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**United Nations Commission on International Trade Law**
**Working Group I (Procurement)**
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# Proposed Article 40: Competitive negotiations

**Proposal submitted by Austria, the United Kingdom and the United States**

1. This paper is submitted by the delegations of Austria, the United Kingdom, and the United States, as a platform for discussions for the May 2009 meeting of the UNCITRAL Working Group I (Procurement), concerning chapter IV of the Model Law on Procurement involving negotiations. The proposal reflects discussions among and comments received from various additional delegations on an intersessional basis.

2. At the last Working Group session, the Working Group deferred its consideration of chapter IV at the suggestion of the Secretariat because the text needed further refinement. The Secretariat also noted difficulties with the completion of the outstanding research and the drafting of any new text by the anticipated May 2009 session of the Working Group. As a result, a delegation agreed to present a conference room paper proposing a revised chapter IV.[1]

3. The proposal set forth in this paper builds on the earlier proposal made at the last session of the Working Group to merge article 40 (Request for proposals) and article 41 (Competitive negotiation). The proposed revised Model Law had presented these two methods as distinct methods, whereas in practice requests for proposals were typically the solicitations used to launch competitive negotiations.[2]

4. The paper further proposes that two-stage tendering be eliminated as a separate procurement method in chapter IV. The view of the sponsoring delegations is that the proposed article 39 on two-stage tendering (drawn verbatim from article 46 of the 1994 Model Law) might be moved to chapter III, but, if two-stage tendering is retained as a permitted form of procurement under the Model Law, the

[1] See Report of Working Group I (Procurement) on the work of its fifteenth session (New York, 2-6 February 2009), A/CN.9/668, paras. 212 and 278.
[2] Ibid., paras. 210-211.

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Working Group would need to engage in a thorough review of the provision. The sponsoring delegations also believe that a rigorous assessment of the various tendering methods set forth in chapter III will need to be made at the next Working Group session, with an eye to simplifying and reducing the number of methods set forth therein.

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| ***Article 40. Request for Proposals with Competitive Negotiations*** | Title should be non-controversial.<br><br>This proposed Article 40 would be the only article in a revised chapter IV, if the accompanying proposal to shift two-stage tendering to chapter III is adopted.<br><br>For drafting and discussion purposes, it should be noted that the final text of this provision must incorporate, by reference or otherwise, other rules in the Model Law (e.g., the rules regarding publication), to ensure that this article is fully integrated into the broader law. |
| (1) [Subject to approval by … (the enacting State may designate an authority to issue the approval)], a procuring entity may engage in procurement by means of a request for proposals (RFP) with competitive negotiations if it is not feasible for the procuring entity to formulate a detailed description of, or specifications for, the subject matter of the procurement, as:<br><br>(a) due to the technical nature of the subject matter of the procurement it will be necessary for the procuring entity to invite rounds of proposals from vendors with a view to negotiating price or technical improvements;<br><br>(b) the nature or state of development of the relevant sector of suppliers or contractors is largely unknown or such that the procuring entity would first require substantial input from the sector before being able to finalize the specifications or description of the subject matter of the procurement;<br><br>(c) the subject matter of the procurement or the delivery method chosen by the procuring entity is [complex and] has many aspects, and is likely to require a high degree of customization;<br><br>(d) the subject matter of the procurement is [complex and] dynamic and the term of the contract sufficiently long, such that the specifications are likely to change over the term of the contract [to reflect technological advances]; or<br><br>(e) the relevant sector of suppliers or contractors does not have a [uniform] [similar] approach to pricing or delivery of the subject | It has been suggested that the conditions for use should not be overly prescriptive. Conditions for use will need to be further reviewed by the Working Group. One illustrative statement of conditions for use, adapted from a U.S. state's procurement regulations, is as follows:<br><br>> Conventional invitations to tender cannot always address the needs of the procuring entity, especially when generic specifications are not available or difficult or impossible to draft and conventional evaluations for award cannot be made on absolute criteria. For example, high technology products and complex services are not amenable to conventional bidding. The Request for Proposals is a solicitation used for situations like these.<br><br>It has also been emphasized that important considerations for conditions for use include the length, size and complexity of the work contemplated. With larger procurements, for example, the exchanges inherent in the RFP process may allow the procuring entity to gain a better understanding of technical requirements, and so would be preferable to a conventional invitation for tenders.<br><br>Once there is consensus in the Working Group on the conditions for use, it will be necessary to decide whether to place the text on conditions for use in the Model Law or in the Guide to Enactment. The conditions for use could be included in a general article for conditions for use for this chapter, or the conditions could be included in the article specific to the RFP process. Ultimately, it has been suggested, the conditions for use could be included usefully in the text of the Law, rather than placed in the Guide to Enactment.<br><br>In assessing the proposed terms for conditions of use, it has been noted that Article XIV (2) of the WTO |

