final draft text to the Commission at its twenty-seventh session. It was noted that the next session of the Working Group was scheduled to be held in New York from 14 to 25 March 1994. It was stated that it would otherwise be impossible to report to the Commission on the basis of the work done at the present session.

153. A suggestion was also made that consideration should be given as to how the Model Law should be presented in its final form. In this regard, support was expressed for presenting a consolidated text including both the Model Law and the Guide to Enactment in which the articles of the Model Law would be followed by the sections of the Guide in which they are discussed. It was also noted that a list of the amendments to the Model Law to cover services would be a useful tool for States that had already adopted legislation based on the Model Law. It was, however, pointed out that the form in which the final text of the Model Law will be presented was dependent on the availability of sufficient financial resources.

B. Working paper submitted to the Working Group on the New International Economic Order at its sixteenth session: Draft model legislative provisions on procurement of services: note by the Secretariat

(A/CN.9/WG.V/WP.38) [Original: English]

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INTRODUCTION

1. The Working Group commenced its work on the topic of procurement at its tenth session, held from 17 to 25 October 1988, and devoted its eleventh to fifteenth sessions to the preparation of the Model Law on Procurement of Goods and Construction (the reports of the tenth to the fifteenth sessions are contained in documents A/CN.9/315, 331, 343, 356, 359 and 371). At its tenth session, the Working Group decided to limit the Model Law, at least initially, to the procurement of goods or construction and not to deal at that stage with the procurement of services (A/CN.9/315, para. 25). The UNCITRAL Model Law on Procurement of Goods and Construction was adopted by the Commission at its twenty-sixth session (Vienna, 5-23 July 1993).[1]

2. At the twenty-sixth session, the Commission had before it a note prepared by the Secretariat on possible future work on the procurement of services (A/CN.9/378/Add.1). The note addressed: the desirability and feasibility of preparing model legislative provisions on the procurement of services; the main differences between procurement of services and procurement of goods or construction; and the possible contents of model legislative provisions on the procurement of services. In its annex, the note presented the proposed text of possible amendments and supplements to the UNCITRAL Model Law on Procurement of Goods and Construction that would be designed to expand its scope to cover the procurement of services.

3. After deliberation, the Commission decided that the Working Group should proceed with the preparation of draft provisions on the procurement of services. While differing views were expressed as to the best possible way in which to proceed in formulating the model provisions, it was agreed that they should be presented in a manner that would be suitable both for States that had adopted the Model Law on Procurement of Goods and Construction and for States considering simultaneous adoption for goods and construction as well as for services.[2]

4. The present note contains proposed draft amendments and supplements to the Model Law that would expand its scope to also cover the procurement of services and that represent an alternative to the possible approach presented in the annex to document A/CN.9/378/Add.1. The main difference between the two proposals is that, while the proposal in document A/CN.9/378/Add.1 is to add, in a chapter IV *bis* to the Model Law, special evaluation procedures to be applied when using tendering for procurement of services, the alternative in the present note would maintain tendering proceedings as they are and add to the provisions on request for proposals special evaluation procedures for procurement of services. This approach might be

[1] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17), annex I.

[2] Ibid, paras. 261-262.

considered preferable because, while tendering proceedings can be used for the procurement of some services, in particular services whose technical and quality parameters and also those of the suppliers can be objectively measured and specified, the procurement of many other types of services would not be carried out by means of tendering proceedings. This is mainly because the tender-evaluation procedures in tendering might, in many cases, be considered not well suited for the procurement of services where the quality and abilities of the supplier are a more significant evaluation factor than the price.

5. The request-for-proposals method in the Model Law would also seem better suited for procurement of services because it would allow the procuring entity to address the request for proposals to a limited number of suppliers or contractors, which is a common practice in the procurement, for example, of consultancy services. It also would provide for advertisements to solicit expressions of interest from suppliers or contractors not directly approached by the procuring entity, but without imposing an obligation on the procuring entity to pursue every single expression of interest it received.

6. The present proposal provides various options to the procuring entity as regards the method of evaluation and selection of a supplier of services in request-for-proposals proceedings. The proposed additional article 39 *bis* would maintain the procedures in article 38 (request for proposals) for the procurement of services except that it would establish different evaluation procedures aimed at taking into account the main differences in the evaluation procedures for goods and construction and for services. The procedures for evaluation in article 39 *bis* would provide for the establishment of a quality and technical threshold, with the successful proposal being chosen from those proposals which attain an evaluation at or above the threshold level. This would be done either through a price-based competition, a competition based on a combination of the technical quality and the price, or through negotiations with the suppliers.

