

Article 8 bis (6)

At the thirteenth session, the Working Group agreed that the use of the word "re-evaluating" in paragraph (6) needed to be reviewed (see A/CN.9/356, para. 37). In that connection, the Working Group might wish to consider replacing the words "re-evaluating at a later stage of the procurement proceedings the qualifications of contractors and suppliers that have been prequalified" by the words "requesting, at a later stage of the procurement proceedings, contractors and suppliers that have been prequalified to re-confirm their qualifications".

* * *

Article 17(2)(e bis)

It is suggested to add the text below, as subparagraph (*e bis*), to reflect the requirement in article 28(7)(a) and (c)(ii) that the solicitation documents specify the factors, including non-price factors, that are to be used by the procuring entity in determining the successful tender, as well as to implement the decision of the Working Group in A/CN.9/356, para. 31, that the method of quantification of non-price factors should be indicated in the solicitation documents:

"(*e bis*) the factors to be used by the procuring entity in determining the successful tender, including any non-price

factors to be used pursuant to article 28(7)(c) and (d) and the manner in which any such non-price factors are to be quantified".

* * *

Article 17(2)(i)

As discussed in A/CN.9/356, para. 132, as well as in note 3 under article 34 *bis*, the Working Group may wish to consider whether further specificity is desirable in the Model Law as to the composition of the price of tenders. One possibility would be to make a more specific reference in article 17(2)(i) to the elements that are to make up the price by adding the following language:

"... including whether the price is to cover elements other than the cost of the goods or construction themselves, such as transportation and insurance charges".

* * *

Article 17(2)(y)

It was decided in A/CN.9/356, para. 69, that reference should be made in solicitation documents to any final approval requirement and to the amount of time expected to be needed to obtain any such final approval. This might be done by adding the following language at the end of subparagraph (*y*):

"and approval by a higher authority or the Government and the amount of time following the dispatch of the notice of acceptance that will be required to obtain the approval".

**3. Procurement: suspension of procurement proceedings and of performance of procurement contract: note by the Secretariat
(A/CN.9/WG.V/WP.34) [Original: English]**

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-2
I. GENERAL REMARKS	3-5
II. STAGE OF PROCUREMENT PROCESS SUBJECT TO SUSPENSION	6-9
III. DEGREE OF DISCRETION IN APPLICATION OF SUSPENSION	10-16
IV. OTHER FEATURES OF SUSPENSION PROVISIONS	17-18

INTRODUCTION

1. As reported to the eleventh session of the Working Group, the procurement laws of a number of countries contain provisions on whether the commencement of recourse proceedings by a contractor or supplier is to have an interruptive effect on the procurement proceedings. It was also reported that provisions are found concerning the effect on the performance of the procurement contract when recourse proceedings are commenced after the award of the procure-

ment contract.¹ At that session, differing views were expressed as to the approach to be taken in the Model Law on the question of interruption of procurement proceedings.²

2. At the thirteenth session, the Working Group had before it draft article 41 of the Model Law, which presented alternative approaches to the question of suspension

¹A/CN.9/WG.V/WP.22, paras. 224 and 225.

²A/CN.9/315, paras. 117 and 118.

of the procurement proceedings, as well as of the performance of a procurement contract, in response to the commencement of recourse proceedings.³ Variant A of draft article 41 provided for automatic suspension of the procurement proceedings upon the commencement of review proceedings, unless the entity conducting the review determined that such a suspension was not in the public interest. Variant B left the question of suspension of the procurement proceedings to the discretion of the entity conducting the review. Both variants invited the Working Group to consider whether or not the Model Law should provide for suspension of the performance of the procurement contract in those cases in which the review proceedings were commenced after the entry into force of the procurement contract. Variant A provided for automatic suspension of performance, in line with the automatic-suspension approach taken in that variant with regard to pre-award protests; variant B left suspension of performance to the discretion of the entity conducting the review. At the same time, it was pointed out that it would also be possible to treat those two situations differently, for example by providing for automatic suspension of the procurement proceedings, but providing that performance of the procurement contract would be suspended only if it was so decided by the entity conducting the review.⁴ At the thirteenth session, a preference was expressed for variant B. However, a number of suggestions were made with regard to the exercise of the power of suspension, and the Working Group decided that the issue of suspension needed further consideration. The Secretariat was requested to prepare a note on the subject of suspension for the fourteenth session.⁵ That note is contained in the present document.

