

**PROCUREMENT REFORM AT THE UNITED NATIONS:
LAUNCHING A PILOT PROGRAMME TO PROMOTE
FAIRNESS, TRANSPARENCY AND EFFICIENCY**

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ABSTRACT

1. Background: Under the general framework of the United Nations Secretariat Procurement Reform, the Secretary-General, recommended a number of measures for strengthening internal control and promoting ethics, integrity, fairness and transparency in the procurement process.
2. Problems and basic issues: This paper illustrates the issues faced and difficulties to take into consideration the different interests of the various internal and external stakeholders for establishing an independent review mechanism in the context of an international and political organization such as the United Nations:
 - (i) the Senior Vendor Review Committee (SVRC) to review and suspend vendors due to ethical reasons; and
 - (ii) the Award Review Board (ARB) to review challenges to procurement awards.
3. Key Findings and conclusions: Successful implementation of a reform requires adequate resources, time and good communication (internal and external). The objective was to build a simple, effective and efficient administrative procedure to allow the UN to take action in a timely manner.
4. Description of the methodology used: Comparative analysis and benchmarking with other Organizations (World Bank, ESA, FAA), using expert knowledge from the inception of the

Programme, launching the implementation on a pilot basis (12months) subject to monitoring and evaluation before full implementation.

INTRODUCTION

The overall volume of procurement in the UN system has been steadily increasing year after year. From 2004 to 2008 (United Nations Office for Project Services, 2008), total UN procurement increased from US\$6.5 billion to US\$13.6 billion and procurement conducted by the Procurement Division of the UN Secretariat alone, increased from US\$1.3 billion to US\$3.1 billion,¹ reaching US\$3,5 billion in 2009.² The growth is primarily attributable to the unprecedented increase in procurement of goods and services in support of the peacekeeping operations, which represents more than 80% of the total procurement volume of the UN. With expanded scope of procurement activity encompassing institutional needs of Organization and specific needs of field operations and relief initiatives the number of parties concerned (parties in interest, stakeholders) has significantly increased, incurring greater workload for the UN along with higher requirements of accountability, responsiveness, fairness and fiscal integrity. To meet challenges the UN faces in carrying out its organizational mandates/mission, a number of measures were proposed in the context of the general management reform (ref. A/60/692). With a view of given recommendations two administrative review bodies (ARB and SVRC) were established in November 2009 on a pilot basis to provide the UN with tools essential for its sustainable and effective performance

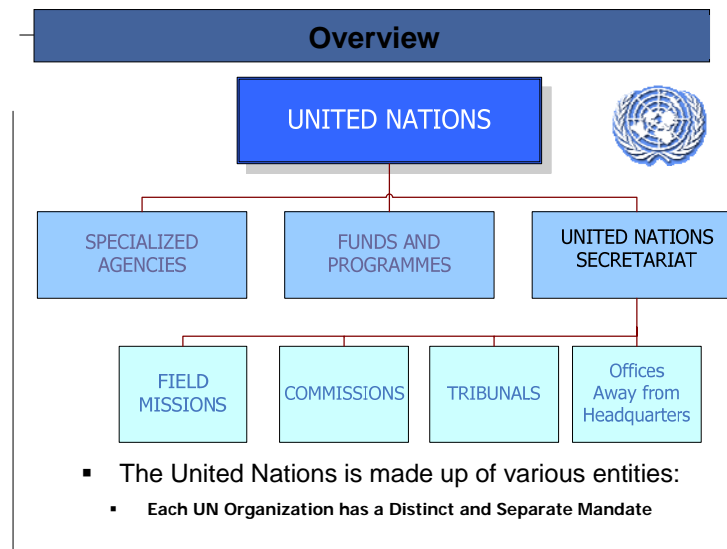
¹ Report of the Secretary-General A/64/284 of 11 August 2009 (Comprehensive Report on United Nations procurement activities).

² United Nations, Procurement Division (2010). *Procurement Trend 2000-2009*. [On-line]. Available at <http://www.un.org/Depts/ptd/trend.htm> [Retrieved March 30, 2010]

I. OVERVIEW

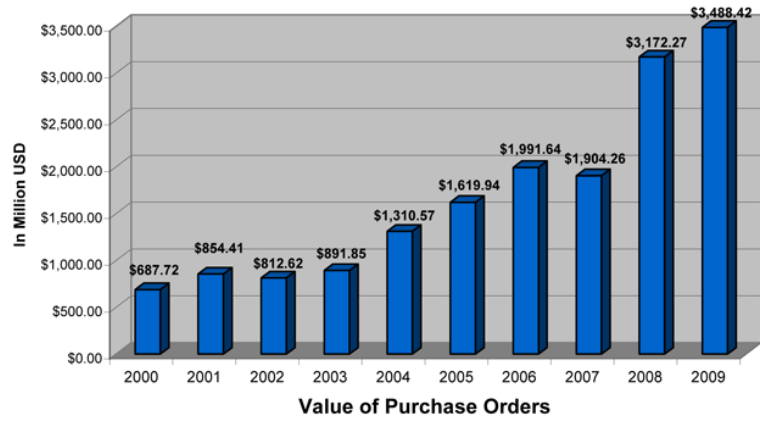
Overview of the UN procurement systems/activities (this part addresses how to do business with the UN, the different types of procurement with statistics on the volume and nature of UN procurement and the regulatory framework).

Under the UN system, the various UN Organizations (Secretariat, Funds and Programmes and Specialized Agencies) are the stewards of public funds which have been entrusted to them by Member States to fulfill their various mandates.



The procurement activity for the UN Secretariat is carried out by the Procurement Division, who is responsible for procurement at UN Headquarters in New York, Economic Commissions, Tribunals and Offices Away from Headquarters (OAH) and Field Missions (currently 16 peacekeeping missions throughout the world). To a certain extent, procurement authority has been decentralized to the field under a Delegation of Procurement Authority (DPA) to Offices Away from Headquarters (OAHs), Regional Commissions and Tribunals and peacekeeping missions.

Procurement Division Procurement Trend 2000-2009



Like any other public procurement, UN procurement involves a process that starts with assessing the needs for goods works and services, drafting the statement of work (SOW) or technical specifications (Specs); conducting a market search, obtaining information on vendors or suppliers who can provide such goods, services or works, advertising these requirements; initiating a solicitation process either informal through issuance of request for quotations (RFQ), or formal through invitation to bid (ITB) or request for proposals (RFP); followed by the evaluation process starting with the opening of bids/proposals, the conduct of technical and commercial evaluation; then by the award process, negotiation, and contract signature. The completion of the process ends with the actual performance of services and delivery of goods and services and payment thereof.³

In undertaking these processes, the UN is guided by the general principles of public procurement embodied in the Financial Regulations and Rules of the UN⁴, namely: best value for money; fairness, integrity and transparency; effective international competition; and the interest of the UN⁵. These principles which are a basis for a model of good governance were taken into account in setting up the two review boards (ARB and SVRC).

