoid unnecessarily long notices or inaccurate summaries); see also *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard*, *supra* note 9, at 43 (listing criteria for determining the lowest evaluated tender and suggesting that states may add their own criteria).

62. UNCITRAL Model Law, *supra* note 1, art. 30, ¶ 4.

63. *Id.*

64. *Id.*

under the Model Law.⁶⁵ Second, urgency must not be foreseeable or the result of delays caused by acquisition activities.⁶⁶

Foreseeability presupposes anticipation or planning on the part of a government. Self-imposed urgencies caused by inadequate planning do not satisfy this condition.⁶⁷ Furthermore, the Model Law Guide explains that an urgent need should not be construed expansively.⁶⁸ Competitive negotiations may only be used for supplies or services needed immediately.⁶⁹ Subsequent procurement of the same must rely on more competitive procedures.⁷⁰

The inclusion of provisions about a catastrophic event also implies that foreseeability does not extend to situations that could be foreseeable in theory but rise to the level of a force majeure event. The Model Law and accompanying guide do not distinguish between known and unknown risks. Generally, a pandemic may be interpreted as a foreseeable or known risk.⁷¹ To prepare for a pandemic, for instance, governments may create framework agreements or stockpile supplies. However, foreseeability in the Model Law must be examined “in the light of the reasonableness of making preparations.”⁷² For a

65. See *id.* arts. 27–28 (“Except as otherwise provided for in articles 29 to 31 of this Law, a procuring entity shall conduct procurement by means of open tendering.”).

66. *Id.* art. 30, ¶ 4.

67. See UNCITRAL Guide, *supra* note 2, at 215 (stating that competitive negotiations may not be used when “the urgency is due to a lack of procurement planning or other inaction on the part of the procuring entity”).

68. See *id.* (explaining that the procurement must directly relate to the urgency).

69. See *id.* (“[I]f there is an urgent need for one item of equipment and an anticipated need for several more of the same type, competitive negotiations can be used only for the item needed immediately.”).

70. See *id.* (noting that even if the need for certain items is anticipated, competitive negotiations may only be used for items that are actually needed immediately).

71. See Bill Gates, *Bill Gates: ‘I Worry We’re Making Those Same Mistakes Again’*, N.Y. TIMES, (Mar. 19, 2023), <https://www.nytimes.com/2023/03/19/opinion/bill-gates-pandemic-preparedness-covid.html> (arguing that we must prepare for disease outbreaks in much the same way we prepare to fight fires, with the understanding that diseases have the power to spread out of control if not quickly and properly managed).

72. See Sue Arrowsmith, *The Approach to Emergency Procurement in the UNCITRAL Model Law: A Critical Appraisal in Light of COVID-19 Pandemic*, in PUBLIC PROCUREMENT REGULATION IN (A) CRISIS? GLOBAL LESSONS FROM THE

pandemic, such preparations have to examine intensity, duration, and degree of risk.⁷³ In other words, foreseeability of general urgency involves an element of certainty. Remote events with unpredictable trajectories do not meet the foreseeability requirement under Article 30(4)(a).

As for the dilatory conduct stipulation in Article 30(4)(a), its application seems to be narrow. A literal reading of Article 30(4)(a) suggests that it excludes delays caused by government officials outside of acquisition activities. This provision explicitly connects dilatory conduct to actions by a procuring entity.⁷⁴ Without any elaboration in the accompanying guide on what delays justify competitive negotiations, the plain meaning of Article 30(4)(a) signals that delays by other public officials in providing funding or submitting requirements packages to acquisition activities will not preclude the use of competitive negotiations.⁷⁵

Comparison of competitive negotiations to single-source procurement discussed below also reveals that competitive negotiations represent the only method intended for general urgency under the Model Law. As discussed below, the Model Law characterizes single-source procurement as a method of last resort and limits its use for “extreme urgencies owing to a catastrophic event” or for requirements that can only be satisfied by one contractor.⁷⁶

The second urgency-related stipulation for competitive negotiations is predicated on the existence of a catastrophic event. Article 30(4)(b) allows for competitive negotiations when, “owing to a catastrophic

COVID-19 PANDEMIC 21, 40–41 (Sue Arrowsmith et al. eds., 2021) (noting that the mere possibility of an event is not enough to make it foreseeable).

73. *See id.* (discussing government intervention, policy decisions, and prediction of needs).

74. *See* UNCITRAL Model Law, *supra* note 1, art. 30, ¶ 4(a) (qualifying the phrase “dilatory conduct” as a result of actions by the procuring entity itself).

75. *See* UNCITRAL Guide, *supra* note 2, at 215 (“Subparagraph (a) addresses situations of urgency not caused by the conduct of the procuring entity, and that do not arise out of foreseeable circumstances.”); *see also* *Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard*, *supra* note 9, at 41 (suggesting a broader approach for enacting states).

76. UNCITRAL Model Law, *supra* note 1, art. 30, ¶ 5; *see* UNCITRAL Guide, *supra* note 2, at 216 (explaining that competitive negotiations are the preferred alternative to single-source procurement in situations of urgency).

event, there is an urgent need . . . making it impractical to use . . . any other competitive method of procurement.”⁷⁷ Unlike the provisions for general urgency in Article 30(4)(a), the Model Law does not condition extreme urgency provisions in Article 30(4)(b) on foreseeability or dilatory conduct. Rather, the Model Law recognizes that extreme urgency compels a greater tradeoff between transparency and a quick response to a catastrophe.⁷⁸ While not clearly stated in the Model Law Guide, the drafters seem to have acknowledged by excluding foreseeability and delay attributable to acquisition activities that a catastrophic event, by definition, lacks predictability and anticipation.