I. GENERAL REMARKS

3. Provisions on suspension, that are found in the procurement codes of a number of countries, share a number of basic, sometimes competing objectives. These include, in addition to giving meaning to the review process, ensuring that procurement is conducted on terms optimal for the procuring entity by protecting competition in and the integrity of the procurement process, avoiding undue delay in the procurement process, protecting the interests of contractors and suppliers, and minimizing wastage of the time and financial resources of the procuring entity as well as of contractors and suppliers. However, a survey of those procurement laws reveals that they differ on a number of issues that affect the exact manner in which a balance is struck between the public interest in effective expenditure of public funds, the needs of the procuring entity, and the interests of contractors and suppliers participating in the procurement. Those issues, which are discussed below, centre around, in particular, the stage of the procurement process that is subject to suspension and the degree of discretion left to the entity conducting the review as to whether to apply a suspension.

4. Suspension of procurement proceedings or of performance of the procurement contract may be available in a

number of countries under the general rules of the legal system governing interim judicial relief, in addition to, or in place of, being available pursuant to specific provisions in procurement laws. The requirements found in such general rules include, for example, that the claimant show that without the interim measure it would suffer irreparable harm, that the imposition of the interim measure will not cause irreparable harm, and that there is a reasonable probability that the claim will succeed. The present note focuses on provisions on suspension found in procurement laws; it does not focus on provisions governing interim measures generally, since such provisions are not specific to procurement and would not be altered by the Model Law.

5. A distinction should also be drawn between provisions for suspension of procurement proceedings in response to the commencement of review proceedings and provisions inserting periods of delay into the procurement proceedings, or providing for annulment of the procurement contract, as part of a requirement that the decision of the procuring entity as to the selection of a contractor or supplier receive the approval of a higher authority. The present note does not discuss the latter type of provisions since they do not concern suspensions resulting from the commencement of review proceedings.

II. STAGE OF PROCUREMENT PROCESS SUBJECT TO SUSPENSION

6. The procurement laws of some countries provide not only for suspension of the procurement proceedings when review proceedings are commenced prior to the award of a procurement contract, but also for suspension of the performance of the procurement contract when review proceedings are commenced following the award of the procurement contract. The procurement laws of some other countries limit the availability of suspension to the pre-award stage of the procurement process, with relief in post-award review proceedings limited to damages.

7. The provisions of a procurement code governing the precise stage at which the review proceedings themselves may be commenced are relevant in determining the particular point in the procurement proceedings at which a suspension could be applied. This is particularly evident in the procurement laws of a number of countries that require the signature of a contract for the entry into force of the procurement contract. The laws of some of those countries limit the commencement of review proceedings to a specified period of time following notification or publication of the procuring entity's selection of a contractor or supplier, and prior to the signature of the procurement contract. Thus, in those countries, the suspension would be applied only at a relatively advanced stage of the procurement proceedings. By contrast, in some other countries the review proceedings may be commenced, and the resulting suspension applied, at any point in the procurement proceedings. Procurement laws which limit the commencement of review proceedings to a period of time between the publication of the procuring entity's decision and the signature of the procurement contract typically make no provision for the commencement of review proceedings following the conclusion of the procurement contract.

³A/CN.9/WG.V/WP.27.

⁴See the Working Group note in the commentary to draft article 41 in A/CN.9/WG.V/WP.27.

⁵A/CN.9/356, paras. 188-190.

8. The generally accepted rationale for suspension at the pre-award stage is that such a measure makes it possible to maintain the status quo at an early stage of the procurement process, thereby enhancing the possibility of applying a meaningful remedy should the complaint turn out to be justified and limiting wasteful expenditures by the procuring entity and by contractors and suppliers. The key rationale for not providing for suspension of the performance of the procurement contract is the potential for disruption and uncertainty that such suspension would bring to the procurement process. In those countries in which the procurement laws provide for it, the availability of suspension of the performance of the procurement contract, and ultimately annulment of that contract, is considered as enhancing competition and promoting compliance with procurement laws. Such an approach is also considered desirable in order to avoid placing the procuring entity in a situation in which it would remain bound to a procurement contract that was less favourable than it could have obtained under the circumstances, while at the same time being required to pay damages to an aggrieved contractor or supplier. Furthermore, suspension of performance is regarded as a way of keeping costs associated with a possible termination of the procurement contract at a minimum.

9. In order to minimize the extent of the disruption that might result from suspension of performance of a procurement contract, some procurement laws limit the availability of the suspension to review proceedings commenced within a limited period of time (e.g., ten days) following the award of the procurement contract.