Under the United Nations Financial Regulations and Rules, the Under-Secretary-General for Management (USG/DM) is responsible for the procurement functions of the United Nations, establishing all United Nations procurement systems and designating the officials responsible for performing procurement functions⁶. In practice, the procurement authority for final award of contracts (contracts, agreements and purchase orders) has been delegated to the Assistant-Secretary General of Central Support Services (ASG/OCSS) acting as Chief Procurement Officer (CPO).

³ United Nations, Procurement Division. (2010, March). *United Nations, Procurement Manual, Revision 6*. [On-line]. Available at <http://www.un.org/Depts/ptd/manual.htm>. [Retrieved March 30, 2010]

⁴ Secretary-General's Bulletin ST/SGB/2003/7 of 9 May 2003 (Financial Regulations and rules of the United Nations).

⁵ Ibid, UN Financial Regulation 5.12

⁶ Ibid, UN Financial Rule 105.13

Under the authority of Financial Rule 105.13(b)⁷, the USG/DM established the Headquarters Committee on Contracts (HCC), an independent advisory body to ensure compliance with the UN's general procurement principles. The HCC renders advice on procurement of goods and services valued at US\$500,000.00 or above to the ASG/OCSS as CPO prior to the issuance of a decision for contract award. The Procurement Division notifies the decision of award to the winning bidder and sends a Letter of Regret to all unsuccessful bidders who participated in the process. The information is also posted on the UN website which is updated on a monthly basis.

To maintain independence of the review bodies, and avoid the perception of a potential conflict of interest, neither the ASG/OCSS, who as CPO is the decision maker on HCC recommendations for award of contract, nor the HCC (Chairperson or members thereof) are involved in the substantive review of cases by the ARB or the SVRC.

In the context of the whole procurement cycle, the key stages which are most relevant to the review bodies are: (i) for the Senior Vendor Review Committee: mainly the initial step of vendor registration and background check on potential UN Vendors and (ii) for the Award Review Board: notification of decision of award of contract to the winning bidder and the Letter of Regret to unsuccessful bidders is the trigger point to start the procedure in filing a procurement challenge.

1.1 What brought about the need for a UN procurement reform?
(This part highlights that the procurement reform was initiated by the Secretary-General as a management reform and not as a legal reform and places the two review bodies as lead examples in the context of the UN Common System).

While all Organizations of the UN system have agreed to the same guiding principles, their individual procurement is governed by the

⁷ Secretary-General's Bulletin ST/SGB/2003/7 of 9 May 2003 (Financial Regulations and rules of the United Nations).

established regulations and rules of each organization, which may differ in matters of detail⁸.

In order to harmonize the procurement function of the different organizations in the UN, the United Nations Global Marketplace (UNGM)⁹ was established to be the sole procurement portal of the UN System. It acts as a single window, through which potential suppliers may register with the 18 UN Agencies (it includes the UN Secretariat hereafter called the “UN”, Funds and Programme, Specialized Agencies and other UN entities) using the UNGM as their supplier roster¹⁰.

The following organizations in the UN system are users of the United Nations Global Market Place (UNGM):

- IAEA - International Atomic Energy Agency
- IAPSO - Inter-Agency Procurement Services Office
- ILO - International Labour Organisation
- ITC - International Trade Centre
- UN/PD - United Nations Procurement Division
- UNDP - United Nations Development Programme
- UNESCO - United Nations Educational, Scientific and Cultural Organization
- UN/FALD - UN Field Administration and Logistics Division
- UNFPA - United Nations Population Fund
- UNHCR - United Nations High Commissioner for Refugees
- UNICEF - United Nations Children's Fund
- UNOPS - United Nations Office for Project Services
- UNRWA - United Nations Relief and Works Agency
- WFP - World Food Programme
- WIPO - World Intellectual Property Organisation

⁸ United Nations, Inter-Agency Procurement Working Group (2006). UN Procurement Practitioner’s Handbook, Chapter I. [On-line]. Available at <http://www.unops.org/SiteCollectionDocuments/Procurement%20docs/UN%20procurement%20practitioners%20handbook.pdf>. [Retrieved March 30, 2010]

⁹ The website of United Nations Global Marketplace (www.ungm.org).

¹⁰ United Nations (2006). General Business Guide for Potential suppliers of goods and services with common guidelines for procurement by organizations in the UN System, Twentieth Edition. [On-line]. Available at http://www.ungm.org/Publications/Documents/gbg_master.pdf [Retrieved March 30, 2010]

In early 2000, the UN was faced with enormous challenges brought about by the controversies surrounding the Oil for Food Program and an unprecedented surge in peacekeeping operations. The Secretary-General thus initiated a reform programme to address these challenges with the view of further strengthening internal controls, particularly to promote ethics, integrity, fairness and transparency in the procurement process. Among the measures taken the UN Reform included the establishment of an Ethics Office and an Independent Bid Protest System¹¹.

1.2 Brief description of the two review bodies

In the past, no formal independent bid protest system existed in the UN Secretariat or in the UN system. There were very few precedents as not many international organizations had adopted any kind of formal bid protest system for their own corporate procurement.¹² Challenges from vendors were essentially addressed on an “ad hoc” basis and the only formal and somewhat unsatisfactory avenue for vendors was to request further information.

With regard to ethical issues, at the time, the UN Secretariat had the most advanced system in the UN system with a Vendor Review Committee (VRC) at headquarters and in the field with Local Vendor Review Committees (LVRCs). However, concerns over the ethical administrative and performance issues of vendors were undertaken by the Vendor Review Committee¹³ under the authority of the Procurement Division and not by an independent entity.

The establishment of ARB and SVRC was conceived as early as 2006, but it was only towards the end of 2009 that these two projects were established on a 12 month pilot basis.

¹¹ Report of the Secretary-General, A/60/846/Add.5 of 14 June 2006 (Investing in the United Nations: for a stronger Organization worldwide: detailed report).

¹² Centre de Recherches en Droit Public (CRDP), Centre de Droit International de Nanterre (CEDIN), Université Paris-Ouest Nanterre, France (2008) “Enterprises and International Organizations: What review mechanisms should be established in connection with the award of public procurement contracts by international organizations?” Translated into English by OSCE Language Services GSOEW665

¹³ United Nations, Supra Note 4 at Sec. 7.01.1

Comparative analysis of review bodies before and after the Reform:

Review Body	Before Reform	After Reform
VRC	<ul style="list-style-type: none"> • Vendor Review Committee in existence to review vendor performance issues. • Chief of Procurement chaired the Vendor Review Committee and made recommendations to the Assistant Secretary General/OCSS for final decision. 	<ul style="list-style-type: none"> • New pilot program - Senior Vendor Review Committee established which strengthens and enhances the capacity of the vendor review functions. • Director of the Ethics Office chairs the SVRC (and in complex cases with two independent experts), The SVRC makes recommendations to the USG/DM for final decision.
ARB	<ul style="list-style-type: none"> • No review body in existence. • Unsuccessful vendors received a standard Letter of Regret and had the right to request further information. 	<ul style="list-style-type: none"> • New pilot program – the Award Review Board created to furnish unsuccessful bidders with a means to request review of an award. • Unsuccessful bidders participating in eligible ITBs or RFPs receive a more detailed Letter of Regret with an option to request a formal Debrief. After receiving the Debrief, the unsuccessful vendor can file a procurement challenge for review by the ARB. The independent ARB experts make recommendations to the USG/DM for final decision.