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| matter of the procurement. | Government Procurement Agreement (GPA) states: "Negotiations shall be primarily used to identify the strength and weakness in tenders." Negotiations undertaken for other purposes may, therefore, raise issues under the GPA.<br><br>It has also been noted, though, that the provisional (2006) GPA text no longer includes this language. Negotiations are addressed in Article XII of the 2006 GPA text, available at www.wto.org. |
| (2) A procuring entity shall issue a request for expressions of interest (RFI) before issuing a request for proposals from suppliers or contractors, to identify the minimum number of suppliers or contractors from whom it must request proposals according to paragraph (3). A notice seeking expressions of interest must be published in a newspaper or relevant trade publication or relevant technical or professional journal of wide international circulation.[3] | As noted, the final text of this provision must incorporate, by reference or otherwise, other requirements in the Model Law (e.g., the requirements regarding publication), to ensure that this article is fully integrated into the broader law.<br><br>The Model Law text suggested by this paper is built around the following highly structured sequence, to ensure predictable transparency:<br><br>• A mandatory request for expressions of interest (RFI).<br><br>• Issuance of the Request for Proposal (RFP) to those that responded to the RFI, and perhaps other vendors.<br><br>• A qualification stage, described by the RFP.<br><br>• The negotiations themselves, per the RFP.<br><br>It might be emphasized, however, that such a highly structured approach is somewhat prescriptive; some procuring entities, for example, might want ultimately to abandon a distinct qualification stage. The Guide to Enactment could point out that these prescribed stages are merely a starting point, as a system evolves into a broader use of competitive negotiations.<br><br>It has also been noted that some legal systems might require that *all* vendors be allowed an opportunity to |

[3] It has been noted that the procuring entity's intention to use competitive negotiation must be stated explicitly, initially in the contract notice. The benefit of this is transparency; if, for example, the conditions for competitive negotiations are not satisfied, at least the notice of competitive negotiation opens up the option for a challenge. This early and clear statement of intent to use competitive negotiations would bring the provision in line with Article XIV(1)(a) of the WTO Government Procurement Agreement ("GPA") ("A Party may provide for entities to conduct negotiations ... in the context of procurements in which they have indicated such intent, namely in the notice referred to in paragraph 2 of Article IX (the invitation to suppliers to participate in the procedure for the proposed procurement) ....").

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| | participate, even if those vendors did not respond to the RFI issued at the outset. The Model Law text suggested here assumes that only those vendors that responded to the RFI could continue in the later stages of the process; this is an issue that the Working Group may wish to address.<br><br>It has also been suggested, as an *alternative* approach, that the negotiations may be preceded by different means of engaging the market – perhaps a prequalification stage, for example. In recognition of these different options, an *alternative* formulation of this paragraph which has been proposed for discussion by the Working Group is as follows:<br><br>(2) A procuring entity may seek expressions of interest (EOI) to assist it in identifying potential suppliers or contractors, or may seek to pre-qualify suppliers or contractors (PQ), or may do both, before issuing a request for proposals. A notice seeking EOI or PQ must be published in a newspaper or relevant trade publication or relevant technical or professional journal of wide international circulation. The notice must set out at least:<br><br>(a) The subject matter of the procurement in general terms;<br><br>(b) That the procedure will consist of (here describe intended stages ending with competitive negotiations);<br><br>(c) The means of obtaining the EOI or PQ documents and the place from which they may be obtained;<br><br>(d) The fee (if any) to obtain the EOI or PQ documents; and<br><br>(e) The deadline for responding to the EOI or PQ.<br><br>Regardless of the phases prescribed by the Model Law, one strongly held view is that there should be publication to the world of whatever is the first step, to maximize competition and transparency.<br><br>It has also been suggested, as an alternative approach, that there be later stages of publication, such as when the specifications have been altered since the time that the original RFI was published. There is strong support |

