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## **Procurement**

### **Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) (the “Model Law”)**

#### **Proposed revisions to the text of the Model Law, made by the Working Group at its sixth to eleventh sessions**

##### **Note by the Secretariat**

This note records the cumulative proposed revisions of the Working Group to the text of the Model Law to date, and is produced so as to assist in finalizing those revisions.

## Annex

# UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

## *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment*

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## **I. UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES**

### **Preamble**

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement of goods, construction and services so as to promote the objectives of:

- (a) Maximizing economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;
- (d) Providing for the fair and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) Achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

## CHAPTER I. GENERAL PROVISIONS

### Article 1. Scope of application

(1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.

(2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:

(a) Procurement involving national defence or national security;

(b) ... (the enacting State may specify in this Law additional types of procurement to be excluded); or

(c) Procurement of a type excluded by the procurement regulations.

(3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers or contractors when first soliciting their participation in the procurement proceedings.

### Article 2. Definitions

For the purposes of this Law:

(a) “Procurement” means the acquisition by any means of goods, construction or services;

(b) “Procuring entity” means:

(i) *Option I*

Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

*Option II*

Any department, agency, organ or other unit, or any subdivision thereof, of the (“Government” or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of “procuring entity”);

(c) “Goods” means objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves; (the enacting State may include additional categories of goods)

(d) “Construction” means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself;

(e) “Services” means any object of procurement other than goods or construction; (the enacting State may specify certain objects of procurement which are to be treated as services)

(f) “Supplier or contractor” means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

(g) “Procurement contract” means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

(h) “Tender security” means a security provided to the procuring entity to secure the fulfilment of any obligation referred to in article 32 (1) (f) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;

(i) “Currency” includes monetary unit of account.

### **Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]**

To the extent that this Law conflicts with an obligation of this State under or arising out of any

- (a) Treaty or other form of agreement to which it is a party with one or more other States,
- (b) Agreement entered into by this State with an intergovernmental international financing institution, or
- (c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

## Article 4. Procurement regulations

The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

### **Article 5. Public accessibility of legal texts**

~~The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.~~

### **Article 5. Publicity of legal texts and information on forthcoming procurement opportunities**

(1) The text of this Law, procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

(2) Notwithstanding the provisions of paragraph (1) of this article, judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public and updated if need be.

(3) As promptly as possible after beginning of a fiscal year, procuring entities may publish information of the expected procurement opportunities for the following [the enacting State specifies the period]. The information published shall not constitute the solicitation of the participation of suppliers or contractors in the procurement proceedings and shall not be binding upon the procuring entity.

*[source A/CN.9/WG.I/WP.54, para 13]<sup>1</sup>*

### **Article [5 bis]. Communications in procurement**

(1) Any document, notification, decision and other information generated in the course of a procurement and communicated as required by this Law, including in connection with review proceedings under chapter VI or in the course of a meeting, or forming part of the record of procurement proceedings under article [11], shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(2) Communication of information between suppliers or contractors and the procuring entity referred to in articles [7 (4) and (6), 31 (2)(a), 32 (1)(d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1), to update for revisions to Model Law] [and any other information generated in the course of a procurement under this Law other than information referred to in paragraph (1) of this article] may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

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<sup>1</sup> Reflecting decisions taken at 11th session, see A/CN.9/623, paras. 26-32.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall[, for the purpose of procurement covered by this Law,] specify:

- (a) Any requirement of form in compliance with paragraph (1) of this article;
- (b) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf;
- (c) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and
- (d) The means to be used to hold any meeting of suppliers or contractors.

(4) The means referred to in the preceding paragraph shall be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. The means to be used to hold any meeting of suppliers or contractors shall in addition ensure that suppliers or contractors can fully and contemporaneously participate in the meeting.

(5) Appropriate measures shall be put in place to secure the authenticity, integrity and confidentiality of information concerned.

[source A/CN.9/WG.I/WP.54, para 4]<sup>2</sup>

## **Article 6. Qualifications of suppliers and contractors**

(1) (a) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings;

(b) In order to participate in procurement proceedings, suppliers or contractors must qualify by meeting such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

(i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;

(ii) That they have legal capacity to enter into the procurement contract;

(iii) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

<sup>2</sup> Reflecting decisions taken at 11<sup>th</sup> session, see A/CN.9/623, paras. 14-20.

(iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;

(v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

(2) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (1) (b).

(3) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this article.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations.

(5) Subject to articles 8 (1), 34 (4) (d) and 39 (2), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality, or that is not objectively justifiable.

(6) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false;

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

### **Article 7. Prequalification proceedings**

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings

conducted pursuant to chapter III, IV or V, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(3) The prequalification documents shall include, at a minimum:

(a) The following information:

(i) Instructions for preparing and submitting prequalification applications;

(ii) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(iii) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(iv) The manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(v) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings; and

(b) (i) In proceedings under chapter III, the information required to be specified in the invitation to tender by article 25 (1) (a) to (e), (h) and, if already known, (j);

(ii) In proceedings under chapter IV, the information referred to in article 38 (a), (c), if already known, (g), (p) and (s).