Article 30(4)(b) incorporates three elements that contracting officers must consider in their decisions. First, an event must be catastrophic. The Model Law Guide includes several references that might be helpful for contracting officers to determine what qualifies as a catastrophic event. In a commentary related to Article 30, the Model Law Guide expressly states that a natural disaster indicates extreme urgency.⁷⁹ In a commentary on framework agreements, the Model Law Guide puts natural disasters and pandemics in the same class.⁸⁰ Thus, an event that requires a prompt and large-scale governmental response will likely be considered catastrophic for the purposes of this article.

Second, the requirement being procured must be connected to a catastrophic event. This element requires a causal connection between the procurement and urgency.⁸¹ The Model Law Guide suggests that causation should not be narrowly construed.⁸² Several needs may arise

77. UNCITRAL Model Law, *supra* note 1, art. 30, ¶ 4.

78. *See* UNCITRAL Guide, *supra* note 2, at 134, 215–16 (noting that the requirement to maximize competition determines the best method of procurement and that competition is less important during times of extreme urgency).

79. *See id.* at 215 (describing an urgent situation as one that is truly exceptional, such as the urgent need for medical supplies or other similar supplies after a natural disaster).

80. *See id.* at 268 (indicating both pandemics and natural disasters are times when needs may arise on an urgent basis).

81. *See id.* at 222 (“ . . . the amount procured using emergency procedures should be strictly limited to the needs from that emergency situation”).

82. *See id.* at 221–22 (noting that the Model Law prohibits the procuring entity from describing the subject matter of the procurement in a way that artificially limits the market to a single source); *see also* *Public Procurement: An Appraisal of the*

from the same catastrophic event, but not all of them might be immediate.⁸³ This comment in the Model Law Guide raises an interesting question about how long after a catastrophic event an acquisition activity may rely on Article 30(4)(b). Such determination must be fact-specific and made on a case-by-case basis. Considering that the Model Law Guide acknowledges the “overlap” between general urgency and extreme urgency,⁸⁴ the further removed a procurement is from a catastrophic event, the less likely a contracting officer will be able to justify her reliance on Article 30(4)(b). One will probably need to look to Article 30(4)(a) and apply the conditions for general urgency.

Third, contracting officers must consider more competitive methods of procurement before relying on the extreme urgency exception in Article 30(4)(b). This condition is similar to the general urgency provision in Article 30(4)(a). The Model Law Guide emphasizes that only immediate needs during extreme urgency may be procured through this article.⁸⁵

2. *Single-Source Procurement*

Single-source procurement presupposes negotiations with and procurement of requirements from one contractor.⁸⁶ Article 27 treats this method as the least preferable option.⁸⁷ Single-source procurement is very restrictive and lacks transparency, which makes this method susceptible to abuse. During emergency, however, this method of procurement is the most relied upon.⁸⁸ This method of

UNCITRAL Model Law as a Global Standard, *supra* note 9, at 43 (recognizing that Article 30(4)(b) allows entities to grant a margin of preference for domestic suppliers, contractors, and producers).

83. *See* UNCITRAL Guide, *supra* note 2, at 221 (explaining that the second condition, relating to extreme urgency due to a catastrophe, somewhat overlaps with the condition for the use of competitive negotiations during a catastrophe, but that the immediacy or level of urgency may be different).

84. *See id.* (acknowledging that there is some overlap between different conditions of urgency).

85. *See id.* at 215 (explaining that the provisions include a requirement of negotiation unless it is not feasible, for example in a case of extreme urgency).

86. UNCITRAL Model Law, *supra* note 1, art. 30(5)(a), art. 52.

87. *Id.* art. 27.

88. *Cf.* Luke RA Butler, *Regulating Single-Source Procurement in Emergency*

procurement lends itself well to circumstances when an acquisition activity has no time to conduct competitive negotiations.

Article 30(5)(b) provides: “A procuring entity may conduct single-source procurement [when,] owing to a catastrophic event, there is an extremely urgent need . . . and engaging in any other method or procurement would be impractical because of the time involved in using those methods.”⁸⁹ As with competitive negotiations, the event must require a major governmental response, be connected to the event triggering such a response, and focus on an immediate response to the event. The same preference for maximizing competition is reflected here as in Article 30(4)(b) for competitive negotiations. An acquisition activity must consider the other methods in the Article 27 hierarchy before employing sole-source procurement.⁹⁰ Thus, this provision largely follows the second urgency provision for competitive negotiations based on the existence of a catastrophic event, but with one important distinction. The distinction between the two seems to be in the degree of urgency.

The Model Law indicates that only “extreme urgency” justifies restriction of competition to a single contractor.⁹¹ However, the Model Law Guide does not clarify via examples or other methods the difference between general urgency and extreme urgency. The Model Law Guide emphasizes the nature of urgency and suggests that “impracticality of holding negotiations with more than one” contractor is a dispositive question.⁹² This stipulation does not really connect urgency to the severity of a catastrophic event. The event may be of the same magnitude as the circumstances giving rise to general urgency for competitive negotiations. The focus seems to be on contracting with one company in a very short period. This scenario is

Situations in Light of the COVID-19 Pandemic: Issues in Policy and Practice, in PUBLIC PROCUREMENT REGULATION IN (A) CRISIS? GLOBAL LESSONS FROM THE COVID-19 PANDEMIC 108 (Sue Arrowsmith et al., eds., 2021) (explaining that many countries relied on single-source procurement during the COVID-19 pandemic).

89. UNCITRAL Model Law, *supra* note 1, art. 30(5)(b).

90. *Id.* art. 27, n. 4.

91. *Id.* art. 30(b).