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| | for the proposition that there must be new publication any time that there has been a material change in the governing requirements, so that all prospective vendors are on notice of this new opportunity. The question of requiring additional publication merits further discussion, as the costs of publication – say, of a notice that a revised RFP has been posted – have dropped substantially with advances in technology.<br><br>Any request for expressions of interest (RFI) must clearly describe the procurement, especially if (as is discussed in later sections) the request is, in essence, the last broadcast public notice of the procurement.<br><br>To square this provision with the GPA, the notice published to the world – whether of an RFI or an RFP – must clearly state the procuring entity's intention to use competitive negotiations. |
| (3) Requests for proposals must be issued to as many suppliers or contractors as practicable, but to not fewer than three. A procuring entity must request proposals from all suppliers or contractors that responded to a previous RFI, and may request proposals from as many others as it considers practicable, but in the aggregate it must solicit proposals from not fewer than three suppliers or contractors. | The important thing is that the language ultimately must ensure that at some stage – at the RFI or RFP stage – there is publication to the world.<br><br>As was noted above, one *alternative* approach is to use a prequalification notice (PQ), as was suggested above. If this *alternative* approach is used, the Working Group may wish to consider the following alternative formulation for this paragraph:<br><br>(3) Requests for proposals (RFPs) must be issued to as many suppliers or contractors as practicable, but not from fewer than [three] [five]. If the RFP has not been preceded by an EOI or PQ, a notice of the RFP must be published in a newspaper or relevant trade publication or relevant technical or professional journal of wide international circulation. If the RFP has been preceded by an EOI but not by a PQ, it must request proposals from all suppliers or contractors that responded to such notice, and may request proposals from as many others as it considers practicable, but in the aggregate it must request proposals from not fewer than [three] [five] suppliers or contractors. If the RFP has been preceded by a PQ, it must request proposals from all suppliers or contractors that pre-qualified.<br><br>The consensus among those submitting this paper is that requiring issuance to, for example, five, rather than three, prospective suppliers or contractors would be too burdensome. Logically, this would turn on the relative |

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| | costs of adding negotiating parties; if advances in systems and technology make it cheaper to negotiate with more suppliers or contractors, the minimum number of suppliers or contractors may be raised.<br><br>The revised text introduces the concept of "RFP" – a solicitation package that launches the actual competitive negotiations process. A useful definition, for possible inclusion in the text of the Model Law, is as follows: "Request for Proposals: Includes all documents, whether attached or incorporated by reference, utilized for soliciting competitive proposals and is generally utilized in the acquisition of services or complex purchases." The Working Group should ensure that there is consensus behind this definition. Once there is consensus, this definition could be included in the general definitional section of the Model Law.<br><br>The Guide should note that, if the RFI approach is used as an initial step (before the RFP), procuring entities should be lenient in allowing tardy expressions of interest; the only hard-and-fast deadline should be for responses to the RFP itself. |
| (4) A procuring entity shall request expressions of interest, as noted in paragraph (2), by publishing a notice of request for expressions of interest; the notice must set out, at least:<br><br>(a) the subject matter of the procurement in detail appropriate to ensure maximum practicable market participation by potential vendors;<br><br>(b) what the procedure will consist of [here describe intended stages ending with competitive negotiations];<br><br>(c) the means of obtaining the solicitation documents and the place from which they may be obtained;<br><br>(d) the fee (if any) to obtain the solicitation documents; and<br><br>(e) the deadline for submitting responses. | The notice of the procurement must be sufficiently detailed to alert prospective vendors, so as to ensure maximum market participation.<br><br>Here, as elsewhere in this proposed article, the proposed terms must yield to any contrary terms in other parts of the Model Law, which is itself under a broader revision. Thus, for example, the publication requirements in this paragraph must be linked to publication requirements elsewhere in the Model Law.<br><br>To streamline this paragraph, the Working Group may wish to consider the following alternative formulation:<br><br>(4) A procuring entity must solicit proposals by publishing a notice or by issuing a notice to the suppliers or contractors identified by the procuring entity, as the case may be, in accordance with paragraph (3). The RFP notice must set out at least:<br><br>(a) The subject matter of the procurement in general terms;<br><br>(b) That the procedure will include competitive negotiations;<br><br>(c) The means of obtaining the solicitation documents and the place from which they may be |