DRAFT AMENDMENTS AND ADDITIONS TO THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION TO ENCOMPASS PROCUREMENT OF SERVICES

1. Change the title of the Model Law to read "UNCITRAL Model Law on Procurement".

2. In article 2*(a)*, add services to the definition of "procurement" and delete the reference to "incidental services" so that the definition of "procurement" would read as follows:

"'Procurement' means the acquisition by any means, including by purchase, rental, lease or hire purchase, of goods, construction *or services.*"

3. In article 2*(c)*, add a reference to "incidental services" to the definition of "goods" as follows:

"'goods' includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity, *and includes services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves.*"

Comment: In view of the deletion of the reference to incidental services from the definition of "procurement", the effect of this addition is to enable the procuring entity to procure incidental services that are an integral part of a contract for the procurement of goods in accordance with the provisions in the Model Law that regulate the procurement of goods rather than in accordance with the provisions on the procurement of services. Such a reference to incidental services is already found in the definition of "construction".

(Note to the Working Group): The Working Group might wish to consider providing a definition of services, especially if the Model Law were to contain provisions applicable only to the procurement of services. One approach to the definition would be to provide that the term "procurement of services" covers products that are neither goods nor construction. This, for example, would seem to be the effective meaning of the term "public service contracts" under the European Community Directive on the Coordination of Procedures for the Award of Public Service Contracts (Directive EEC 92/50). Another approach might be to provide a blank space in the Model Law in which the enacting State would provide its own definition or listing of what are to be treated as services in its jurisdiction. This would provide flexibility, since some products might be treated as services in some States and not in others, while also providing for transparency, since the enacting State would be called upon to indicate in its legislation what would be regarded as services.

4. Except in the articles mentioned in paragraph 5 hereunder, make the following changes throughout the Model Law:

(i) where the words "goods or construction" are followed by the words "to be procured", replace the words "goods or construction to be procured" by the word "procurement";

(ii) where the words "goods or construction" are not followed by the words "to be procured", replace the words "goods or construction" by the words "the procurement".

5. Add the words "or services" after the word "goods" in articles 19(1), 20(1)*(d)* and 23(1)*(c)*, and, in articles 18*(a)* and 25*(g)*, after the word "construction". In article 20(1)*(a)*, *(b)* and *(c)*, replace the words "goods or construction" by the words "goods, construction or services".

6. In article 9(2), add a reference to article 39 *bis* (5)*(c)*(i), (ii) and (iii), so as to cover those communications in the procurement of services to which article 9(2) would be applicable.

7. In articles 19(1) and 40(1), add the words "or services" after the word "goods".

Comment: This would enable the procuring entity to use, for procurement of services, the request-for-quotations method currently found in the Model Law.

8. In article 23 (1)*(b)*, add the words "or a description of the services to be procured" after the words "to be effected".

9. In article 38, add a paragraph (7) *bis* as follows:

"(7) *bis*. In the procurement of services, in place of the procedures provided for in paragraphs (7), (8) and (9) of article 38, the procuring entity shall evaluate the proposals in accordance with article 39 *bis*."

Comment: The effect of this addition would be to apply the evaluation procedures in article 39 *bis* to the procurement of services by means of request for proposals, in place of the evaluation procedures provided for in article 38(7), (8) or (9), which would then only be used for the procurement of goods and construction.

(Note to the Working Group) The Working Group may wish to consider whether the conditions for use of request for proposals as set out in article 17(1) are broad or flexible enough to encompass the types of cases in procurement of services for which tendering proceedings would not be the preferred method of procurement.

10. Add an article 39 *bis* as follows:

"Article 39 *bis* *Evaluation of proposals for procurement of services*

(1) In evaluating proposals in the procurement of services, the procuring entity shall apply only the criteria referred to in article 38(3).

(2) *(a)* The procuring entity shall establish a threshold level with respect to quality and technical aspects that the proposals shall have to attain in order to merit further consideration under paragraph (3) of this article.

(b) Without considering the price of the proposals, the procuring entity shall rate each proposal in accordance with the factors for evaluating the proposals as set forth in article 38(3) and the relative weight and manner of application of those factors as set forth in the request for proposals. The procuring entity shall then rank the proposals in accordance with the ratings.

(3) *(a)* The procuring entity shall then compare the proposals that have attained a rating at or above the threshold level established in accordance with paragraph (2)*(a)* of this article.

(b) The successful proposal shall be either:

(i) the proposal with the lowest price; or

(ii) the proposal with the highest combined evaluation of the price, and of technical capacity as rated in accordance with paragraph (2)*(b)* of this article; or

(iii) the proposal which the procuring entity selects after negotiations in accordance with paragraph (4) of this article.

(4) *(a)* The procuring entity may engage in negotiations with suppliers and contractors as a means of ascertaining the successful proposal in accordance with paragraph (3)*(b)*(iii) of this article if it has so specified in the request for proposals.