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

### **Article 8. Participation by suppliers or contractors**

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

### **Article 9. Form of communications**

~~(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.~~

~~(2) Communications between suppliers or contractors and the procuring entity referred to in articles 7 (4) and (6), 12 (3), 31 (2) (a), 32 (1) (d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.~~

~~(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.<sup>3</sup>~~

## **Article 10. Rules concerning documentary evidence provided by suppliers or contractors**

If the procuring entity requires the legalization of documentary evidence provided by suppliers or contractors to demonstrate their qualifications in procurement proceedings, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

## **Article 11. Record of procurement proceedings**

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) A brief description of the goods, construction or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) The names and addresses of suppliers or contractors that submitted tenders, proposals, offers or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;

(b) bis. The procuring entity's decision as to the means of communication to be used in the procurement proceedings;

*[source A/CN.9/WG.I/WP.54, para 18]<sup>4</sup>*

(c) Information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations;

(d) The price, or the basis for determining the price, and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract, where these are known to the procuring entity;

(e) A summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference pursuant to articles 34 (4) (d) and 39 (2);

(f) If all tenders, proposals, offers or quotations were rejected pursuant to article 12, a statement to that effect and the grounds therefor, in accordance with article 12 (1);

<sup>3</sup> Reflecting decision to replace article 9 with proposed article 5 bis above taken at 10<sup>th</sup> session, see A/CN.9/615, para. 18.

<sup>4</sup> Reflecting decision taken at 9<sup>th</sup> session, see A/CN.9/595, para. 49.

(g) If, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;

(h) The information required by article 15, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

(i) In procurement proceedings involving the use of a procurement method pursuant to paragraph (2) or subparagraph (a) or (b) of paragraph (3) of article 18, the statement required under article 18 (4) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(i bis) In procurement proceedings involving the use of electronic reverse auctions, information about the grounds and circumstances on which the procuring entity relied to justify recourse to the auction, the date and time of the auction and [any further information that the Working Group may decide to add].

*[source A/CN.9/WG.I/WP.55, para 34]<sup>5</sup>*

(j) In the procurement of services by means of chapter IV, the statement required under article 41 (2) of the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;

(k) In procurement proceedings involving direct solicitation of proposals for services in accordance with article 37 (3), a statement of the grounds and circumstances on which the procuring entity relied to justify the direct solicitation;

(l) In procurement proceedings in which the procuring entity, in accordance with article 8 (1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;

(m) A summary of any requests for clarification of the prequalification or solicitation documents, the responses thereto, as well as a summary of any modification of those documents.

(2) Subject to article 33 (3), the portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) of this article shall, on request, be made available to any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to article 33 (3), the portion of the record referred to in subparagraphs (c) to (g), and (m), of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs (c) to (e), and (m), may be ordered at an earlier stage by a competent

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<sup>5</sup> Reflecting decision taken at 11<sup>th</sup> session, see A/CN.9/623, para. 100.

court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) Information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1) (e).

(4) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.

### **Article 12. Rejection of all tenders, proposals, offers or quotations<sup>6</sup>**

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval)), and if so specified in the solicitation documents or other documents for solicitation of proposals, offers or quotations, the procuring entity may reject all tenders, proposals, offers or quotations at any time prior to the acceptance of a tender, proposal, offer or quotation. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender, proposal, offer or quotation, the grounds for its rejection of all tenders, proposals, offers or quotations, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have submitted tenders, proposals, offers or quotations.

(3) Notice of the rejection of all tenders, proposals, offers or quotations shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations.

### **Article [12 bis]. Rejection of abnormally low tenders, proposals, offers, quotations or bids**

(1) The procuring entity may reject a tender, proposal, offer, quotation or bid if a price submitted therein is abnormally low in relation to the goods, construction or services to be procured, provided that:

(a) [The procuring entity has specified the right to do so in the solicitation documents or in any other documents for the solicitation of proposals, offers, quotations or bids;]

(b) The procuring entity has requested in writing from the supplier or contractor concerned details of constituent elements of a tender, proposal, offer, quotation or bid that

<sup>6</sup> Location of articles 12, 12 bis and 15 to be considered. See A/CN.9/WG.I/XI/CRP.2, para. 25 and A/CN.9/WG.I/WP.50, para 45.

give rise to concerns as to the ability of the supplier or contractor that submitted such a tender, proposal, offer, quotation or bid to perform the procurement contract;

(c) The procuring entity has taken account of the information supplied, if any, but continues, on a reasonable basis, to hold those concerns; and

(d) The procuring entity has recorded those concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) [The solicitation documents or other documents for solicitation of proposals, offers, quotations or bids [may] [should] include an explicit statement that a procuring entity may carry out analyses of potential performance risks and prices submitted.]

(3) The decision of the procuring entity to reject a tender, proposal, offer, quotation or bid in accordance with this article and grounds for the decision shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.<sup>7</sup>

[source A/CN.9/WG.I/WP.54, para 26]

### **Article 13. Entry into force of the procurement contract**

#### **Or: Article 13. Acceptance of tenders, offers, proposals, quotations or bids [or submissions] and entry into force of the procurement contract**

[Source A/CN.9/WG.I/XI/CRP.2, para 11]

(1) In [all procurement under this Law] [tendering proceedings [including two-stage and restricted tendering proceedings]], acceptance of the tender [submission] and entry into force of the procurement contract shall be carried out in accordance with article [36].

[Source A/CN.9/WG.I/XI/CRP.2, para 4]

[if paragraph (1) addresses tendering proceedings only]

#### **Variant A**

(2) In all the other methods of procurement [cross refer], the manner of acceptance of the successful submission and entry into force of the procurement contract shall be notified to the suppliers or contractors by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings~~at the time that proposals, offers or quotations are requested.~~

[Source A/CN.9/WG.I/XI/CRP.2, para 4]

#### **Variant B**

<sup>7</sup> Reflecting decision taken at 11<sup>th</sup> session, see A/CN.9/623, paras. 43-49.