The fundamental legal principles and ethical considerations taken into account in setting up the review bodies were:

- (i) Fairness and transparency, giving access to justice and right to a fair “trial” for bidders filing a challenge with the ARB;
- (ii) Ethics and integrity for the UN filing a case against a vendor with the SVRC;
- (iii) Due Process and standard of review for the experts reviewing ARB and SVRC cases; and
- (iv) Efficiency and effectiveness for the UN in the context of the Management Reform, to improve the procurement process (time and quality) and raising the standards.

The UN strongly encourages all vendors to actively participate in the Global Compact. Further, the SVRC closely follows the UN Supplier Code of Conduct issued by the Procurement Division which is based on the principles (the 10th principle on Corruption) of the Global Compact in order to strengthen fairness, integrity, and ethics for registered UN vendors. The purpose of the Code was primarily to educate vendors about the conduct required to do business with the UN; it is published on the website and was sent to all UN registered vendors.

Human Rights

Principle 1: The support and respect of the protection of international human rights;

Principle 2: The refusal to participate or condone human rights abuses.

Labour

Principle 3: The support of freedom of association and the recognition of the right to collective bargaining;

Principle 4: The abolition of compulsory labour;

Principle 5: The abolition of child labour;

Principle 6: The elimination of discrimination in employment and occupation.

Environment

Principle 7: The implementation of a precautionary and effective program to environmental issues;

Principle 8: Initiatives that demonstrate environmental responsibility;

Principle 9: The promotion of the diffusion of environmentally friendly technologies.

Anti-Corruption

Principle 10: The promotion and adoption of initiatives to counter all forms of corruption, including extortion and bribery.

1.3 Senior Vendor Review Committee (SVRC)

The UN decided to further strengthen and enhance the capacity of the existing VRC.

The role of the SVRC was developed to preserve fairness, ethics, integrity and transparency in the procurement process, and to provide due process in the administrative review procedure¹⁴. The SVRC consists of one senior and independent person, initially the Director of the United Nations Ethics Office, who may sit alone when considering simple cases, or as Chairperson with two experts, selected as panel members by him /her, when considering complex cases¹⁵.

The primary purpose of the SVRC is to provide written independent advice to the USG/DM on addressing vendors registered with, or seeking to register with, the United Nations (UN Vendors) who are under investigation, accused, convicted or involved in litigation in which the Vendor is alleged to have, or did engage in a fraudulent, corrupt or unethical practice. The latter is interpreted as any violation of the UN Suppliers Code of Conduct.¹⁶

The SVRC expert(s) make recommendations to the Under-Secretary-General for Management (USG/DM) for final administrative decision. Any kind of information or evidence may form the basis of submissions presented to the SVRC.

The SVRC has the discretion to determine the relevance, materiality, weight and sufficiency of all information or evidence provided. Legal privilege applies to communications between legal counsel and their client.

If the SVRC finds that the evidence is not reasonably sufficient to support a finding that the Vendor engaged in fraudulent, corrupt or unethical practice, the SVRC shall direct the SVRC Secretary to so notify the Due diligence Officer acting as Review Officer and the Vendor in writing, and the matter shall be closed.

¹⁴ “OECD Principles for Integrity in Public Procurement.” (2009), Organization for Economic Co-operation and Development , vol.2009, no. 11: 1-142

¹⁵ United Nations 2009. *SVRC Terms of Reference*. UN .internal document

¹⁶ United Nations, Procurement Division (2007, March). *UN Supplier Code of Conduct*, Rev 03. [On-line]. Available at http://www.un.org/depts/ptd/pdf/conduct_english.pdf [Retrieved March 30, 2010]

However, if the SVRC finds that the evidence is reasonably sufficient to support a finding that the Vendor engaged in fraudulent, corrupt or unethical practice, the SVRC can determine an appropriate sanction/remedy, issues a recommendation to the USG/DM for final decision.

Sanctions and Remedies range between:

- (i) Ineligibility to Register for new Vendors, Suspension either indefinitely, or for a minimum period of time, without condition or subject to reinstatement conditions, other Sanctions/Remedies that the SVRC deems appropriate under the circumstances, including full or partial cancellation of existing contracts.
- (ii) Probation may be applied where a Vendor has admitted fault, cooperated with the investigating authority, sanction may be suspended for a period of time not to exceed twelve (12) months, during which period the Vendor shall complete the reinstatement proceedings described below.

Parties Subject to Sanction/Remedy: In addition to companies (parent and its affiliates), the SVRC may also recommend that specific individuals be barred from conducting business with the UN, in this case UN/PD, either indefinitely, or for a specified period of time. When the SVRC recommends that a sanction/remedy be imposed on a particular Vendor, it may add that an appropriate sanction/remedy be imposed on any individual or organization that, directly or indirectly, controls or is controlled by the Vendor.

Factors Affecting Sanction/ Remedy: Sanctions or Remedies are intended to ensure that Vendors change their practices and procedures to ensure the prevention of future occurrences of fraudulent, corrupt or unethical practice.

During the review process, the SVRC experts consider several factors in determining an appropriate sanction/remedy:

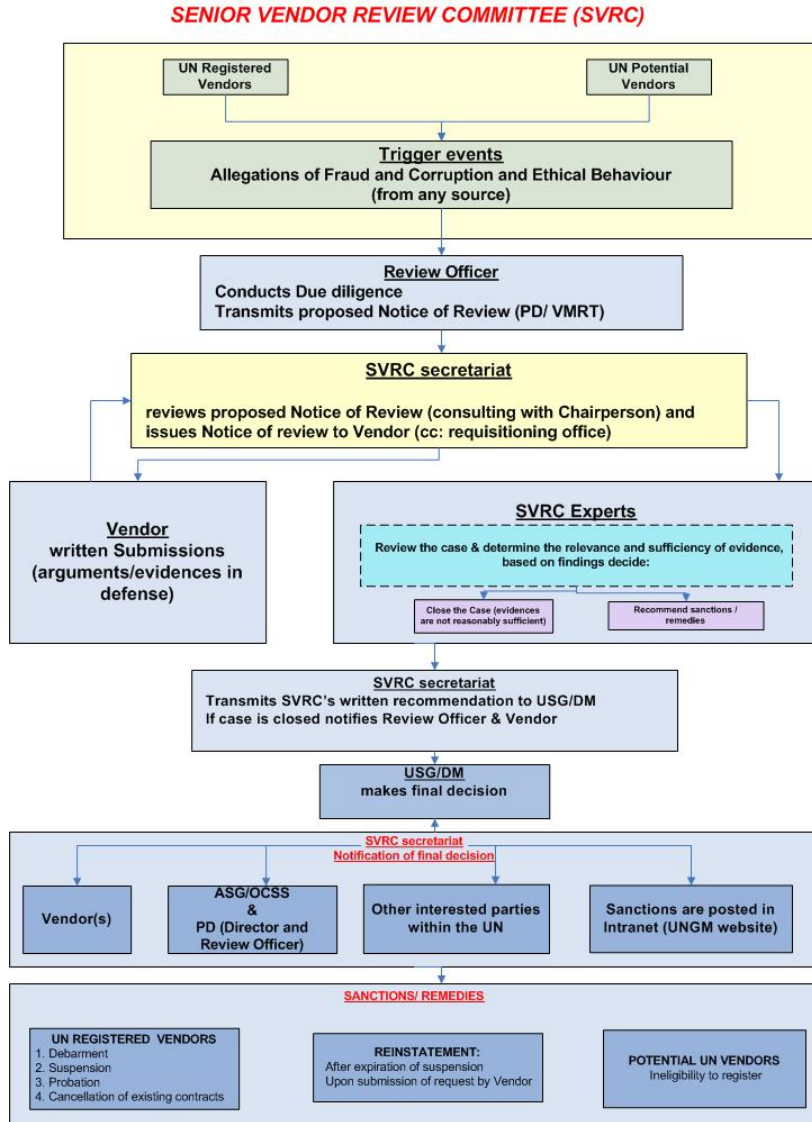
- (i) severity of the Vendor's actions;

- (ii) past conduct of the Vendor involving a fraudulent, corrupt, or unethical practice;
- (iii) the financial loss to the United Nations and the financial implications of the actions taken by the Vendor;
- (iv) damage caused by the Vendor to the credibility of the procurement process and the reputation of the United Nations;
- (v) quality of the evidence against the Vendor; mitigating circumstances;
- (vi) the degree of cooperation by the Vendor; and
- (vii) any other factor that the SVRC deems relevant.

Written Recommendation: The SVRC communicates its written findings of fact and its recommendation(s), including reasons therefore to the USG/DM for final decision. In doing so, it follows the standards of review in its operating procedures and the principles of the United Nations Global Compact (Global Compact)¹⁷.

¹⁷ United Nations Global Compact Office website at www.unglobalcompact.org
[Retrieved March 30, 2010]

The flowchart below illustrates the SVRC process from start to end.



The UN strongly encourages all vendors to actively participate in the Global Compact. Further, the SVRC closely follows the UN Supplier Code of Conduct issued by the Procurement Division which is based on the principles (the 10th principle on Corruption) of the Global Compact in order to strengthen fairness, integrity, and ethics for registered UN vendors.

1.4 Award Review Board (ARB)

The purpose of the ARB is to offer unsuccessful bidders, who participated in UN tenders, a process whereby they may file a procurement challenge on a *post award basis* against an award of contract.

The procurement challenge is open during the pilot phase to unsuccessful bidders who participate in a solicitation exercise identified as eligible, and who, as a prerequisite for filing a challenge, have requested and received a debrief from the UN Procurement Division. Unsuccessful bidders must request a formal debrief within 10 business days from the date of the Letter of Regret to receive clear and comprehensive feedback on how their bid or offer was treated and evaluated. If after receiving a debrief, the unsuccessful bidder still believes the procurement process was unfair or not properly carried out, they may file a procurement challenge. Under the UN procedure, the procurement challenge does not suspend or create a “standstill period” to freeze the action to award the contract¹⁸
¹⁹

The USG/DM established a secretariat to the ARB (ARB Secretariat) headed by a registrar (ARB Registrar) and managed by a secretary (ARB Secretary) to facilitate the ARB’s proper functioning. The ARB Registrar determines on a case by case basis whether the ARB shall consist of a single expert or a panel of three experts based on the complexity of the case. In cases where the procurement challenge raises major issues of fraudulent, corrupt or unethical practice, such cases are transferred to the SVRC through a “fast track” procedure.

¹⁸ “DIRECTIVE 2007/66/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2007.” (2007, December 20), Official Journal of the European Union, L 335: 31-46

¹⁹ UNCITRAL Working Group I (Procurement) Annotated provisional agenda for the eighteenth session of Working Group I (Procurement A/CN.9/WG.I/WP.72 of 11 January 2010.

The independent ARB expert(s) review a procurement challenge and issue a report containing findings and recommendations on the merits of the procurement challenge to the USG/DM who takes the final administrative decision on the matter. There is no further appeal allowed by the unsuccessful bidder.

Possible remedies which may be granted to a successful protester include:

- (i) reimbursement of the cost of procedure,
- (ii) cancellation and rebid, or modification of a multiple year contract with limitation to 1 year followed by a rebid; monetary damages are generally excluded. Where the ARB concludes that the flaws found in the procurement exercise justify the recommendation to cancel the contract, the successful bidder(s) will have the option to intervene in the procedure in order to preserve its interest²⁰.

In addition to specific recommendations on the merit of the case, experts are invited to issue general recommendations for the UN to improve its procurement process in the future, for example clarification of solicitation documents or of the procedure in the Procurement Manual, or any other useful comments for procurement practitioners, whether directed to UN staff or Vendors.. Considering the remote location and hardship conditions under which UN peacekeeping operations operate, and the exigency of service to deliver commodities (i.e. food rations, rotation of military troops, etc)²¹ which are vital to the success of the UN mandate, cancellation of a signed contract award as a remedy in most cases does not appear to be a viable solution. The final administrative decision on the procurement challenge will be taken on a case by case basis. Using a balancing test among the 4 procurement principles (Best Value for Money, Fairness, integrity and transparency, International Competition, Interest of the UN)²² underlying the common framework, potential conflicts among those guiding principles may occur with political and security reasons

²⁰ United Nations 2009. ARB Terms of Reference. UN internal document.