III. DEGREE OF DISCRETION IN APPLICATION OF SUSPENSION

10. Differing approaches are found with respect to the degree of discretion given to the entity conducting the review proceedings to determine whether to apply a suspension. The procurement laws of some countries provide for the automatic application of suspension provisions upon the commencement of review proceedings, while the laws of some other countries provide that suspension is discretionary. The laws of yet other countries have a mixture of the two approaches, with automatic suspension upon the commencement of review proceedings prior to the award and, when review proceedings are commenced following award, discretionary suspension of performance of the procurement contract. It may also be noted that the inclusion in a procurement law of a provision mandating suspension of the performance of the procurement contract does not mean that that procurement law necessarily requires annulment of the procurement contract in the event that the complaint is found to be justified. It may be further noted that in a certain number of countries, suspension of the contract-award procedure is mandatory when a regional supranational authority with oversight responsibilities makes a finding that a clear and manifest infringement of the laws applicable to that procedure has taken place.

11. A key rationale behind automatic suspension is that such an approach is more effective in preserving the status quo pending the outcome of the review proceeding. The rationale behind discretionary suspension is that the increased flexibility offered by a case-by-case determination

minimizes disruption of the procurement process, avoids disproportionate inconvenience for the procuring entity and lessens the harm that might result to all parties and interests involved, including the public interest.

12. Procurement laws that mandate automatic suspension usually permit the procuring entity to obtain a waiver of suspension requirements in certain specified types of circumstances. Such provisions typically require that the procuring entity cite urgent and compelling circumstances in order to obtain the waiver, for example, that the suspension would cause grave detriment to the procuring entity or to the public interest by delaying or precluding the procurement of indispensable, urgently needed goods or construction.

13. In a number of countries, procuring entities seeking to override suspension requirements must take certain formal or procedural steps. Such steps are, for example, that the procuring entity present to the entity conducting the review proceedings a written statement of the circumstances justifying the waiver, that the waiver must be claimed within a certain period of time following the commencement of the review proceedings, and that the procuring entity notify the complainant of the waiver of the normally applicable suspension provisions.

14. The laws of some countries also provide for an exception to the application of automatic suspension requirements in cases in which a petition seeking review is dismissed at the outset due to formal defects in that petition (e.g., lack of signature by complainant).

15. Under a discretionary suspension regime, the determination of whether to grant a request for a suspension typically involves deciding whether the negative consequences of a suspension for all the interests involved outweigh the benefits. As is the case with provisions concerning waiver of automatic suspension, provisions governing discretionary suspension usually permit a procuring entity to cite urgent and compelling circumstances and prejudice to the public interest as grounds for avoiding a suspension. Specific factors considered relevant in deciding on suspension might include whether alternatives, not involving a new procurement, exist to meet the procuring entity's needs pending completion of the review proceedings and whether suspension would, due to statutory deadlines for the expenditure of funds, jeopardize the availability of public funds budgeted for the procurement.

16. Another approach to the exercise of discretion in suspension of procurement proceedings that is found in practice is one in which the entity conducting the review is permitted to determine that something less than a total suspension of the procurement proceedings is warranted. Under such an approach, which may be referred to as "partial suspension", certain aspects of the procurement proceedings, such as the opening of tenders, or the making of an award, may be suspended, while other aspects, such as the reception of tenders, may be permitted to continue. The notion of partial suspension may also be applied to the performance of the procurement contract. For example, under the procurement laws of some countries the procuring entity may be required, upon the commencement of a review proceeding, to request the contractor or supplier that

has begun performance to continue with performance in a reduced manner so as to minimize the costs of a possible termination of the procurement contract.

IV. OTHER FEATURES OF SUSPENSION PROVISIONS

17. In procurement laws providing for suspension, it is common to find time periods and deadlines for the carrying out and completion of the review proceedings. Such time limits have the effect of setting a maximum duration for the suspension, so as to limit the extent of disruption caused by the suspension. In some cases, such time periods and deadlines may also have the effect of setting a minimum duration for the suspension, with a view to providing sufficient time for a thorough review.

18. The procurement laws of a limited number of countries make reference to the effect of a suspension on the validity of tenders and tender securities submitted by contractors and suppliers. For example, the procurement laws of some countries make reference, in the context of a challenge to the procuring entity's selection of a winning contractor or supplier, to an obligation on the part of that winning contractor or supplier to ensure that the validity periods of its tender and tender security cover the duration of the review proceeding. References are also found in some laws to similar obligations on the part of the contractor or supplier initiating the review and on the part of other contractors or suppliers, as well as to an obligation on the part of the procuring entity to pay heed to the question of the continued validity of tenders and tender securities during the suspension.