92. *See* UNCITRAL Guide, *supra* note 2, at 221 (explaining that for the level of urgency to justify single-source procurement, “the urgency must be so extreme that negotiating with more than one supplier or contractor would be impractical.”).

already contemplated in Article 30(5)(a), which covers requirements available from only one contractor.⁹³ The issue here is likely not the availability of a supply or service from one contractor. Rather, the Model Law underscores that the use single-source procurement should be limited to a narrow set of circumstances.⁹⁴

Single-source procurement under the Model Law raises the question of contractor selection for a single-source award. The Model Law does not include provisions on supplier lists. Nor does it include provisions on negotiating with contractors in both competitive negotiations and sole-source procurements. When time is of the essence, acquisition activities will likely turn to the contractors they have dealt with in the past.

III. AGREEMENT ON GOVERNMENT PROCUREMENT

The GPA represents a plurilateral agreement currently consisting of 48 members,⁹⁵ with over 30 additional members having observer status.⁹⁶ The extent of each member's obligations under the GPA depends on individually negotiated schedules.⁹⁷ Each schedule lists goods, services, and entities expressly committed to the GPA's coverage.⁹⁸ Most countries do not exclude from their schedules goods or services that governments may need during a crisis.⁹⁹ Considering

93. UNCITRAL Model Law, *supra* note 1, art. 30(5)(a).

94. *The Approach to Emergency Procurement in the UNCITRAL Model Law: A Critical Appraisal in Light of COVID-19 Pandemic*, *supra* note 72, at 50 (explaining that the 2011 Model Law limits the scope of single-source procurement for urgency to catastrophic events).

95. *Government Procurement: Agreement on Government Procurement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/gproc_e/gppga_e.htm [hereinafter *Government Procurement*].

96. *Agreement on Government Procurement: Parties and Observers*, WORLD TRADE ORG., <https://www.wto.org/english/tratope/gproce/memobse.htm> [hereinafter *Parties and Observers*].

97. *Agreement on Government Procurement: Coverage Schedules*, WORLD TRADE ORG., <https://www.wto.org/english/tratope/gproce/memobse.htm> [hereinafter *Coverage Schedules*].

98. *Id.*

99. Robert D. Anderson & Anna Caroline Müller, *Keeping Markets Open While Ensuring Due Flexibility for Governments in a Time of Economic, and Public Health Crisis: The Role of the WTO Agreement on Government Procurement (GPA)*, 29

that many countries are substantially influenced by the GPA, its emergency-related provisions and provisions that allow for flexibility may serve as a useful model for utilizing a public procurement regulatory framework during a crisis.

The GPA contains provisions similar to the UNCITRAL Model Law. Insofar as they are based on the same presumptions, the discussion below will only highlight differences not discussed above in the analysis of the UNCITRAL Model Law. For example, the GPA does not set out the hierarchy of preferable methods of procurement and does not identify each specific procurement method in a separate article like the UNCITRAL Model Law does. The GPA, however, groups all methods under three main categories: (i) open tendering; (ii) selective tendering; and (iii) limited tendering.¹⁰⁰ The GPA indicates that open tendering should be considered a default choice, and limited tendering should be employed when open tendering and selective tendering are inappropriate.¹⁰¹ Within all these categories, the GPA contemplates adjustments needed to address different situations. In the context of open tendering, the GPA allows for shortening time periods.¹⁰² In the context of selective tendering, the GPA provides for expedient procurement.¹⁰³ The limited tendering provisions expressly contain urgency language.¹⁰⁴

The analysis below will discuss selective tendering separately. This category perhaps introduces a variation of the procurement methods envisioned by the UNCITRAL Model Law. Urgency-related methods

PUB. PROCUREMENT L. REV. 189, 191–92 (2020) (explaining that most countries do not exclude pharmaceutical products, test kits, face masks, or other such products or goods related to COVID-19 from their schedules).

100. GPA, *supra* note 1, art. IV(4).

101. *Id.* art. XII(1); *see, e.g.*, International Trade Administration, *Japan - Selling to the Government*, PRIVACY SHIELD FRAMEWORK, <https://www.privacyshield.gov/ps/article?id=Japan-Selling-to-the-Government> (last accessed Nov. 9, 2023) (explaining that for Japan, there are three tendering procedures covered by the WTO agreement: open tendering, for which the highest bidder wins; selective tendering, used with a limited number of suppliers or when open tendering is inappropriate; and limited or single tendering, used when it is difficult to find suppliers and when neither more open option is appropriate).

102. GPA, *supra* note 1, art. XI(4–5).

103. *Id.*

104. *Id.* art. XIII(1)(d).

and exceptions will be combined for the ease of understanding and convenience.

A. SELECTIVE TENDERING

Article 1 of the GPA defines selective tendering as procurement when “only qualified suppliers are invited . . . to submit tenders.”¹⁰⁵ The nature of a specific requirement may dictate the size of a competition pool and show that only a limited number of contractors are capable to perform the requirement.¹⁰⁶ Similar to competitive negotiations under the UNCITRAL Model Law, selective tendering presumes that an acquisition activity may negotiate with and consider offers from a few selected contractors. In contrast to the UNCITRAL Model Law, an acquisitions activity may limit the pool by relying not only on its market research, but also on the available list of contractors under an existing arrangement.¹⁰⁷ This arrangement may take the form of a framework agreement or a supplier list.¹⁰⁸

If an acquisition activity chooses to rely on a supplier list, selective tendering might present issues in urgent cases. A contractor not registered on a supplier list may request to be put on the list at any time.¹⁰⁹ Article IX explicitly prohibits an acquisition activity to exclude contractors “on the grounds that the entity has insufficient time to examine the request.”¹¹⁰ The GPA does not consider urgency as an exception here. Rather, Article IX permits contracting officers to consider the “complexity of the procurement.”¹¹¹ This condition

105. *Id.* art. I(q).

106. *See Japan - Selling to the Government*, *supra* note 101 (explaining that selective tendering is done when there are few potential suppliers or when open tendering is inappropriate, and that in such cases, the procuring entity selects companies it considers capable from a list of suppliers and invites those companies to bid).