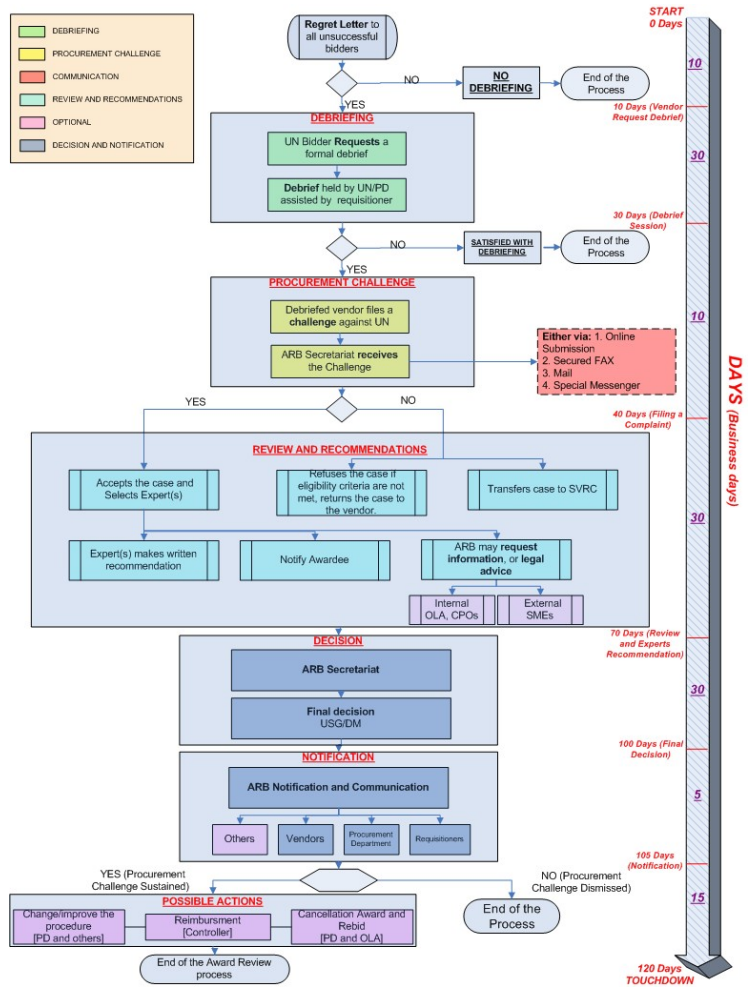
²¹ United Nations, Procurement Division (2009). *Types of Commodities Purchased – 2009*. [On-line]. Available at <http://www.un.org/depts/ptd/09com50.htm>. [Retrieved March 31, 2010]

²² Secretary-General's Bulletin ST/SGB/2003/7 of 9 May 2003 (Financial Regulations and rules of the United Nations), Regulation 5.12.

generally prevailing over other considerations in the interest of the Organization.

The flowchart below illustrates the ARB process from start to end.

AWARD REVIEW BOARD (ARB)



II. PREPARATORY PHASE

It was decided to implement the programme on a pilot basis within the existing UN regulatory framework:

- (i) The ARB procedure was largely inspired by the Federal Administration Aviation (FAA) model which has a comparable procurement activity in volume and nature. With more than 10 years of experience in alternative dispute resolutions in bid protest, the FAA has adopted a simple and efficient procedure with speedy resolution of cases.
- (ii) The SVRC procedure was adopted in line with the established sanction regime of the World Bank comprising of the Office of Evaluation and Suspension (OES) and the Sanctions Board²³. Similarly, for consistency and harmonization purposes, the UN definitions on fraud and corruption mirror the common definitions adopted by the Multilateral Development Banks (MDBs)²⁴.

2.1 Challenges during the preparatory phase

a). Legal and institutional issues (Convention on the Privileges and immunities of the United Nations), compliance/conformity with the international procurement agreements (UNCITRAL, WTO)

Until the launch of the pilot programme, as a condition for submitting any bids or proposals, the UN required that any potential bidder agree that the UN was free to accept or reject any bid or proposal and that no appeals against such decision was permissible.²⁵

²³ World Bank (2010). *Sanctions System at the World Bank*. [On-line]. Available at <http://www.worldbank.org/sanctions> [Retrieved March 31,2010]

²⁴ African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, European Investment Bank Group International Monetary Fund, Inter-American Development Bank Group , World Bank Group (2006). *International Financial Institutions Anti-Corruption Task Force*. [On-line]. Available at <http://siteresources.worldbank.org/INTDOII/Resources/FinalIFITaskForceFramework&Gdlines.pdf>. [Retrieved March, 31 2010]

²⁵ Miller, Anthony J. (2009). "The Privileges and Immunities of the United Nations." *International Organizations Law Review*, 6: 7–115

However, Section 29(a) of the Convention on the Privileges and Immunities of the United Nations²⁶ (“Convention”) states that “[t]he United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party...”.

One of the difficulties we faced in the preparatory phase was to fulfill our obligations under section 29 of the Convention whilst retaining the privileges and immunities accorded to the UN by virtue of Articles 104 and 105 of the UN Charter²⁷. There was a risk that if the UN did not provide mechanisms in accordance with Section 29 of the Convention, a national court could claim jurisdiction if faced with a private law claim of a *prima facie* valid nature²⁸.

Article 104 of the UN Charter provides that “[T]he Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.”

Article 105, paragraph 1, provides that “[T]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.”²⁹

In order that the launching of the ARB and SVRC is not interpreted as a waiver of these privileges and immunities, the following clause posted on the UN website has been included in all solicitation documents where the SVRC or ARB are mentioned - “Nothing in these procedures shall be deemed to be a waiver of the privileges and immunities of the UN.”³⁰

²⁶ General Assembly resolution 22A (I) of 13 February 1946 (Privileges and Immunities of the United Nations).

²⁷ United Nations, *Charter of the United Nations*, 24 October 1945. [On-line]. Available at <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [Retrieved March 31, 2010]

²⁸ *Waite and Kennedy v. Germany*, 118 I.L.R. 121–137 (1999), in the light of Article 6(1) of the European Convention on Human Rights (ECHR). The Court stated that “a material factor” in determining whether to accord immunity to the defendant international organization “is whether the applicants had available to them reasonable alternative means to protect effectively their rights” under the European Convention (at 136) (as cited in Miller (Supra Note 22) 2009)

²⁹ United Nations. *Charter of the United Nations*, 24 October 1945. [On-line]. Available at www.un.org [Retrieved March 31, 2010],

³⁰ United Nations 2008. Concept Paper for an independent ‘Bid Protest System’. UN internal document.

Without any review mechanism in place, the UN was also seemingly not in conformity with the modern procurement practices adopted by other comparable organizational bodies and its own recommendation to Member States.

The 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services³¹ (UNCITRAL Model Law) is intended to serve as a model for States for the evaluation and modernization of their procurement laws and practices and the establishment of procurement legislation where none presently exists. The 1994 version of the UNCITRAL Model Law originally provided for limited review mechanisms³², new provisions are currently being discussed under Chapter VI (Remedies) which will soon require an independent review body and a standstill clause. It recognizes that an effective means to review acts and decisions of the procuring entity and procedures followed by the procuring entity is essential to ensure the proper functioning of the procurement system and to promote confidence in that system.