[\(2\) Unless otherwise notified to the suppliers or contractors by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, in all other methods of procurement \[cross refer\], acceptance of the successful submission and entry into force of the procurement contract shall be carried out in accordance with article \[36\].](#)

[\[Source A/CN.9/WG.I/XI/CRP.2, para 9\]<sup>8</sup>](#)

#### **Article 14. Public notice of procurement contract awards**

- (1) The procuring entity shall promptly publish notice of procurement contract awards.
- (2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1).
- (3) Paragraph (1) is not applicable to awards where the contract price is less than [...].

#### **Article 15. Inducements from suppliers or contractors**

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

#### **Article 16. Rules concerning description of goods, construction or services**

- (1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction or services to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, or description of services, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.
- (2) To the extent possible, any specifications, plans, drawings, designs and requirements or descriptions of goods, construction or services shall be based on the relevant objective technical and quality characteristics of the goods, construction or services to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods, construction or services to be procured and provided that words such as “or equivalent” are included.

<sup>8</sup> Reflecting provisional decision to conform procedures taken at 11<sup>th</sup> session, see [A/CN.9/WG.I/XI/CRP.2 and A/CN.9/623, para. 102.](#)

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction or services to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs to be included in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations;

(b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

### **Article 17. Language**

The prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where:

(a) The procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article 8 (1), or

(b) The procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested).

## **CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE**

### **Article 18. Methods of procurement\***

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.

(2) In the procurement of goods and construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 19, 20, 21 or 22.

(3) In the procurement of services, a procuring entity shall use the method of procurement set forth in chapter IV, unless the procuring entity determines that:

(a) It is feasible to formulate detailed specifications and tendering proceedings would be more appropriate taking into account the nature of the services to be procured; or

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\* States may choose not to incorporate all these methods of procurement into their national legislation. On this question, see Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/403).

(b) It would be more appropriate (, subject to approval by ... (the enacting State designates an organ to issue the approval),) to use a method of procurement referred to in articles 19 to 22, provided that the conditions for the use of that method are satisfied.

(4) If the procuring entity uses a method of procurement pursuant to paragraph (2) or subparagraph (a) or (b) of paragraph (3), it shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of that method.

### **Article 19. Conditions for use of two-stage tendering, request for proposals or competitive negotiation**

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of two-stage tendering in accordance with article 46, or request for proposals in accordance with article 48, or competitive negotiation in accordance with article 49, in the following circumstances:

(a) It is not feasible for the procuring entity to formulate detailed specifications for the goods or construction or, in the case of services, to identify their characteristics and, in order to obtain the most satisfactory solution to its procurement needs,

(i) It seeks tenders, proposals or offers as to various possible means of meeting its needs; or,

(ii) Because of the technical character of the goods or construction, or because of the nature of the services, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) When the procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) When tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to article 12, 15 or 34 (3), and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when:

(a) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,

(b) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods.

### **Article 20. Conditions for use of restricted tendering**

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with article 47, when:

(a) The goods, construction or services, by reason of their highly complex or specialized nature, are available only from a limited number of suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, construction or services to be procured.

### **Article 21. Conditions for use of request for quotations**

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of a request for quotations in accordance with article 50 for the procurement of readily available goods or services that are not specially produced or provided to the particular specifications of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

### **Article 22. Conditions for use of single-source procurement**

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in accordance with article 51 when:

(a) The goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, and no reasonable alternative or substitute exists;

(b) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(c) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods;

(d) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for

compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(e) The procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or

(f) The procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.

(2) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 34 (4) (c) (iii) or 39 (1) (d), provided that procurement from no other supplier or contractor is capable of promoting that policy.

### **Article 22 bis. Conditions for use of electronic reverse auctions**

(1) A procuring entity may engage in procurement by means of an electronic reverse auction in accordance with articles [51 bis to 51 sexies] under the following conditions:

(a) Where it is feasible for the procuring entity to formulate detailed and precise specifications for the goods [or construction or, in the case of services, to identify their detailed and precise characteristics]; and

(b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction such that effective competition is ensured.

(2) The electronic reverse auctions shall be based on:

(a) Prices where the procurement contract is awarded to the lowest price; or

(b) Where the procurement contract is awarded to the lowest evaluated bid, prices and other evaluation criteria specified in the notice of the electronic reverse auction, provided that such other criteria are quantifiable and can be expressed in monetary terms.

(3) Where the procurement contract is awarded to the lowest evaluated bid, the electronic reverse auction shall be preceded by a full initial evaluation of bids in accordance with the award criteria and the relative weight of such criteria specified in the notice of the electronic reverse auction.

[\[source A/CN.9/WG.I/WP.55, para 3\]<sup>9</sup>](#)

## **CHAPTER III. TENDERING PROCEEDINGS**

### **SECTION I. SOLICITATION OF TENDERS AND OF APPLICATION TO PREQUALIFY<sup>10</sup>**

#### **Article 23. Domestic tendering**

In procurement proceedings in which

- (a) Participation is limited solely to domestic suppliers or contractors pursuant to article 8 (1), or
- (b) The procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested in submitting tenders,

the procuring entity shall not be required to employ the procedures set out in articles 24 (2), 25 (1) (h), 25 (1) (i), 25 (2) (c), 25 (2) (d), 27 (j), 27 (k), 27 (s) and 32 (1) (c) of this Law.

#### **Article 24. Procedures for soliciting tenders or applications to prequalify**

- (1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).
- (2) The invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

#### **Article 25. Contents of invitation to tender and invitation to prequalify**

- (1) The invitation to tender shall contain, at a minimum, the following information:
  - (a) The name and address of the procuring entity;
  - (b) The nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided;
  - (c) The desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

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<sup>9</sup> Reflecting decision taken at 11th session, see A/CN.9/623, paras. 52-56.