107. GPA, *supra* note 1, art. IX(1).

108. *Id.*; *see also* Sue Arrowsmith, *Recommendations for Urgent Procurement in the EU Directives and GPA: COVID-19 and Beyond*, in *PUBLIC PROCUREMENT REGULATION IN (A) CRISIS? GLOBAL LESSONS FROM THE COVID-19 PANDEMIC* 63, 98 (Sue Arrowsmith et al., eds., 2021) (arguing that framework agreements are possible under the GPA, even though they are not expressly mentioned).

109. GPA, *supra* note 1, art. IX(10–11).

110. *Id.* art IX(11).

111. *Id.*

creates a disincentive to refer to supplier lists during urgency because a request from an unregistered contractor might create delays in procuring supplies or services.¹¹²

Another disincentive in using supplier lists for selective tendering is the requirement in Article IX to publish notices for each procurement involving a supply list.¹¹³ In other words, selective tendering of a supplier list does not really limit a pool of competition. Actually, introduction of a supplier list into selective tendering might expand competition because publication of a notice makes an unregistered contractor consider requesting admission to a supplier list or, in the case of a rogue contractor, create delays for competitors.

Thus, the same problem of contractor selection identified above in the context of single-source procurement and competitive negotiations under the UNCITRAL Model Law may present itself in selective tendering under the GPA. Contracting officers will likely turn to the contractors they have dealt with in the past. Alternatively, they may look to the contractors within existing framework agreements and issue call-offs. In both cases, contractors with a pre-existing relationship with the government will be in a more advantageous position.

B. URGENT PROCUREMENT

1. *Limited Tendering*

When faced with the possibility of a delay, acquisition activities prefer to rely on provisions that expressly contemplate rapid procurement. Such provisions signify to them that a tradeoff in favor of expediency has already been considered by drafters. As long as the situation they are confronting fits the stipulations of these provisions, they do not have to worry about potential delays created by their choice. Consequently, limited tendering represents a far better choice

112. See *Recommendations for Urgent Procurement in the EU Directives and GPA: COVID-19 and Beyond*, *supra* note 108, at 98 (explaining that if an unregistered supplier requests to participate and gives proper documentation, the procuring entity must consider the request and may not exclude the supplier for reasons of time except in complex situations).

113. GPA, *supra* note 1, art. IX(12).

during a crisis under the GPA than selective tendering.

Article XIII permits limiting competition “where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or service could not be obtained in time using open tendering or selective tendering.”¹¹⁴ Resembling the UNCITRAL Model Law, it excludes foreseeable events. As discussed above in the context of the UNCITRAL Model Law, the analysis of foreseeability will require consideration of known and unknown risks, as well as self-inflicted emergencies. The GPA does not qualify urgency and does not discuss causes for the existence of urgency directly. However, the GPA “implicitly precludes” delays caused by acquisition activities from limited tendering by imposing a temporal condition for derogation of open tendering and selective tendering.¹¹⁵ Additionally, Article XIII cautions acquisition activities not to use limited tendering to circumvent competition.¹¹⁶ This qualification suggests that the rationale for using limited tendering must be linked to “the interests [acquisition activities] seek to protect,” which would be rapid procurement during emergency.¹¹⁷

The main distinctions between Article XIII’s and the UNCITRAL Model Law’s urgency provisions are the absence of both a catastrophic event requirement and variation between degrees of urgency. This gives acquisition activities more flexibility under the GPA. Single-source procurement may be used even if the government is not dealing with a catastrophic event.¹¹⁸ Extreme urgency may be

114. *Id.* art. XIII(1)(d).

115. *Id.*; see also *Recommendations for Urgent Procurement in the EU Directives and GPA: COVID-19 and Beyond*, *supra* note 108, at 100 (explaining that precluding limited tendering where the procuring entity has caused delays is implicit in the GPA requirement that the goods and services could not have been procured in the time necessary for public tendering).

116. GPA, *supra* note 1, art. XIII(1).

117. *Cf. Recommendations for Urgent Procurement in the EU Directives and GPA: COVID-19 and Beyond*, *supra* note 108, at 100 (explaining that Article XIII’s requirement that entities not use the Article to avoid competition among suppliers demonstrates that derogations can only be used to promote the interests they seek to protect).

118. *Id.* at 99 (explaining that the GPA allows single-source procurement even when there is no catastrophe); see Anderson & Müller, *supra* note 99, at 193 (explaining that the GPA allows states to take extraordinary measures, such as limited tendering, when there is an urgent situation, but that such states can still

characterized as any urgency that calls for a rapid governmental action.¹¹⁹

Article XIII also allows for further narrowing of what is already a limited competition procedure. Article XIII.1 gives contracting officers substantial flexibility to deviate from other provisions of the GPA by restricting solicitations, narrowing qualification criteria, and applying stricter rules for amendments to tenders.¹²⁰ Acquisition activities, however, must not apply these deviations in a discriminatory or protectionist manner.¹²¹

2. *Exceptions Applicable During Urgency*

The GPA recognizes that shorter tendering periods might be needed under certain circumstances. Article XI allows acquisition activities to reduce applicable time periods from 40 days to not less than 10 days “when a state of urgency duly substantiated by the procuring entity renders [the applicable] time period impracticable.”¹²² Considering that the GPA does not have a standstill requirement, Article XI provides flexibility to conduct procurement in a relatively short period of time.

Additionally, the GPA contains a general exception that acquisition activities can rely upon during an emergency. Article III states that the GPA “shall [not] be construed to prevent any party from imposing or enforcing measures necessary to protect . . . order or safety . . . or human life or health.”¹²³ This wording has not been interpreted by the World Trade Organization’s Appellate Body.¹²⁴ Deviations based on broad interpretation will likely not withstand scrutiny because the necessity requirement may require a more competitive approach than,

observe transparency and competition-enhancing disciplines of the GPA).