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| | obtained;<br><br>(d) The fee (if any) to obtain the solicitation documents; and<br><br>(e) The deadline for submitting proposals. |
| (5) The requests for proposals issued in accordance with paragraph (3), above, must include the following information:<br><br>(a) the name and address of the procuring entity;<br><br>(b) the date and time by when proposals must be submitted, and the location or address where submissions must be sent;<br><br>(c) a description of the subject matter of the procurement with as much detail, in at least summary form, as is known to the procuring entity about the subject matter at the time it issues the request for proposals, and any expectations as to delivery or completion of the subject matter of the procurement;<br><br>(d) the required format for proposals;<br><br>(e) if applicable, the qualification criteria and weighting that will be used qualify suppliers or contractors, as more particularly set out in paragraph (7);<br><br>(f) the process by which the procuring entity will determine which suppliers or contractors will be invited to participate in negotiations, as more particularly set out in paragraph (8); and<br><br>(g) the process the procuring entity will use to conduct the competitive negotiations and identify the successful supplier or contractor, as more particularly set out in paragraph (9). | The Working Group may wish to consider the detail required in the RFP. On one hand, the procuring entity should provide detailed information on the proposed procurement, to ensure maximum participation. On the other hand, requiring the procuring entity to publish *all* the information it has available may prove too demanding.<br><br>Here, as elsewhere in this proposed article, the proposed terms must yield to any contrary terms in other parts of the Model Law, which is itself under a broader revision. Thus, for example, other provisions regarding the detail required in solicitations may affect this paragraph.<br><br>The text of the Model Law proposed here is relatively spare. The Working Group may wish to draw upon the 1994 Model Law's Guide to Enactment text regarding competitive negotiations (old Article 49), which encourages procuring entities to develop their own rules to govern competitive negotiations:<br><br>(2) The enacting State may wish to require in the procurement regulations that the procuring entity take steps such as the following: establish basic rules and procedures relating to the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; prepare various documents to serve as a basis for the negotiations, including documents setting forth the desired technical characteristics of the goods or construction to be procured, or a description of the nature of services to be procured, and the desired contractual terms and conditions; and request the suppliers or contractors with whom it negotiates to itemize their prices so as to assist the procuring entity in comparing what is being offered by one supplier or contractor during the negotiations with offers from the other suppliers or contractors.<br><br>National rules and guidance for competitive negotiations are set out, for example, in the 2006 guidance on competitive dialogue issued by the UK Office of Government Commerce, available at http://www.ogc.gov.uk/documents/guide_competitive_dialogue.pdf, and |

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| | in the U.S. Federal Acquisition Regulation (FAR) Part 15, 48 C.F.R. Part 15, available at www.acquisition.gov/far. |
| (6) A procuring entity may modify, or issue clarifications regarding, the solicitation documents before the submission deadline. Such modifications or clarifications must be in writing and must be given to all prospective suppliers or contractors to whom a notice was issued under paragraph (4) sufficiently before the submission deadline to allow the suppliers or contractors to address them in their proposals. | It has been suggested that, to improve flow, this paragraph might be moved to appear after the current paragraph (9). |
| (7) If the procuring entity will seek to qualify suppliers or contractors before negotiations begin, the request for proposals must set out the criteria to be used in evaluating the proposals during the qualification stage, the relative weight to be accorded to each such criterion and the manner in which they are to be applied in evaluating the proposals. The qualification criteria must be relevant to the subject matter of the procurement, and should include:<br><br>(a) the experience, and managerial and technical competence, of the supplier or contractor;<br><br>(b) the financial resources of the supplier or contractor;<br><br>(c) the quality of the proposal submitted by the supplier or contractor; and<br><br>(d) the result of reference checks performed on the supplier or contractor by the procuring entity, if appropriate. | Some have urged that no separate qualification stage be required.<br><br>It has been noted that background checks may not be appropriate in all cases.<br><br>It has been noted, too, that where qualification requirements are "relevant" to the procurement, these should be the minimum reasonable statement of qualifications; setting overly restrictive qualifications would reduce competition inappropriately.<br><br>It has been suggested that if the Model Law is to require that qualification criteria be "relevant" to the procurement, the Working Group may wish to clarify "how" relevant the qualification criteria must be. Must, for example, the qualification criteria be traceable directly to the requirements being fulfilled by the procurement?<br><br>Here, as elsewhere in this proposed article, the proposed terms must yield to any contrary terms in other parts of the Model Law; here, other provisions regarding qualification requirements may be relevant. |
| (8) The request for proposals must set out the process by which the procuring entity will determine which suppliers or contractors will sufficiently meet the qualification criteria in order to pass into the competitive negotiation phase. Where there is a sufficient number of suppliers or contractors suitable to be selected to participate in the negotiations, the procuring entity may limit the number of suppliers or contractors which it intends to invite to participate in the negotiations provided that the | It should be noted that this paragraph could narrow the field of suppliers or contractors on two distinct grounds: (1) because suppliers or contractors failed to meet qualification requirements, and (2) because the procuring entity desires to narrow the number of suppliers or contractors for efficiency in negotiations.<br><br>Language after the first sentence in this paragraph is closely modelled on language from Regulation 18(12) of England's *Public Contracts Regulations 2006.* |