<sup>10</sup> To consider which steps described in the tendering process under the Model Law might be considered to be issues that should be addressed from the perspective of general rules applicable to all procurement methods. See A/CN.9/623, para 102.

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- (d) The criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article 6 (1) (b);
  - (e) A declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article 8 (1), as the case may be;
  - (f) The means of obtaining the solicitation documents and the place from which they may be obtained;
  - (g) The price, if any, charged by the procuring entity for the solicitation documents;
  - (h) The currency and means of payment for the solicitation documents;
  - (i) The language or languages in which the solicitation documents are available;
  - (j) The place and deadline for the submission of tenders.
- (2) An invitation to prequalify shall contain, at a minimum, the information referred to in paragraph (1) (a) to (e), (g), (h) and, if it is already known, (j), as well as the following information:
- (a) The means of obtaining the prequalification documents and the place from which they may be obtained;
  - (b) The price, if any, charged by the procuring entity for the prequalification documents;
  - (c) The currency and terms of payment for the prequalification documents;
  - (d) The language or languages in which the prequalification documents are available;
  - (e) The place and deadline for the submission of applications to prequalify.

## **Article 26. Provision of solicitation documents**

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

## Article 27. Contents of solicitation documents

The solicitation documents shall include, at a minimum, the following information:

- (a) Instructions for preparing tenders;
- (b) The criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 34 (6);
- (c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (d) The nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;
- (e) The criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 34 (4) (b), (c) or (d) and the relative weight of such criteria;
- (f) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
- (g) If alternatives to the characteristics of the goods, construction, services, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;
- (h) If suppliers or contractors are permitted to submit tenders for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which tenders may be submitted;
- (i) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods, construction or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes;
- (j) The currency or currencies in which the tender price is to be formulated and expressed;
- (k) The language or languages, in conformity with article 29, in which tenders are to be prepared;
- (l) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by

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suppliers or contractors submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;

(m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) The manner, place and deadline for the submission of tenders, in conformity with article 30;

(o) The means by which, pursuant to article 28, suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) The period of time during which tenders shall be in effect, in conformity with article 31;

(q) The place, date and time for the opening of tenders, in conformity with article 33;

(r) The procedures to be followed for opening and examining tenders;

(s) The currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 34 (5) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity;

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) Notice of the right provided under article 52 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) If the procuring entity reserves the right to reject all tenders pursuant to article 12, a statement to that effect;

(y) Any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 36, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(z) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

## **Article 28. Clarifications and modifications of solicitation documents**

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their tenders.

## **SECTION II. SUBMISSION OF TENDERS**

### **Article 29. Language of tenders**

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

### **Article 30. Submission of tenders**

(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to article 28, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or

contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

~~(5) (a) Subject to subparagraph (b), a tender shall be submitted in writing, signed and in a sealed envelope;~~

~~(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality;~~

~~(c) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.~~

(5) (a) A tender shall be submitted in writing, and signed, and:

(i) If in paper form, in a sealed envelope; or

(ii) If in any other form, according to requirements specified by the procuring entity, which ensure at least a similar degree of authenticity, security, integrity and confidentiality;

(b) The procuring entity shall provide to the supplier or contractor receipt showing the date and time when its tender was received;

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law.

[source A/CN.9/WG.I/WP.54, para 11]<sup>11</sup>

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

### **Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders**

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A

<sup>11</sup> Reflecting decision taken at 11th session, see A/CN.9/623, paras. 21-24.

supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.

### **Article 32. Tender securities**

(1) When the procuring entity requires suppliers or contractors submitting tenders to provide a tender security:

(a) The requirement shall apply to all such suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an issuer in this State if the tender security and the issuer otherwise conform to requirements set forth in the solicitation documents (, unless the acceptance by the procuring entity of such a tender security would be in violation of a law of this State);

(d) Prior to submitting a tender, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security; any requirement that refers directly or indirectly to conduct by the supplier or contractor submitting the tender shall not relate to conduct other than:

(i) Withdrawal or modification of the tender after the deadline for submission of tenders, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign the procurement contract if required by the procuring entity to do so;

(iii) Failure to provide a required security for the performance of the contract after the tender has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall promptly return, or procure the return of, the tender security document, after whichever of the following that occurs earliest:

(a) The expiry of the tender security;

(b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) The termination of the tendering proceedings without the entry into force of a procurement contract;

(d) The withdrawal of the tender prior to the deadline for the submission of tenders, unless the solicitation documents stipulate that no such withdrawal is permitted.

## SECTION III. EVALUATION AND COMPARISON OF TENDERS

### Article 33. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

~~(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders.~~

(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are fully and contemporaneously apprised of the opening of the tenders.

[source A/CN.9/WG.I/WP.54, para 11]<sup>12</sup>

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have submitted tenders but that are not present or

<sup>12</sup> Reflecting decision taken at 11th session, see A/CN.9/623, para. 25.

represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11.

### **Article 34. Examination, evaluation and comparison of tenders**

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted;

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents;

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(3) The procuring entity shall [not accept] [reject]<sup>13</sup>a tender:

(a) If the supplier or contractor that submitted the tender is not qualified;

(b) If the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) If the tender is not responsive;

(d) In the circumstances referred to in article 15.

(4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

(b) The successful tender shall be:

(i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or

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<sup>13</sup> Reflecting consideration of terms “acceptance” and “rejection”, see A/CN.9/WG.I/XI/CRP.2, para. 24.