(b) (i) Any negotiations between the procuring entity and a supplier or contractor shall be confidential.

(ii) Subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or any other information relating to the negotiations without the consent of the other party.

(c) The procuring entity shall:

(i) invite for negotiations on the price or other aspects of its proposal the supplier or contractor that has attained the highest rating in accordance with paragraph (2)*(b)* of this article;

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

(iii) inform the other suppliers or contractors that they did not attain the required threshold level;

(iv) if it appears to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (4)*(c)*(i) of this article will not result in a procurement contract, inform that supplier or contractor that it is terminating the negotiations.

(d) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second highest 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."

Comment: Article 39 *bis* is meant to take account of the fact that, in many cases, the major factor in the examination and evaluation of proposals in the procurement of services is the technical competence and ability of the supplier or contractor. The establishment of a threshold level enables the procuring entity to, in particular, apply a price-based criterion for the evaluation of the proposals in those circumstances where it is appropriate to do so.

The procuring entity is presented with three options as to how to select the successful proposal. The first option, in paragraph (3)*(b)*(i), is presented because, if the qualification threshold is set at a sufficiently high level, then all those suppliers or contractors that attain a rating at or above that level would in all probability be able to provide the services needed by the procuring entity at more or less the same level of quality. This would permit the procuring entity to subject those proposals to a straightforward price competition.

In the second option, as set out in paragraph (3)*(b)*(ii), the procuring entity would, using a pre-disclosed formula, weight the technical aspects of the proposals, weight the

price of the proposals as a separate criterion, and then combine the results of the evaluations according to the two weighted criteria in rating each proposal. It would then compare the ratings of the proposals on the basis of the combined evaluations, and the proposal with the highest combined rating would be the successful one.

While paragraphs (3)*(b)*(i) and (3)*(b)*(ii) do not envisage negotiations, under the procedures in paragraph (3)*(b)*(iii) the procuring entity may negotiate with suppliers so as to ascertain the successful proposal. Such negotiations are to be conducted in accordance with paragraph (4) of this article.

It would appear that negotiation to ascertain the successful proposal as now set out in paragraph (3)*(b)*(iii) is commonly used in the procurement of consultancy services. Paragraph (4) aims at ensuring that the negotiations are fair to both the procuring entity and the suppliers and contractors. It provides for confidentiality and respect for the ranking in the technical rating, while leaving the procuring entity some flexibility in determining which supplier or contractor best meets its needs.

(Note to the Working Group): It is, however, conceivable that under certain circumstances the procuring entity may wish to negotiate with a number of suppliers so as to enable them to submit their best and final offers before a final evaluation. This is not provided for in article 39 *bis,* where the negotiations under paragraph (4) may only be held with one supplier at a time with the intention of entering into a procurement contract. The Working Group may wish to consider whether to provide for such broader negotiations, prior to the evaluation procedures provided under article 39 *bis.*

11. In article 42(2), add a subparagraph *(e) bis* as follows:

"*(e)bis* a selection of the method of evaluation in the procurement of services pursuant to article 39 *bis;*"

Comment: This would exempt the selection of the evaluation procedure by the procuring entity from the review procedures.

(Note to the Working Group)

(i) Paragraph (1) of article 39 *bis* states that the procuring entity may only apply those criteria that are provided for in article 38(3). The assumption here is that those criteria that are peculiar to the procurement of services, in particular the experience and qualifications of the supplier and of the personnel proposed to provide the services, are covered by the criterion in article 38(3)*(a)* which refers to the managerial and technical competence of the supplier. The Working Group may, however, wish to consider whether it would be necessary to expand the criteria in article 38(3) in order to take into account the specific requirements peculiar to the procurement of services;

(ii) In the evaluation procedures, there is no provision on the application of margins of preference for domestic suppliers or contractors for the procurement of services. The assumption is that, if the procuring entity wishes to apply margins of preference, it could so specify in the request for proposals. However, a narrow interpretation of the criteria in article 38(3) and of their manner of application in article 39 *bis* might not lead to this conclusion. The Working Group may therefore wish to consider whether to provide expressly for the application of margins of preference in the evaluation of the proposals for the procurement of services;

(iii) The Working Group may also wish to consider whether, considering that article 39 *bis* establishes an evaluation procedure that is carried out in two stages (by first considering and evaluating the technical aspects of the offer before considering the price) and considering that paragraph (4) provides for negotiation as a procedure for evaluation in the procurement of services through request for proposals, there is a need to maintain two-stage tendering or competitive negotiations as methods that may be used for procurement of services.

C. Report of the Working Group on the New International Economic Order on the work of its seventeenth session (New York, 14-25 March 1994)

(A/CN.9/392) [Original: English]

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