119. Cf. *Recommendations for Urgent Procurement in the EU Directives and GPA: COVID-19 and Beyond*, *supra* note 108, at 100 (suggesting that the GPA allows for single-source procurement in general urgency situations and arguing that the GPA should contain “explicit derogation for crises”).

120. GPA, *supra* note 1, art. XIII(1).

121. *Id.*

122. GPA, *supra* note 1, art. XI(2).

123. *Id.* art. III(2).

124. Anderson & Müller, *supra* note 99, at 194 (explaining that the wording of Article III has not been interpreted by the WTO’s Appellate Body).

for example, sole-source procurement under Article XIII.¹²⁵ However, “the more vital or important the interests or values [involved in the procurement] are, the easier it would be to accept a measure as necessary.”¹²⁶ Thus, this general exception supports deviations from the GPA’s rules to the extent necessary to protect interests enumerated in Article III.2 during a crisis.¹²⁷

IV. RECOMMENDATIONS

This paper attempted to assess the effectiveness of UNCITRAL Model Law and GPA provisions for urgent procurement. As set out at the beginning of this paper, speed and flexibility factor significantly into the selection of procurement methods during emergencies. Both legal frameworks contain provisions that acquisition activities may employ in emergency situations. Country-specific experiences in the COVID-19 pandemic, however, suggest that fine-tuning of both legal frameworks will make them more suitable in the emergency context. Of course, the same assumptions and limitations outlined at the beginning of this paper bear on the recommendations discussed below.

A. UNCITRAL MODEL LAW FRAMEWORK AGREEMENTS

As discussed above, the Model Law closed framework agreements are generally awarded after an open solicitation. Once awarded, an agency places orders with the contractors that are parties to the

125. *Id.* (acknowledging that while GPA Article III.2 has not been explicitly interpreted by the WTO Appellate Body, the analysis of similar wording in GATT 1994 Article XX suggests a two-tiered approach: the measure must fit a specific exception and meet the requirements of the opening clauses); *see also Recommendations for Urgent Procurement in the EU Directives and GPA: COVID-19 and Beyond*, *supra* note 72, at 100 (arguing that the necessity requirement may require a competitive approach rather than a fully flexible approach).

126. *See* Anderson & Müller, *supra* note 99, at 194. (referring to the Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, 22 (adopted May 20, 1996), and Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R, ¶¶ 5.71-5.74 (adopted June 16, 2016)).

127. *Id.* at 194–95 (concluding that while measures in response to COVID-19 under GPA Article III.2 are not automatically acceptable, the severity of the crisis offers broad justification for actions taken to protect life and health, and the GPA’s flexibility permits governments to respond swiftly and decisively in public health emergencies).

framework agreement. Even with all the benefits that closed framework agreements provide during emergency, additional changes might make them more attractive and better adapted to special crisis situations.

The Model Law's provisions on closed framework agreements may incorporate exceptions for urgency that make these closed frameworks a hybrid of open and closed framework agreements. For example, Colombia allowed for the "direct" award of a framework agreement that was initially limited to contractors that passed the first stage.¹²⁸ The Colombian government issued a decree that provided for the award of a framework agreement without an open solicitation.¹²⁹ As a result, any contractors could enter an already existing agreement without going through the first stage. This exception to the normal procuring procedure facilitated "the provision of goods and services directly related to" COVID-19.¹³⁰ If introduced into the Model Law and adopted by states, this approach will likely enhance price competition among contractors and help governments realize value for money even in an unpredictable environment.

B. UNCITRAL MODEL LAW COMPETITIVE NEGOTIATIONS

The Model Law allows acquisition activities to "negotiate with a sufficient number of contractors to ensure effective competition."¹³¹ However, the Model Law does not really articulate the extent of justification contracting officers must provide behind their selection. Article 25 includes a catch-all provision on "other information required to be included in the record."¹³² The absence of a more specific language concerning documentation for restrictive procurement diminishes the importance of record-keeping and does

128. Sebastián Barreto Cifuentes, *Emergency Procurement and Responses to COVID-19: The Case of Colombia*, in PUBLIC PROCUREMENT REGULATION IN (A) CRISIS? 441, 447 (Sue Arrowsmith et al. eds., 2021) (finding that Article 5 of Decrees 440 and 537 2020 "conferred on Colombia Compra Eficiente the power to organize framework agreements to be awarded 'directly'").

129. *Id.* (explaining that this power could only be exercised during an emergency).

130. *Id.* (elaborating that this emergency power was to be used to "facilitate the provision of goods and services directly related to the emergency").

131. UNCITRAL Model Law, *supra* note 1, art. 34(3).

132. *Id.* art. 25 (1)(w).

not provide guidance on proper considerations in competitive negotiations.

The United Kingdom's experience during the pandemic is illustrative here. The UK National Audit Office issued multiple reports that highlighted lack of documentation to support decisions on procurement of supplies and protective equipment.¹³³ Along with the Public Accounts Committees, these reports concluded that it was impossible to assess conflict of interests because of inadequate documentation.¹³⁴ The lack of documented articulation for procurement decisions raised suspicions of wrongdoing and eroded public trust.¹³⁵

To mitigate these risks, the Model Law should include provisions requiring contracting officers to explain their reasons for the selection of contractors. This approach encourages oversight, promotes public trust, and communicates to contracting officers the level of consideration required to limit competition to a small group of contractors.