(ii) If the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of criteria specified in the solicitation documents, which criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable;<sup>14</sup>

(c) In determining the lowest evaluated tender in accordance with subparagraph (b) (ii) of this paragraph, the procuring entity may consider only the following:

(i) The tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;

(ii) The cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services;

(iii) The effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand subparagraph (iii) by including additional criteria)]; and

(iv) National defence and security considerations;

(d) If authorized by the procurement regulations, (and subject to approval by ... (the enacting State designates an organ to issue the approval),) in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article 27 (s), for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate again its

<sup>14</sup> [To consider whether this is a step described in the tendering process under the Model Law that might be considered to be an issue that should be addressed from the perspective of general rules applicable to all procurement methods. See A/CN.9/WG.I/XI/CRP.2, paras. 27 and 102 and A/CN.9/WG.I/WP.52, para 21.](#)

qualifications in accordance with criteria and procedures conforming to the provisions of article 6. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 12 (1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in article 11.

### **Article 35. Prohibition of negotiations with suppliers or contractors**

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

### **Article 36. Acceptance of tender and entry into force of procurement contract**

(1) Unless the procuring entity has rejected one or more tenders in accordance with the provisions of ~~Subject to~~ articles 12 [12 bis, 15] and 34 (7), the procuring entity shall accept the successful tender, the tender that has been ascertained to be the successful tender pursuant to article 34 (4) (b) shall be accepted. Notice of and shall promptly notify such acceptance of the tender ~~shall be given promptly~~ to the supplier or contractor submitting the tender.

(2) [source article 36(4) in 1994 text, with changes as marked] ~~Except as provided in paragraphs (2) (b) and (3) of this article, a~~ procurement contract in accordance with the terms and conditions of the accepted tender enters into force when ~~the this~~ notice ~~referred to in paragraph (1) of this article~~ is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force, and unless a written procurement contract is required. The notice is dispatched when it is properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by a mode authorized by [article 9].

(23) ~~(a) Notwithstanding the provisions of paragraph (4) of this article, If~~ the solicitation documents ~~may~~ require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender: -

~~(a) In such cases, t~~The procuring entity (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

~~(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph (a) of this paragraph, t~~The procurement contract enters into force when the contract is signed by the supplier or contractor and by

the procuring entity. Between the time when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(34) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to article 31 (1) or the period of effectiveness of tender securities that may be required pursuant to article 32 (1).

~~(4) Except as provided in paragraphs (2) (b) and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force. The notice is dispatched when it is properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by a mode authorized by article 9. [NB article 36(4) from 1994 text has been relocated to para. 2 above]~~

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 34 (4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 12 (1), to reject all remaining tenders. ~~The notice provided for in paragraph (1) of this article~~Notice of the acceptance of that tender shall then be given to the supplier or contractor that submitted ~~that tender~~it.

(6) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, the procuring entity shall notify all ~~notice of the procurement contract shall be given to~~ other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

[Source A/CN.9/WG.I/XI/CRP.2, para 20]<sup>15</sup>

## CHAPTER IV. PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES

### Article 37. Notice of solicitation of proposals

(1) A procuring entity shall solicit proposals for services or, where applicable, applications to prequalify by causing a notice seeking expression of interest in submitting a proposal or in prequalifying, as the case may be, to be published in ... (the enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall

<sup>15</sup> Reflecting provisional consideration of these changes by Working Group at 11th session, see [A/CN.9/WG.I/XI/CRP.2](#) and [A/CN.9/623, para. 102.](#)

contain, at a minimum, the name and address of the procuring entity, a brief description of the services to be procured, the means of obtaining the request for proposals or prequalification documents and the price, if any, charged for the request for proposals or for the prequalification documents.

(2) The notice shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade or professional publication of wide international circulation except where participation is limited solely to domestic suppliers or contractors pursuant to article 8 (1) or where, in view of the low value of the services to be procured, the procuring entity decides that only domestic suppliers or contractors are likely to be interested in submitting proposals.

(3) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) where direct solicitation is necessary for reasons of economy and efficiency, the procuring entity need not apply the provisions of paragraphs (1) and (2) of this article in a case where:

(a) The services to be procured are available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) Direct solicitation is the only means of ensuring confidentiality or is required by reason of the national interest, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

(4) The procuring entity shall provide the request for proposals, or the prequalification documents, to suppliers or contractors in accordance with the procedures and requirements specified in the notice or, in cases in which paragraph (3) applies, directly to participating suppliers or contractors. The price that the procuring entity may charge for the request for proposals or the prequalification documents shall reflect only the cost of printing and providing them to suppliers or contractors. If prequalification proceedings have been engaged in, the procuring entity shall provide the request for proposals to each supplier or contractor that has been prequalified and that pays the price charged, if any.

### **Article 38. Contents of requests for proposals for services**

The request for proposals shall include, at a minimum, the following information:

(a) The name and address of the procuring entity;

(b) The language or languages in which proposals are to be prepared;

(c) The manner, place and deadline for the submission of proposals;

(d) If the procuring entity reserves the right to reject all proposals, a statement to that effect;

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- (e) The criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 7 (8);
- (f) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (g) The nature and required characteristics of the services to be procured to the extent known, including, but not limited to, the location where the services are to be provided and the desired or required time, if any, when the services are to be provided;
- (h) Whether the procuring entity is seeking proposals as to various possible ways of meeting its needs;
- (i) If suppliers or contractors are permitted to submit proposals for only a portion of the services to be procured, a description of the portion or portions for which proposals may be submitted;
- (j) The currency or currencies in which the proposal price is to be formulated or expressed, unless the price is not a relevant criterion;
- (k) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes, unless the price is not a relevant criterion;
- (l) The procedure selected pursuant to article 41 (1) for ascertaining the successful proposal;
- (m) The criteria to be used in determining the successful proposal, including any margin of preference to be used pursuant to article 39 (2), and the relative weight of such criteria;
- (n) The currency that will be used for the purpose of evaluating and comparing proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;
- (o) If alternatives to the characteristics of the services, contractual terms and conditions or other requirements set forth in the request for proposals are permitted, a statement to that effect and a description of the manner in which alternative proposals are to be evaluated and compared;
- (p) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

- (q) The means by which, pursuant to article 40, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;
- (r) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
- (s) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity;
- (t) Notice of the right provided under article 52 to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;
- (u) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;
- (v) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of proposals and to other aspects of the procurement proceedings.