In January 1996, the World Trade Organization (WTO) negotiated an Agreement on Government Procurement³³. It sets out mandatory requirements for the establishment of a domestic bid challenge system, giving suppliers a right of recourse to either a national court or an impartial and independent review body.

For more than 80 years, the US Government Accountability Office (GAO) has provided an independent forum for the resolution of disputes concerning the awards of federal contracts³⁴. The Federal

³¹ UNCITRAL Working Group I Annotated provisional agenda for the eighteenth session of Working Group I (Procurement) A/CN.9/WG.I/WP.72 of 11 January 2010.

³² Ibid., Chapter VI

³³ Agreement on Government Procurement (GPA), Marrakesh, 15 April 1994, World Trade Organization entered into force on 1 January 1996.

³⁴ United States Government Accountability Office (2009). Bid Protests at GAO: A Descriptive Guide, GAO-09-471SP. [On-line]. Available at <http://www.gao.gov/decisions/bidpro/bid/d09417sp.pdf>. [Retrieved March 30, 2010]

Acquisition Regulation provides regulatory implementation for GAO's protest authority at 48 C.F. R. § 33.104³⁵.

The US Federal Aviation Administration (FAA) set up an Office of Dispute Resolution for Acquisition (ODRA) in 1996 as a tribunal for contract disputes and bid protests. ODRA encourages the use of Alternative Dispute Resolutions (ADR). Under ODRA, the Default Adjudicative Process is most similar to the ARB. When parties are not able to resolve their differences through ADR, a Dispute Resolution Officer (DRO) is appointed to review the record of the facts surrounding the dispute and makes factual findings and recommendations for final Agency action to the Administrator of the FAA, through the Director of the ODRA³⁶.

Other organizations have review mechanisms in place mostly for their Borrower in case of lending institutions such as the World Bank (WB), the Inter-American Development Bank (IADB) and in more limited cases for their own procurement activities European Space Agency (ESA)³⁷, North Atlantic Treaty Organization (NATO)³⁸.

By launching the SVRC and the ARB, the UN has an established mechanism that substantially conforms to modern procurement treaty law and international practices.

³⁵ Vacketta, Carl L. Esq. (2007). "Government Contracts Primer," p.11. DLA Piper US LLP

³⁶ Federal Aviation Administration, Office of Dispute Resolutions for Acquisition (2003). *The ODRA Guide, Issue 2003-1*. [On-line]. Available at: http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/odra_process/odra_guide/#DefaultAdjudicativeProcess. [Retrieved March 23, 2010]

³⁷ European Space Agency (ESA) (2008). Procurement Regulations, ESA/ADMIN/REG (2008) 4. [On-line]. Available at http://emits.esa.int/emits-doc/ESA_HQ/EIO-PROCUREMENT_REGULATIONS.pdf. [Retrieved March 31, 2010]

³⁸ NATO (2009). NATO unclassified NAMS Regulation Number 251-01, 1st Revision including Amendment 2. [On-line]. Available at <http://www.namsa.nato.int/pdf/nr-251-01e.pdf> [Retrieved March 31, 2010]

b). Resources (Human, financial and other).

The pilot programme was adopted by the General Assembly as an “unfunded” mandate and the launch of its implementation had to be done within existing resources. This proved to be one of the major practical obstacles i.e. the absence of a budget with earmarked funds.

Under those circumstances, it was decided to temporarily host the SVRC under the Ethics Office (one Chairperson) with some resources from the Procurement Division (one review officer) and the ARB as well as its secretariat (one Secretary and one support staff). This arrangement is limited to support services during the pilot phase; in any event there is no involvement by the HCC Chairperson or its members in reviewing the merit of the case of procurement challenges

2.2 Establishing a Panel of Experts

a). Membership (UN vs. non UN personnel), selection criteria of experts

One of the main concerns in the establishment of the panel of experts was the composition of the review board. Noting that the UN is a large international organization, the question was raised whether it would be better to have the review board composed of UN officers as is typically the case in the UN system, or members recruited from the outside. To maintain greater independence and transparency in the selection of panel of experts, the UN decided to look for candidates from outside of the Organization. The next question to arise was what qualifications these selected experts would have - whether they would need to have previous procurement experience, be knowledgeable of the UN system and its rules and regulations, and/or have a main legal experience and related procurement or administrative experience.

The selection criteria for the experts were finally established based on a combination of factors such as:

- (i) relevant experience and
- (ii) academic qualifications, experts sought were those serving in the capacity of academics, judges, lawyers, mediators, practitioners and other Chief Procurement Officers and Members of international, regional or national Organizations (at a senior director level and above).

To the extent possible and to achieve a balance and diversification in the representation of experts without compromising the level of quality,

- (iii) gender and
- (iv) geographic representation was also considered for the pilot phase.

b). Independence and possible conflict of interest

Another main concern in the establishment of the panel of experts was the requirement that impartiality of the members is prevalent in their conduct of the review. Independence would provide assurance regarding fairness in the review as well as indicate that the members of the review board showed no personal or professional interests in the results of the review conducted. One of the assurances in the establishment of the board is to request each expert to sign an “Ethical Declaration” including a no conflict of interest and confidentiality clause.

c). Remuneration

Another challenge encountered in the implementation process was the policy of remuneration to be provided to the members of the review board. Considering that during the pilot period, the review boards will operate on unfunded mandate some experts had agreed to be working on a pro-bono basis. Generally, experts will be paid consultant’s fee on a lump sum basis per case and per person, which we benchmarked against a comparable and slightly different system of remuneration for the judges appointed by the General Assembly (GA) to serve under the new United Nations Dispute Tribunals (UNDT)) established in July 2009³⁹.

³⁹ United Nations. General Assembly Resolution “General Assembly Resolution on administration of justice at the United Nations: United Nations Dispute

d). Contractual legal status and UN privileges and immunities

The UN has also taken into consideration the nature of the appointments of the experts and their exposure. Accordingly, it was decided that the experts would be recruited as individual consultants in accordance with Special Service Agreement (SSA) guidelines⁴⁰.

A key element was their legal status: experts will be given the status of “experts on mission” within the meaning of article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations⁴¹. As such, experts enjoy quasi diplomatic privileges under the umbrella of the UN and are being granted protection against any third party claims and confidentiality for all acts done in the performance of their UN functions during and after their assignment⁴².

2.3 Awareness, Communication and Training

a). UN staff (PD and requisitioners) – Debriefing workshops

Debriefings are an important step of the bid protest system, as a good debriefing should reduce the number of challenges. The purpose of the debriefing is to increase transparency and understanding of the process by explaining the rationale behind the decisions to the unsuccessful bidders. It is intended to instill confidence in bidders that they were treated fairly and assure them that their proposals were properly evaluated in accordance with the criteria in solicitation documents and applicable UN procurement rules and regulations and

Tribunal and United Nations Appeals Tribunal” A/Res/62/228 (2008, february6) [On-line] Available at http://www.un.org/reform/ga_resolution62_228_paras39-45.shtml [Retrieved March 31, 2010]

⁴⁰ Administrative Instruction ST/AI/1999/7 of 25 August 1999 (Consultants and Individual Contractors).