Furthermore, the Model Law needs to broaden the definition of "dilatory conduct."¹³⁶ Currently, only the delays attributable to acquisitions activities are considered dilatory.¹³⁷ Thus, delays caused by requiring activities or other public entities do not prevent a contracting officer from relying on the general urgency exception in Article 30(4)(a).¹³⁸

133. Sue Arrowsmith & Luke RA Butler, *Emergency Procurement and Responses to COVID-19: The Case of the United Kingdom*, in PUBLIC PROCUREMENT REGULATION IN (A) CRISIS? 355, 357 (Sue Arrowsmith et al. eds., 2021) (asserting that although the NAO reports found no evidence of wrongdoing, they nevertheless expressed concern regarding the absence of documentation).

134. *Id.* at 375–76 (emphasizing that one primary legal requirement for procurement procedures is articulating and documenting the reasoning behind decisions).

135. *See* Arrowsmith, *supra* note 72, at 48 (explaining that the UK's lack of proper documentation for certain contracts during the COVID-19 pandemic led to a loss of public trust and suspicions of misconduct and suggesting that a more meticulous articulation of policy could have prevented inconsistencies in the approach to potential PPE suppliers for single source contracts).

136. UNCITRAL Model Law, *supra* note 1, art. 30(4)(a).

137. *Id.*; UNCITRAL Guide, *supra* note 2, at 135 (failing to qualify the language of Article 30(4)(a)).

138. UNCITRAL Model Law, *supra* note 1, art. 30(4)(a).

This approach does not encourage sound planning and arguably creates integrity issues. While Article 30(4)(a) might provide an avenue for rapid procurement in its current form, the focus on an acquisition activity itself and not the government as a whole narrows the requirement of foreseeability. In the United States, for example, the government is treated as one rather than as an entity consisting of multiple parts.¹³⁹ Such approach promotes better management of requirements and encourages early planning by all public officials involved in procurement. States reforming their procurement systems based on the Model Law would be better served if they adopt a broader interpretation by focusing on any delay caused by the government in relation to the procurement in question.

Finally, the Model Law Guide does not fully articulate the instances that satisfy the existence of a catastrophic event for the purposes of applying Article 30(4)(b). The Model Law Guide indicates that events requiring large-scale responses by the government should be considered catastrophic.¹⁴⁰ However, the focus on responses presupposes that an event has occurred. What if the government takes measures to prepare for an impending emergency or contain an event from becoming a catastrophe? The exact language of Article 30(4)(b) and the Model Law Guide do not directly address these situations.

In Nigeria, the Public Procurement Act (“PPA”), which was influenced by the 1994 version of the Model Law, explicitly allows for emergency procurement in the face of a serious threat.¹⁴¹ Section 43 of the PPA permits acquisition activities to employ emergency procedures when “the country is either seriously threatened by or actually confronted with a disaster [or] catastrophe.”¹⁴² Unlike the Model Law, the PPA does not contain provisions on competitive

139. U.S. GOV’T ACCOUNTABILITY OFF., AGENCY MANAGEMENT OF CONTRACTORS RESPONDING TO HURRICANE KATRINA AND RITA 1, 3–5 <https://www.gao.gov/assets/gao-06-461r.pdf> [hereinafter GAO].

140. See UNCITRAL Guide, *supra* note 2, at 268 (listing the need for clean water and medical supplies as possible consequences of a catastrophic event).

141. Geo Quinot et al., *Emergency Procurement and Responses to COVID-19 in Africa: The Contrasting Cases of South Africa and Nigeria*, in PUBLIC PROCUREMENT REGULATION IN (A) CRISIS? 525, 540 (Sue Arrowsmith, et al. eds., 2021) (adding that procurement laws adopted by the states were likewise influenced by the 1994 version of the UNCITRAL Model Law).

142. *Id.* at 544 (referring to Public Procurement Act, § 43(1)(a)).

negotiations and turns to single-source procedures during actual or threatened emergencies.¹⁴³ However, the Nigerian law indicates that a threatened disaster or catastrophe might be an appropriate justification for invoking urgent procurement provisions. The Model Law Guide should include such clarification and expand Article 30(4)(b) to threats of a catastrophic event.

C. UNCITRAL MODEL LAW SINGLE-SOURCE PROCUREMENT

The Model Law broadly limits single-source procurement. The Model Law allows for urgent single-source procurement only in extreme urgency and when “engaging in any other method or procurement would be impractical.”¹⁴⁴ As discussed above, this limitation reflects the hierarchy of Article 27, which classifies sole-source procurement as the least desirable method.¹⁴⁵

During the COVID-19 pandemic, however, multiple countries resorted to single-source procurement and some did so with few limitations. In Brazil, the Coronavirus Act effectively expanded the possibility of a single-source procurement by allowing acquisitions activities to procure goods and services directly from contractors without a bidding process.¹⁴⁶ The law deemed compliant with

143. See *id.* (explaining that emergency procurement allows for single-source procurement under the 1994 UNCITRAL Model Law, but the 2011 Model Law differs by requiring competitive negotiations in urgent cases, and noting that the PPA permits single-source procurement when there is a serious threat even absent a formal emergency declaration).

144. UNCITRAL Model Law, *supra* note 1, art. 30(5)(b).

145. *Id.* art. 27(1).