### **Article 39. Criteria for the evaluation of proposals**

- (1) The procuring entity shall establish criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals. Those criteria shall be notified to suppliers or contractors in the request for proposals and may concern only the following:
  - (a) The qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services;
  - (b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity;
  - (c) The proposal price, subject to any margin of preference applied pursuant to paragraph (2), including any ancillary or related costs;
  - (d) The effect that the acceptance of a proposal will have on the balance of payments position and foreign exchange reserves of [this State], the extent of participation by local suppliers and contractors, the economic development potential offered by the proposal, including domestic investment or other business activity, the encouragement of employment, the transfer of technology, the development of managerial, scientific and

operational skills and the countertrade arrangements offered by suppliers or contractors (... (the enacting State may expand subparagraph (d) by including additional criteria));

(e) National defence and security considerations.

(2) If authorized by the procurement regulations (and subject to approval by ... (each State designates an organ to issue the approval),) in evaluating and comparing the proposals, a procuring entity may grant a margin of preference for the benefit of domestic suppliers of services, which shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

#### **Article 40. Clarification and modification of requests for proposals**

(1) A supplier or contractor may request a clarification of the request for proposals from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the request for proposals that is received by the procuring entity within a reasonable time prior to the deadline for the submission of proposals. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its proposal and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the request for proposals.

(2) At any time prior to the deadline for submission of proposals, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the request for proposals by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the request for proposals and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the request for proposals, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors participating in the procurement proceedings, so as to enable those suppliers or contractors to take the minutes into account in preparing their proposals.

#### **Article 41. Choice of selection procedure**

(1) The procuring entity, in ascertaining the successful proposal, shall use the procedure provided for in article 42 (2) (a), 42 (2) (b), 43 or 44 that has been notified to suppliers or contractors in the request for proposals.

(2) The procuring entity shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of a selection procedure pursuant to paragraph (1) of this article.

(3) Nothing in this chapter shall prevent the procuring entity from resorting to an impartial panel of external experts in the selection procedure.

### **Article 42. Selection procedure without negotiation**

(1) Where the procuring entity, in accordance with article 41 (1), uses the procedure provided for in this article, it shall establish a threshold with respect to quality and technical aspects of the proposals in accordance with the criteria other than price as set out in the request for proposals and rate each proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the request for proposals. The procuring entity shall then compare the prices of the proposals that have attained a rating at or above the threshold.

(2) The successful proposal shall then be:

(a) The proposal with the lowest price; or

(b) The proposal with the best combined evaluation in terms of the criteria other than price referred to in paragraph (1) of this article and the price.

### **Article 43. Selection procedure with simultaneous negotiations**

(1) Where the procuring entity, in accordance with article 41 (1), uses the procedure provided for in this article, it shall engage in negotiations with suppliers or contractors that have submitted acceptable proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all such suppliers or contractors.

(2) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(3) In the evaluation of proposals, the price of a proposal shall be considered separately and only after completion of the technical evaluation.

(4) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals as well as with the relative weight and manner of application of those criteria as set forth in the request for proposals.

### **Article 44. Selection procedure with consecutive negotiations**

Where the procuring entity, in accordance with article 41 (1), uses the procedure provided for in this article, it shall engage in negotiations with suppliers and contractors in accordance with the following procedure:

(a) Establish a threshold in accordance with article 42 (1);

(b) Invite for negotiations on the price of its proposal the supplier or contractor that has attained the best rating in accordance with article 42 (1);

(c) Inform the suppliers or contractors that attained ratings above the threshold that they may be considered for negotiation if the negotiations with the suppliers or contractors with better ratings do not result in a procurement contract;

- (d) Inform the other suppliers or contractors that they did not attain the required threshold;
- (e) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to subparagraph (b) of this article will not result in a procurement contract, inform that supplier or contractor that it is terminating the negotiations;
- (f) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

### **Article 45. Confidentiality**

The procuring entity shall treat proposals in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors. Any negotiations pursuant to article 43 or 44 shall be confidential and, subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other information relating to the negotiations without the consent of the other party.

## **CHAPTER V. PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT**

### **Article 46. Two-stage tendering**

- (1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.
- (2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods, construction or services as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.
- (3) The procuring entity may, in the first stage, engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 12, 15 or 34 (3) concerning any aspect of its tender.
- (4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods, construction or services to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or

contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 34 (4) (b).

### **Article 47. Restricted tendering**

(1) (a) When the procuring entity engages in restricted tendering on the grounds referred to in article 20 (a), it shall solicit tenders from all suppliers and contractors from whom the goods, construction or services to be procured are available;

(b) When the procuring entity engages in restricted tendering on the grounds referred to in article 20 (b), it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) The provisions of chapter III of this Law, except article 24, shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

### **Article 48. Request for proposals**

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) The relative managerial and technical competence of the supplier or contractor;

(b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) The price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(4) A request for proposals issued by a procuring entity shall include at least the following information:

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- (a) The name and address of the procuring entity;
- (b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;
- (c) 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; and
- (d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal.
- (5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.
- (6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.
- (7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:
- (a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential;
- (b) Subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;
- (c) The opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.
- (8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.
- (9) The procuring entity shall employ the following procedures in the evaluation of proposals:
- (a) Only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;
- (b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;
- (c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.