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| solicitation documents specify:<br><br>(a) the objective and non-discriminatory criteria to be applied in order to limit the number of suppliers or contractors in accordance with this paragraph; and,<br><br>(b) the minimum number of suppliers or contractors, which shall be not less than three, which the procuring entity intends to invite to participate in the negotiations and, where appropriate, the maximum number. | Here, as elsewhere in this proposed article, the proposed terms must yield to any contrary terms in other parts of the Model Law. |
| (9) The solicitation documents must set out the process the procuring entity will use to conduct the competitive negotiations and to determine to which supplier or contractor it will award the procurement contract. The process must be consistent with the requirements of this Law. | It has been suggested that this paragraph is now redundant, and may be deleted, as an earlier paragraph describes what must be set out in the solicitation documents. Some commentators, however, believe that this separate paragraph should remain, to emphasize that the process of competitive negotiations must be carefully explained to prospective suppliers or contractors.<br><br>The second sentence in this paragraph cites the need for consistency with other provisions of the Model Law. The Working Group may wish to amend that second sentence, to specifically cite other provisions in the revised Model Law which govern publication requirements and the criteria for award.<br><br>A separate issue stems from the language regarding award. The Guide to Enactment might note that alternatively a procuring entity might only *recommend* award, rather than announcing to which vendor award will be made. This will turn on the procurement processes used in the procuring state. |
| (10) Competitive negotiations must be concurrent (that is, by conducting negotiations separately but roughly simultaneously with every supplier or contractor qualified for competitive negotiations after the prequalification stage). | This remains a controversial paragraph. The proposed text calls for concurrent negotiations, not consecutive negotiations (that is, beginning and concluding negotiations with the highest-ranked supplier or contractor after the prequalification stage; if those negotiations with the highest-ranking offer or failed, turning to negotiations with the other suppliers or contractors qualified for competitive negotiations in the order in which they were ranked). This approach favouring concurrent negotiations was taken because of the following concerns with allowing consecutive, rather than concurrent, negotiations:<br><br>• It is not clear that equality of treatment can be assured if negotiations are consecutive. |

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| | • Focusing negotiations on only the highest-rank supplier or contractor "tips off" that supplier or contractor as to the technical evaluation scores -- though that information is supposed to remain secret.<br>• Focusing negotiations first on only one supplier or contractor could undermine the procuring entity's negotiating leverage; the supplier or contractor first in line knows it, and will not give up much in negotiations.<br>• The procuring entity loses the benefits of "learning" which it may gain from concurrent negotiations with other suppliers or contractors.<br>• The only apparent benefit of consecutive negotiations is to reduce the burden for the negotiating team; in some instances, however, the negotiating team may underestimate the broader benefits of concurrent negotiations.<br>Regardless of the formulation selected, it has been suggested that the final text should emphasize the principle of equal treatment of suppliers or contractors, especially in concurrent negotiations. As noted, equal treatment may be difficult to achieve, in practice, in consecutive negotiations. |
| (11) The procuring entity may request suppliers or contractors qualified for competitive negotiations to provide written information or documents in the course of the negotiations. A procuring entity must keep confidential all submissions, information and documents provided by a supplier or contractor to the procuring entity, or obtained by the procuring entity, during the procurement process unless the supplier or contractor consents to their disclosure, they are in the public domain or are required to be disclosed by law. | Paragraph (15) below suggests that the Working Group may wish to make it clear that the procuring entity may *not* issue successive requests for best and final offers (BAFOs) from suppliers or contractors that remain under competitive consideration. The concerns that underlie this paragraph – the concerns with preserving suppliers' or contractors' confidential information – explain, in part, the bar against "multiple BAFOs." There is a concern that the procuring entity may, in calling for round after round of BAFOs, directly or indirectly expose the vendors' confidential information. |
| (12) Any requirements, guidelines, documents, clarifications or other information relative to the subject matter of the procurement that are communicated by the procuring entity to a supplier or contractor during negotiations shall be communicated on an equal basis to all other suppliers or contractors participating in the | It has been suggested that this language should conform to the GPA. Article XIV (4) of the current GPA is set out in the footnote below; the provisional (2006) GPA text should also be consulted. As noted, it may be difficult to accommodate the principles of equal treatment called for by the GPA if consecutive negotiations are used. |