146. See Michael Bowsher, *COVID-19 Has Not Gone Away: Changes to Brazilian Public Procurement Law to Streamline the Contracting System*, MICHAEL BOWSHER'S MOSTLY PROCUREMENT BULL. (Jun. 20, 2020), <https://mostlyprocurement.typepad.com/my-blog/2020/06/covid-19-changes-in-the-brazilian-public-procurement-legal-system-aim-to-streamline-contracts-maria-tereza-fonseca-dias-as.html> (detailing that new Brazilian legislation, like the 2020 Coronavirus Act and the Provisional Measure, was introduced in response to the pandemic, allowing for price registration and direct purchase without bidding to expedite procurement); José Guilherme Giacomuzzi, *Brazil's Responses to COVID-19 Pandemic in Procurement Law*, PUB. PROCUREMENT INT'L (Aug. 3, 2020), <https://publicprocurementinternational.com/2020/08/03/brazils-responses-to-the-covid-19-pandemic-procurement-law/> (recounting that Brazil has implemented numerous legal norms since the declaration of a public health emergency on February 3, 2020, with Law 13,979 being the most significant regarding government

conditions for direct awards all procurement of supplies and services necessary to tackle the COVID-19 pandemic.¹⁴⁷ Similarly, South African government removed the requirement to show that competition was impracticable and invoked exceptions to public solicitations to facilitate single-source procurement.¹⁴⁸ In the United States, the Health and Human Services, for example, used single-source provisions to procure COVID-19 testing and awarded contracts worth approximately \$1 billion.¹⁴⁹

The Model Law's narrow parameters in Article 30(5)(b) do not create an incentive to adopt its approach to single-source procurement during a crisis. Under the Model Law, an acquisition activity not only needs to establish existence of a catastrophic event, but also needs to show that it cannot use the other methods of procurement.¹⁵⁰ Alternatively, an acquisition activity needs to show that only one contractor can meet the requirement.¹⁵¹ In many urgent situations, competition remains possible. The experience of other countries

procurement law, which has undergone modifications through successive provisional measures as the pandemic situation and the need for regulatory direction have evolved).

147. Guilherme Giacomuzzi, *supra* note 146 (outlining that Law 13,979 primarily aimed to relax the requirements for public bidding and contracts during the pandemic, with Article 4 creating an unlimited exemption from the mandatory public bidding for purchases related to COVID-19 health needs, thereby allowing the government to procure medicines, equipment, and services swiftly without the usual constraints of Law 8,666).

148. *The Approach to Emergency Procurement in the UNCITRAL Model Law: A Critical Appraisal in Light of COVID-19 Pandemic*, *supra* note 72, at 44, 51 (indicating that the regulatory frameworks in countries such as Colombia, Brazil, South Africa, China, Italy, and Nigeria have broadly permitted the use of single-source procurement during the COVID-19 pandemic, often with few or no conditions).

149. U.S. DEP'T OF HEALTH & HUM. SERVS., THE ASSISTANT SECRETARY FOR ADMINISTRATION AWARDED AND MANAGED FIVE SOLE SOURCE CONTRACTS FOR COVID-19 TESTING IN ACCORDANCE WITH FEDERAL AND CONTRACT REQUIREMENTS 4, <https://oig.hhs.gov/oas/reports/region5/52100014.pdf> [hereinafter HHS Report] (noting that \$1 billion in sole-source contracts for COVID-19 testing awarded by HHS will be reviewed for compliance with federal laws, regulations, policies, and contract terms, as well as the legitimacy of claimed costs).

150. UNCITRAL Guide, *supra* note 2, at 220–21 (explaining that under the Model Law, single-source procurement is a method of last resort, to be used only after all other methods have been considered and are deemed unsuitable).

151. UNCITRAL Model Law, *supra* note 1, art. 30(5)(a).

shows that a more expansive approach to single-source procurement is preferable during urgency. Thus, a state reforming its procurement system should not constrain itself by adopting the Model Law's single-source provisions. The GPA's approach within limited tendering presents a far more flexible system that can be employed during emergency. The Model Law should adopt a similar approach.

D. SELECTIVE TENDERING UNDER THE GOVERNMENT PROCUREMENT AGREEMENT

The GPA does not provide an exception for urgency for selective tendering. The GPA indicates that only "the complexity of procurement" represents "an exceptional case."¹⁵² This narrow wording creates a disincentive to utilize supplier lists during urgencies, which UNCITRAL Model Law does not provide for at all. A request from a contactor not registered on a supplier list might create delays in procuring urgent requirements because an acquisition activity must examine a request from unregistered contractors.¹⁵³ Inadequate "time to examine the request" does not represent a justification to exclude a contractor unless a complex nature of the procurement dictates so.¹⁵⁴

Australia administers a system that is arguably close to the GPA's selective tendering method.¹⁵⁵ In Australia, standing offer arrangements may include common-use-supply arrangements.¹⁵⁶

152. GPA, *supra* note 1, art. IX.11.

153. *Id.*; *Recommendations for Urgent Procurement in the EU Directives and GPA: COVID-19 and Beyond*, *supra* note 72, at 98 (pointing out that under Article IX.11 of the GPA, procuring entities are obligated to evaluate bids from unregistered suppliers who meet submission deadlines, with insufficient time not being a valid reason for exclusion unless the procurement's complexity justifies it, which can undermine the expediency of using lists).

154. GPA, *supra* note 1 art. IX.11.

155. *Types of Agreement Guideline*, GOV'T OF WESTERN AUSTR., <https://www.wa.gov.au/government/multi-step-guides/procurement-guidelines/procurement-planning-individual-purchases-guidelines/types-of-agreement-guideline> (illustrating that Australia's procurement system employs a selective tendering method akin to that of the GPA, enabling State agencies to efficiently procure goods and services while ensuring competition and value for money).

156. *Procuring During the COVID-19 Emergency*, QUEENSL. GOV'T (last visited Oct. 12, 2023), <https://www.hpw.qld.gov.au/data/assets/pdf/0018/11790/emergency-procurement-covid-19.pdf> (summarizing that while agencies should

During the pandemic, Australian procurement authorities allowed for derogation from regular procedures “to meet urgent needs for essential services . . . to preserve life, safety, and well-being.”¹⁵⁷ The government encouraged acquisition activities to “revisit routine procedures that may delay effective relief . . . in a timely manner.”¹⁵⁸

Similarly, the GPA should adopt an urgency exception for selective tendering to clarify that urgency justifies altering conventional procurement methods. In response to pressures triggered by a crisis, selective tendering procedures will likely compel adjustments. Complex procurement does not really signify urgency. The converse might be true, since the magnitude of the need for supplies and services, as was the case during the COVID-19 pandemic, might make procurement complex. However, such generalizations will likely not cover all of the procurement of vital equipment and services that are necessary during a crisis. While the GPA’s Article III exception arguably allows for deviations from regular selective tendering procedures, the element of necessity inherent in Article III does not afford sufficient flexibility and likely calls for an additional determination by contracting officers.