#### **Article 49. Competitive negotiation**

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.

#### **Article 50. Request for quotations**

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation meeting the needs of the procuring entity.

#### **Article 51. Single-source procurement**

In the circumstances set forth in article 22 the procuring entity may procure the goods, construction or services by soliciting a proposal or price quotation from a single supplier or contractor.

## Article 51 bis. Pre-auction procedures in stand-alone electronic reverse auctions

(1) The procuring entity shall cause a notice of the electronic reverse auction to be published in accordance with procedures of article 24 of this Law.

(2) The notice shall include, at a minimum, the following:

(a) Information referred to in article 25 (1) (a), (d) and (e), and article 27 (d), (f), (h) to (j) and (t) to (y);

(b) The criteria to be used by the procuring entity in determining the successful bid, including any criteria other than price to be used, the relative weight of such criteria, the mathematical formula to be used in the evaluation procedure and indication of any criteria that cannot be varied during the auction;

(c) Whether any limitation on the number of suppliers or contractors to be invited to the auction is imposed, and if so, such number and the criteria and procedure that will be followed in selecting that number of suppliers or contractors;

(d) Whether prequalification is required and, if so, information referred to in article 25 (2) (a) to (e);

(e) Whether submission of initial bids is required and, if so:

(i) Information referred to in articles 25 (f) to (j);

(ii) Whether initial bids are to be submitted for assessment of their responsiveness to the requirements specified in the notice of the auction or in addition for their evaluation; and

(iii) If evaluation of initial bids is involved, procedures to be used in such evaluation;

(f) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;

(g) The manner and, if already determined, deadline by which the suppliers and contractors shall register to participate in the auction;

(h) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;

(i) Whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage); and

(j) The rules for the conduct of the electronic reverse auction, including the information that will be made available to the bidders in the course of the auction and the conditions under which the bidders will be able to bid.

(3) Except as provided for in paragraphs (4) to (6) of this article, the notice of the electronic reverse auction shall serve as an invitation to participate in the auction and shall be complete in all respects, including as regards information specified in paragraph (7) of this article.

(4) Where a limitation on the number of suppliers or contractors to be invited to the auction is imposed, the procuring entity shall:

(a) Select suppliers or contractors corresponding to the number and in accordance with the criteria and procedure specified in the notice of the electronic reverse auction; and

(b) Send an invitation to prequalify or to submit initial bids or to participate in the auction, as the case may be, individually and simultaneously to each selected supplier or contractor.

(5) Where prequalification is required, the procuring entity shall:

(a) Prequalify suppliers or contractors in accordance with article 7; and

(b) Send an invitation to submit initial bids or to participate in the auction, as the case may be, individually and simultaneously to each prequalified supplier or contractor.

(6) Where submission of the initial bids is required, the procuring entity shall:

(a) Include in the solicitation documents information referred to in article 27 (a), (k) to (s) and (z) of this Law;

(b) Solicit and examine initial bids in accordance with articles 26, 28 to 32, 33 (1) and 34 (1) of this Law;

(c) As specified in the notice of the electronic reverse auction, assess responsiveness of initial bids to all requirements set out in the notice of the electronic reverse auction in accordance with article 34 (2) or in addition carry out evaluation of initial bids in accordance with the procedures and criteria set out in the notice of the electronic reverse auction; and

(d) Send an invitation to participate in the auction individually and simultaneously to each supplier or contractor except for those whose bid has been rejected in accordance with article 34 (3). Where evaluation of initial bids took place, the invitation shall be accompanied by the information on the outcome of such evaluation.

(7) Unless already provided in the notice of the electronic reverse auction, the invitation to participate in the auction shall set out:

(a) The deadline by which the invited suppliers and contractors shall register to participate in the auction;

- (b) The date and time of the opening of the auction;
- (c) The requirements for registration and identification of bidders at the opening of the auction;
- (d) Information concerning individual connection to the electronic equipment being used; and
- (e) All other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction.

(8) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.

(9) The auction shall not take place before expiry of adequate time after the notice of the electronic reverse auction has been issued or, where invitations to participate in the auction are sent, from the date of sending the invitations to all suppliers or contractors concerned. This time shall be sufficiently long to allow suppliers or contractors to prepare for the auction.

*[source A/CN.9/WG.I/WP.55, para 10]<sup>16</sup>*

**Article 51 ter. Pre-auction procedures in auctions used as a phase preceding the award of the procurement contract in procurement proceedings under this Law**

(1) The award of the procurement contract in procurement proceedings under this Law may be preceded by an electronic reverse auction[, provided that conditions for use of the relevant procurement proceedings and electronic reverse auctions are met and their procedures are compatible].

(2) The procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings shall state that the award of the procurement contract will be preceded by an electronic reverse auction and provide information referred to in article 51 bis (2) (b) and (f) to (j).

(3) Before proceeding to the auction, the procuring entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor admitted to participate in the auction and comply with the provisions of article 51 bis (7) to (9).

*[source A/CN.9/WG.I/WP.55, para 14]<sup>17</sup>*

<sup>16</sup> Reflecting decisions taken at 11th session, see A/CN.9/623, paras. 62-73.

<sup>17</sup> Reflecting decisions taken at 11th session, see A/CN.9/623, paras. 74-77.

**Article 51 quater. Requirement of sufficient number of bidders to ensure effective competition**

(1) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction in accordance with articles 51 bis (4) to (6) and article 51 ter (3) is sufficient to secure effective competition.