⁴¹ Secretary- General Bulletin ST/SGB/2002/9 of 18 June 2002 (Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission).

⁴² Miller, Anthony J. (2007). “United Nations Experts on Mission and their Privileges and Immunities.” *International Organizations Law Review: 11-56*

procedures. It will also serve to identify weaknesses in the bidder's proposals so they can prepare better proposals in the future.⁴³

The added value of the debriefing process is its function as a capacity building tool to vendors to improve their offers in future solicitations and in assisting the Organization in improving the quality of the procurement functions.

However, if debriefings are not handled properly, they could potentially be more harmful to the process. For example, where an unsuccessful bidder is not intending to file a challenge but has requested a debrief simply for feedback on its proposal, if the debriefing is mishandled, this could lead to loss of confidence in the process and an eventual procurement challenge.

Therefore, a series of debriefing seminars were held for UN staff to strengthen internal capacity, internal guidelines and tools on how to conduct a successful debriefing meeting.

b). Experts – Knowledge of UN rules and regulations, Induction Program

The UN has made an effort to involve the experts not only in the process of reviewing cases, but at the early stages of development of the procedure under the pilot programme.

Three meetings were held involving experts. The first one in 2007 to identify best practices, where a UN delegation visited different institutions (such as the World Bank and Inter-American Development Bank) to present the concept of the pilot programmes and to see what comparable procedures were in place. The second meeting was a brain storming session held in 2008 at George Washington University with draft documents on the ARB and SVRC circulated to the experts for their input. There was significant feedback on the documents that resulted in re-drafting of the Terms of Reference (TORs) and Standard Operating Procedures (SOPs). The final meeting was held in July 2009 to finalize the procedure; experts were invited to comment on the final drafts of the TORs and SOPs of the SVRC and TORs of the ARB. These documents as well

⁴³ ESI International. Presentation to the United Nations, 30 October 2009. *Debriefing and Protest Workshop*. UN archive, New York.

as the list of experts were approved by the USG/DM with minimal changes. As a result of these series of meetings, the experts are now familiar the procedures of the ARB and SVRC.

However, in the majority of cases, the experts chosen to be on the panel will have never dealt previously with the UN in an official capacity. In order for the experts to be able to review cases and make recommendations effectively, it was considered necessary to brief them on UN procurement, legal and institutional rules and practices.

A one day induction program on February 23, 2010 for the experts to familiarize themselves with the ARB and SVRC in the context of the UN system and the framework behind the new procedures (i.e. the Financial Rules and Regulations, the Procurement Manual, and other legal institutional and contractual frameworks). It also added a human element and allowed all experts to meet in person, to facilitate future work collaboration

Further, we have established an online resource center to house all the relevant information and tools that would be needed by the experts in relation to general procurement, bid protests, sanctions, ethics and other matters in relation to the SVRC and ARB procedures. This online resource center is located in a Community of Practice (CoP) tailored for the ARB. CoPs were initially used to help improve performance in the field and at UN Headquarters to facilitate the sharing of knowledge and experiences. It provides a platform for internal and informal online discussions, uploading of documents and sharing of practices and tools by members around the world. CoPs are an initiative of the Peacekeeping Best Practices Section in the Policy, Evaluation and Training Division of the UN Department of Peacekeeping Operations

c).Internal and External Communication

Within the UN, communication regarding the pilot programmes has been open and accessible to all interested parties. An internal procurement website (PD extranet) was used to house key information on the ARB and SVRC.

The UN has also utilized Communities of Practice (CoPs) and the Intranet (I-seek) as a means of communication within the UN and with the experts. Staff members of the ARB / SVRC Secretariat are

able to easily communicate with each other and the independent experts by starting online discussions or posting new information on the CoP.

Member States are informed through reports submitted to the Advisory Committee on Administrative and Budget Questions (ACABQ) and the Fifth Committee which is the Committee on Procurement of the General Assembly.

The general public (and particularly vendors) are informed by the Procurement Division website⁴⁴ which now has a new section on complaints and debriefs.

III. IMPLEMENTATION PHASE

3.1 Review Process

a). Confidentiality (content and means of support)

One of the most important aspects in the establishment of the two review bodies is ensuring the security and confidentiality of the records and information while using e-communication. Access to information and data is restricted only to those authorized individuals who are working for the two review bodies and those directly involved with the review of cases. The following security measures have been established:

- (i) Access to the review body's electronic information transmission system.
- (ii) A secured fax telephone system is installed for the review bodies.
- (iii) Experts are being provided with the iron key flash drives equipped with encryption, identity theft protection and secure web browsing.
- (iv) A secured system of communication among the panel of experts in the review of cases is currently under consideration.

⁴⁴ The website of UN Procurement Division (<http://www.un.org/Depts/ptd/>).

- (v) Document management system to be linked with the case management software will be acquired as discussed in the succeeding topics.

3.2 Case Management

a). Monitoring and evaluation: Data and Statistics (Bid Module), i.e., number and type of protests received, acted upon, and decided and time frame; Determination of key performance indicators.

Efficient and effective case management system is an important and necessary tool for:

- (i) ensuring the proper monitoring and managing of cases submitted to the two review boards; and
- (ii) collection of data for reporting audit and archiving purposes.

Such system will facilitate proper distribution and disposition of cases, thus reduce any delays and minimize costs in carrying out the activities of the two review bodies. As part of this process, we initially compared how case management was undertaken within other departments/offices of the UN – such as the United Nations Dispute Tribunal, Office of Internal Oversight Services and Office of Legal Affairs. We then reviewed how case management procedures were undertaken by various external agencies. It was determined that there is a need for case management software as a helpful tool to assist in the management of cases. The UN also conducted a research based on case management software recommended by the American Bar Association (ABA)⁴⁵.

The case management software should be able to keep track of the complete review process undertaken by the two review bodies from the time a challenge is filed with the ARB or a notice of review is submitted to SVRC until the final disposition of the case. Case management would involve managing and tracking paper documents, files and records, with consideration of possible records retention

⁴⁵ American Bar Association (2010). *Practice/Case Management Software Comparison Chart for Solo/Small Firm*. [On-line]. Available at <http://www.abanet.org/tech/ltrc/charts/PracticeCaseManagement-TimeBilling-IntegratedSoftwareChart.pdf> [Retrieved February 8, 2010]

process. Having such case management software would facilitate in obtaining data and statistics (Bid Module), i.e., number and type of protests/notices received, acted upon, and decided and time frame; and determination of key performance indicators.