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| negotiations. At all times during negotiations, procuring entities must treat participating suppliers or contractors equally. In particular, procuring entities must ensure that information is not provided in a discriminatory or other manner that may give some suppliers or contractors an unfair advantage over others.[4] | |
| (13) Competitive negotiations may be used to determine the supplier or contractor to be awarded the procurement contract, or they may be used to reduce the number of solutions or to identify a single solution that the procuring entity is willing to consider for the subject matter of the procurement. | It has been suggested that the Guide should make clear that this language allows the procuring entity to stop the process on initial proposals, rather than going through Best and Final Offers (BAFOs).<br><br>It has also been suggested that if the process can be arrested at the first stage, without resorting to BAFOs, the next stage (e.g., award notice) should still be transparent and available to all suppliers or contractors, to avoid discrimination. Again, other provisions of the Model Law (e.g., those going to transparency and award) should be consulted and cross-referenced. |
| (14) Where competitive negotiations are used to determine the supplier or contractor to be awarded the procurement contract, the award shall be made to the supplier or contractor identified through the process set out in the solicitation documents [as offering the [most beneficial solution] [solution having the best value]]. | It has been suggested that the following paragraph might be referenced in the Guide to Enactment, to adopt the preference of some funding institutions for requiring that evaluation criteria be expressed in objective, monetary terms:<br><br>The criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal. |

[4] Article XIV(4) of the GPA reflects the important principle that negotiations should not be used to discriminate between suppliers:
"Entities shall not, in the course of negotiations, discriminate between different suppliers. In particular, they shall ensure that:
"(a) any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation;
"(b) all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations;
"(c) all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised requirements; and
"(d) when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline."

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| (15) Where competitive negotiations are used to reduce the number of solutions or to identify a single solution that the procuring entity is willing to consider for the subject matter of the procurement, following the negotiations the procuring entity must request all suppliers or contractors with whom it has negotiated to submit a best and final offer in respect of the solutions or solution identified through the negotiation process. The request must be in writing, must specify the date and time by which offers must be submitted, and must set out the evaluation criteria, the relative weight to be accorded to each such criterion and the manner in which they are to be applied in evaluating the best and final offers. The evaluation criteria must be relevant to, and must include the price for, the solutions or solution identified. The relative weight accorded to each criterion must, to the extent practicable, be objective [and quantified or expressed in monetary terms]. The procuring entity must determine [which supplier or contractor it will recommend be awarded] [to which supplier or contractor it will award] the procurement contract on the basis of the best and final offers. | The Guide should make it clear that this stage (request for best and final offers (BAFOs)) applies only where the procuring entity has not previously made award(s) based on initial proposals.<br><br>The Working Group may wish to amend the Guide, to make it clear that the procuring entity may, in this notice calling for BAFOs, simply cross-refer to the criteria for award set out in the initial RFP. The Model Law text proposed here would, in essence, allow the procuring entity to shift the evaluation criteria for award in the final step of the negotiated procurement.<br><br>The Working Group may wish to amend the Guide to explain that, if at this late stage changes are made in the evaluation criteria as they were set out in the RFP, those changes may only be *minor* changes. If the procuring entity wishes to make *major* changes to the evaluation criteria, the procuring entity must start the process from the beginning, with publication of RFIs, to ensure a fair process that is an inclusive as possible.<br><br>The Working Group may wish to make it clear in the Guide to Enactment that, once BAFOs are submitted, the procuring entity may seek clarifications but *not* another round of BAFOs from the competing suppliers or contractors.<br><br>Again, as noted above, it has been pointed out that if award is made on initial proposals, the next step (e.g., notice of award) should remain transparent and available to all suppliers or contractors, to avoid discrimination. |