(2) If the number of suppliers or contractors registered to participate in the auction is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity may cancel the electronic reverse auction

*[source A/CN.9/WG.I/WP.55, para 18]<sup>18</sup>*

**Article 51 quinquies. Requirements during the auction**

(1) During an electronic reverse auction:

(a) All bidders shall have an equal and continuous opportunity to submit their bids;

(b) There shall be automatic evaluation of all bids;

(c) The successive results of the auction established according to the evaluation criteria specified in the notice of the electronic reverse auction must instantaneously be communicated on a continuous basis to all bidders;

(d) There shall be no communication between the procuring entity and the bidders, other than as provided for in paragraphs 1 (a) and (c) above.

(2) The procuring entity shall not disclose the identity of any bidder during the auction.

(3) The auction shall be closed in accordance with the criteria specified in the notice of the electronic reverse auction.

(4) The procuring entity may suspend or terminate the electronic reverse auction in the case of system or communication failures [that prevent holding the auction] [or for other reasons stipulated in the rules for the conduct of the electronic reverse auction]. The provisions of paragraph (2) of this article shall apply in the case of suspension or termination of the auction.

*[source A/CN.9/WG.I/WP.55, para 20]<sup>19</sup>*

**Article 51 sexies. Award of the procurement contract on the basis of the results of the electronic reverse auction**

(1) The procurement contract shall be awarded to the bidder that, at the closure of the auction, submitted the bid with the lowest price or the lowest evaluated bid, as applicable, unless such bid

<sup>18</sup> Reflecting decisions taken at 11th session, see A/CN.9/623, paras. 78-83.

<sup>19</sup> Reflecting decisions taken at 11th session, see A/CN.9/623, paras. 84-89.

is rejected in accordance with articles 12, 12 bis, 15 and [36 (...)]. In such case, the procuring entity may:

- (a) Award the procurement contract to the bidder that, at the closure of the auction, submitted the bid with the next lowest price or next lowest evaluated bid, as applicable; or
- (b) Reject all remaining bids in accordance with article 12 (1) of this Law, and hold another auction under the same procurement proceedings or announce new procurement proceedings.

(2) Notice of acceptance of the bid shall be given promptly to the bidder that submitted the bid that the procuring entity is prepared to accept.

(3) The name and address of the bidder with whom the procurement contract is entered into and the contract price shall be promptly communicated to other bidders.

[source A/CN.9/WG.I/WP.55, para 29]<sup>20</sup>

## CHAPTER VI. REVIEW\*

### Article 52. Right to review

(1) Subject to paragraph (2) of this article, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Law may seek review in accordance with articles 53 to [57].

~~(2) The following shall not be subject to the review provided for in paragraph (1) of this article:~~

- ~~(a) The selection of a method of procurement pursuant to articles 18 to 22;~~
- ~~(b) The choice of a selection procedure pursuant to article 41 (1);~~
- ~~(c) The limitation of procurement proceedings in accordance with article 8 on the basis of nationality;~~
- ~~(d) A decision by the procuring entity under article 12 to reject all tenders, proposals, offers or quotations;~~
- ~~(e) A refusal by the procuring entity to respond to an expression of interest in participating in request for proposals proceedings pursuant to article 48 (2);~~
- ~~(f) An omission referred to in article 27 (t) or article 38 (s).<sup>21</sup>~~

<sup>20</sup> Reflecting decisions taken at 11th session, see A/CN.9/623, paras 90-96.

\* States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not, to one degree or another, see fit to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

### **Article 53. Review by procuring entity (or by approving authority)**

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, as the case may be.)

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity (or of the approving authority) need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 30 days after the submission of the complaint, issue a written decision. The decision shall:

(a) State the reasons for the decision; and

(b) If the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken.

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [54 or 57]. Upon the institution of such proceedings, the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [54 or 57].

### **Article 54. Administrative review\***

(1) A supplier or contractor entitled under article 52 to seek review may submit a complaint to [insert name of administrative body]:

(a) If the complaint cannot be submitted or entertained under article 53 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

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<sup>21</sup> Reflecting provisional decision taken at 6<sup>th</sup> session, see A/CN.9/568, para. 109.

\* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 54 and provide only for judicial review (article 57).

(b) If the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) Pursuant to article 53 (5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 53 (4); or

(d) If the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 53, provided that the complaint is submitted within 20 days after the issuance of the decision.

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(3) The [insert name of administrative body] may [grant] [recommend]\*\* one or more of the following remedies, unless it dismisses the complaint:

(a) Declare the legal rules or principles that govern the subject-matter of the complaint;

(b) Prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) Require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) Annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

(e) Revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

(f) Require the payment of compensation for

*Option I*

Any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

*Option II*

Loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings;

(g) Order that the procurement proceedings be terminated.

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\*\* Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

- (4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.
- (5) The decision shall be final unless an action is commenced under article 57.

**Article 55. Certain rules applicable to review proceedings under article 53  
[and article 54]**

- (1) Promptly after the submission of a complaint under article 53 [or article 54], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case may be,] shall notify all suppliers or contractors participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.
- (2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.
- (3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

**Article 56. Suspension of procurement proceedings**

- (1) The timely submission of a complaint under article 53 [or article 54] suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.
- (2) When the procurement contract enters into force, the timely submission of a complaint under article 54 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.
- (3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.
- (4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be

made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(5) Any decision by the procuring entity under this article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

### **Article 57. Judicial review**

The [insert name of court or courts] has jurisdiction over actions pursuant to article 52 and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time-limit, under article 53 [or 54].