Based on the selection criteria, the UN is presently reviewing the system requirements with our IT personnel.

b). Measurement of the efficiency and effectiveness of the programme and reporting requirements

At the initial stage of the pilot phase, the focus was on procurement reform to strengthen internal control measures in procurement⁴⁶ and the need for the procurement system to be more transparent, open, impartial and cost-effective, based on competitive bidding and fully reflecting the international character of the United Nations⁴⁷. In order to measure efficiency and effectiveness, the ARB/SVRC Secretariat has established Key Performance Indicators (KPI). At the end of the pilot period, the two review bodies will report to the General Assembly the experiences gained and provide a comprehensive proposal concerning the implementation of the system, which shall be subject to prior consideration and approval of the Assembly.

⁴⁶ Supra Note 9 at Sec.1.5

⁴⁷ General Assembly resolution A/Res/62/269 of 4 August 2008 (Procurement Reform: Resolution adopted by the General Assembly on the report of the Fifth Committee (A/62/604/Add.2)).

CONCLUSION

Lessons Learned

First lesson: In pursuit of the fundamental principle of public procurement, and with reference to fairness, integrity, and transparency, it is important and at often times challenging to keep a balance between economic interests (financial) of the Organization and requirement for public accountability (social responsibility). In establishing the SVRC and the ARB, the UN has adopted an administrative review mechanism, which focuses on the management rather than judicial nature and allows securing interests of the Organization yet simultaneously provide an opportunity for public and private companies, and individuals doing business with the UN to make a stand for their rights and uphold the justice of a cause where in their view they received an unfair treatment.

Second lesson: the establishment of a protest system in itself is not sufficient to insure integrity, impartiality and fairness of procurement processes. Having internal resources such as staff members, who are for a reason loyal to the Organization, to serve in capacity of advisers may give rise to (leaves room for) concerns and uncertainty about objectivity of cases' review and final decisions. Addressing this concern, the UN brought a new element to the review mechanism by involving third party experts to serve on the SVRC and ARB review boards. This proved to be essential to successfully launch the Pilot Programme. It allowed from the start of the implementation to have a high level of professionalism and independence in case review, and as a result, build credibility and trust in the new Pilot Programme and in the UN reform.

Third lesson: the UN, being faced with a limited budget for this Programme, nevertheless was able to gain tremendous support from volunteer sources, either individual expert advice, reaching out and partnering with a number of UN and Bretton Woods sister organisations, academic institutions and professionals, and create a network who effectively contributed at the pilot stage of the Programme. However, there is an understanding (although no firm commitment yet) that for the next phase, funding is required for the review board to be fully operational and sustainable.

Effects of the mechanism in operation

This mechanism proves to be mutually beneficial for the UN and Vendors doing business with the UN.

With improved communication (debriefing procedure, review) ambiguities, lack of clarity and understanding of the UN terminology (forms and procedure) used in the procurement process is to be reduced. This should result in better quality and efficiency in terms of time- and cost-saving, thus preventing loss of opportunities both for the UN and potential Vendors. Furthermore, for Vendors, the UN sanction mechanism provides an incentive to bringing their business practices in conformity with established international and ethical standards such as the UN Supplier Code of Conduct. The UN reaffirms its high image, credibility and professionalism which are the core value of the UN Charter, to attract new business partners, building trust with Member States, Donors and the international community, and ultimately serving the interest of its clients in supporting peacekeeping operations to fulfill its mandate.

Considerations for the future

Currently, the Pilot Programme is limited in scope and soon other aspects will have to be taken into account, such as:

a). For the ARB:

The geographical scope, should the pilot be extended beyond the UN Secretariat Headquarters i.e., establishment of the pilot programme in missions, OAHs and other offices operationally independent from the UN Secretariat; whether or not we should adopt a different financial threshold (higher or lower); how we can reconcile our procedure with the strict requirements contained in some procurement agreements such as the standstill clause and a two level procedure with an appellate body to review the protest or decision.

b). For the SVRC:

How should we take into consideration and integrate some parallel initiatives such as the MDBs on cross debarment of Vendors, and the proposal from the High Level Committee on Management –

Procurement Network (HLCM-PN) on Vendor eligibility under the UNGM and in the broader context of delivering as “One UN”⁴⁸.

The Pilot Programme has now been established and its success will be measured with the review of cases and administrative actions taken during the Pilot phase. Member States will have to decide, based on results achieved and the final report on activities which will be submitted in 2011 to the General Assembly, whether to continue the existing procedure of the ARB and SVRC and if so how to proceed for a complete roll out after the Pilot Phase.

While the future is somewhat uncertain, there is little doubt that a return to recent past practices would be out of step with advances already made by sister organizations and some UN Member States. We are therefore hopeful that the pilot programmes will clearly demonstrate that these two initiatives will serve the interests, both of the procurement community and the UN, in effectively implementing the mandates entrusted to it.

Secretary-General Ban Ki-moon said on October 13, 2006 in his acceptance speech to the General Assembly upon election that “[t]he true measure of the success for the United Nations is not how much we promise but how much we deliver for those who need us most...”

March 31, 2010 (Rev. 17/07/2010).

⁴⁸ United Nations, Secretary-General Press Release (2007). *CEB backs system-wide approach on ethics, information disclosure*. [On-line]. Available at <http://www.un.org/News/briefings/docs/2007/db071029.doc.htm> [Retrieved March 30, 2010]

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ANNEX I. LIST OF ABBREVIATIONS

ABA	American Bar Association
ACABQ	Advisory Committee on Administrative and Budget Questions
ARB	Award Review Board
ASG/OCSS	Assistant Secretary-General, Office of Central Support Services, DM
COP	Community of Practice
CPO	Chief Procurement Officer (Field Mission and/or OAH)
DM	Department of Management (HQ)
DRO	Dispute Resolution Officer
ESA	European Space Agency
FAA	Federal Aviation Administration
GA	General Assembly
GAO	US Government Accountability Office
HCC	Headquarters Committee on Contracts
HLCM-PN	High Level Committee on Management – Procurement Network
HQ	UN Secretariat Headquarters, New York
ITB	Invitation to Bid
KPI	Key Performance Indicator
LVRC	Local Vendor Review Committee
LVRC	United Nations Procurement Division
MDB	Multilateral Development Bank
NATO	North Atlantic Treaty Organization
OAHs	Offices Away from Headquarters
ODRA	Office of Dispute Resolution
RFP	Request for Proposal
RFQ	Request for Quotation
SG	United Nations Secretary-General
SOP	Standard Operating Procedures
SOW	Standards of Work
SSA	Special Service Agreement
SVRC	Senior Vendor Review Committee
TOR	Terms of Reference
UN/DP	United Nations Secretariat Procurement Division (HQ)
UNCITRAL	United Nations Commission on International Trade Law
UNDT	United Nations Dispute Tribunals
UNGM	United Nations Global Marketplace
USG/DM	Under Secretary-General for Management (HQ)
VRC	Vendor Review Committee
WB	World Bank
WTO	World Trade Organization

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