E. LIMITED TENDERING UNDER THE GOVERNMENT PROCUREMENT AGREEMENT

As argued above, the general exception in Article III supports deviations from the GPA’s provisions. However, the determination via Article III depends on the necessity of the measure rather than a set of conditions described in Article XIII. One commentator notes that limited tendering in Article XIII is already more flexible than the Article III “necessity requirement that may require a competitive

adhere to Standing Offer Arrangements pursuant to clause 5.3 of the QPP, they are allowed to deviate from these arrangements under certain conditions).

157. *Id.* (outlining that under sustained emergency relief, agencies may procure from a single supplier with one quote if traditional procurement methods would delay essential deliveries critical for preserving life, safety, and well-being).

158. *Id.* (summarizing that when procuring outside of clause 5.3, agencies should determine if there is an emergency requiring urgent delivery of essential goods or services, reassess and prioritize procurement plans, re-evaluate standard procedures that could impede timely relief, and consider actions that are reasonable and justifiable).

approach in principle.”¹⁵⁹ The addition of an express derogation for crises will indicate that Article XIII methods of procurement may be invoked to protect the interests enumerated in Article III without going through the necessity analysis contemplated by Article III. In other words, the addition of a reference to crisis situations in Article XIII sets up a more straightforward analysis and interpretation of limited tendering. Thus, an express provision for urgency in Article XIII will likely facilitate faster acquisition decisions.

Having offered this minor change, the author accepts that states may interpret Article XIII broadly as currently drafted, thereby not injecting the “less flexible”¹⁶⁰ necessity analysis in its application. For example, Singapore relied on a procurement regulation almost identical to Article XIII.1.d to stockpile N-95 masks and acquire most medical supplies.¹⁶¹ The government of Singapore deemed the language of Article XII—or Article 26 of the Government Procurement Act, Chapter 120, in Singaporean legislation¹⁶²—to provide broad discretion and “obviated the need for . . . special legislation on emergency procedures.”¹⁶³ Subsequently, the government issued statements and responses justifying limited tendering as a procurement choice during the COVID-19 emergency.¹⁶⁴ The government’s position evolved around

159. *Recommendations for Urgent Procurement in the EU Directives and GPA: COVID-19 and Beyond*, *supra* note 72, at 100 (noting that the necessity requirement in Article III generally mandates a competitive approach, in contrast to the method of limited tendering described in Article XIII).

160. *Id.* (discussing the necessity requirement in Article III); Anderson & Müller, *supra* note 125, at 194. (discussing interpretation of “necessary measures”).

161. Henry Gao, *Emergency Procurement and Responses to COVID-19: The Case of Singapore*, in PUBLIC PROCUREMENT REGULATION IN (A) CRISIS? 485, 489–90 (Sue Arrowsmith et al. eds., 2021) (summarizing that the COVID-19 emergency in Singapore necessitated practical deviations from open tendering for medical goods and services, leading to direct procurement or limited tendering methods akin to those provided by the GPA’s Article XIII.1.d).

162. Government Procurement Regulations 2014, c. 120, no. S 269, art. 26(1), (2)(e) (Sing.), <https://sso.agc.gov.sg/SL/GPA1997-S269-2014?DocDate=20140404#pr26->.

163. Gao, *supra* note 161, at 489 (indicating that this approach provides wide discretion and is deemed to eliminate the necessity for specific legislation governing emergency procurement procedures).

164. *Id.* at 490 (explaining that inquiries from opposition Members of Parliament regarding emergency procurement were addressed by the government without

impracticability of other tendering methods and maintaining accountability while relying on emergency procedures.¹⁶⁵ This experience suggests that the GPA's Article XIII might already contain implicit deviations that do not need an Article III-level necessity analysis.

V. CONCLUSION

This paper analyzed the provisions of the UNCITRAL Model Law and the GPA for urgent procurement. Both legal frameworks offer a set of procurement rules suitable for wide-ranging emergency responses. However, certain constraints contained within the two and provisions open to differing interpretation do not make them sufficiently flexible to address a global pandemic or a crisis of the same scale. To this end, this paper offered recommendations that, while not representing significant changes, give states sufficient flexibility to tackle unprecedented challenges through public procurement.

The recommendations used state-specific experiences to connect the proposed changes to real world experiences. The underlying theme of these recommendations stems from the supposition identified at the beginning. A crisis elevates the need for speed and flexibility in public procurement. The focus on expediency, however, was not intended to minimize the intricacy of public procurement. Governments must balance multiple competing interests to maintain the integrity and transparency of a public procurement system even in the worst of crises. The recommendations here are for refinement rather than a change of direction.

leading to additional disputes and noting that the government resorted to limited tendering for sourcing not only medical supplies but other items and services like tracing devices).

165. *Oral Answer by Ministry of National Development on Setting Up Covid-19 Facilities*, SING. MINISTRY OF NAT'L DEV. (June 5, 2020), <https://www.mnd.gov.sg/newsroom/parliament-matters/q-as/view/oral-answer-by-ministry-of-national-development-on-setting-up-of-covid-19-facilities> (conveying in 2021 that the Ministry of National Development expedited the establishment of COVID-19 facilities using emergency procurement procedures, which permit the bypassing of tenders and direct awarding of contracts to experienced vendors capable of rapid execution while maintaining accountability for public funds); UNCITRAL Model Law, *supra* note 1, art. 30(5)(b).

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