Model Law accordingly enabled the procuring entity to select the "lowest evaluated tender", i.e. to select on the basis of criteria in addition to price. Subparagraphs (4)*(c)*(ii) and (iii) indicated the non-price criteria envisaged in the Model Law.

66. However, subparagraphs (4)*(c)*(ii) and (iii) did not adequately address his Government's concerns. For instance, in considering two tenderers which met the prequalification requirements and offered identical engineering skills and financial and personnel capabilities, the procuring entity might prefer the tenderer with previous experience of the particular type of work required. It was important to ensure that the procuring entity could select that tenderer, even where there was a price margin in favour of the less experienced tenderer.

67. He was not convinced that under subparagraphs (4)*(c)*(ii) and (iii) the procuring entity could. Nor was it clear from articles 6 and 21 that the procuring entity would have a sufficient margin of discretion in such cases. He therefore suggested amending subparagraph (4)*(b)*(i) to begin something like "the tender from that tenderer which has been determined to be fully capable of undertaking the contract and whose tender contains the lowest tender price . . .". That amendment, if approved, would provide the necessary latitude for the procuring entity to disregard the lowest tender price if necessary.

68. Mr. WALLACE (United States of America) said that the Model Law had been drafted in such a way as to deal with the concerns of the Australian Government. First, formal tendering was only one of the methods open to procuring entities; the other methods, such as two-stage tendering, competitive negotiation and a request for proposals, allowed for consideration of a mixture of price and non-price factors. Secondly, even formal tendering offered a degree of latitude, because tenders were judged on the basis of qualification and responsiveness as well as of price.

*The meeting rose at 5 p.m.*

## Summary record of the 506th meeting

**Tuesday, 13 July 1993, at 9.30 a.m.**

[A/CN.9/SR.506]

*Chairman:* Mr. MOHAMMED (Nigeria)

*The meeting was called to order at 9.45 a.m.*

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add. 1 and 2, A/CN.9/377)

**Consideration of draft Model Law on Procurement *(continued)***

*Article 29* (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of paragraph (4).

2. Mr. SHIMIZU (Japan), referring to subparagraph (4)*(c)*(iii), said that, as the Working Group's text was the result of long discussions, he would not propose the deletion of the subparagraph. He wished to say for the record, however, that his delegation would have preferred its deletion. First, his delegation considered, as a matter of principle, that the evaluation of tenders should be based on price factors. Secondly, to allow a procuring entity to consider factors with political implications could lead to abuse; such factors should be considered by high governmental authorities. Lastly, the factors indicated in subparagraph (4)*(c)*(iii) could undermine the logical structure of the tendering procedure as envisaged in the draft Model Law.

3. Mr. MORAN BOVIO (Spain), referring to the suggestion made by the observer for Australia at the previous meeting for an amendment to subparagraph (4)*(b)*(i), said he agreed with what had been said by the representative of the United States of America and felt that it would be preferable to leave the subparagraph as it stood.

4. Mr. WALSER (Observer for the World Bank) said that the qualifications of suppliers and contractors should not be considered in the evaluation of tenders since it would already have been decided in the prequalification process which suppliers and contractors had the necessary qualifications. To attempt to compare the qualifications of one bidder with those of another would introduce an element of subjectivity and could encourage corruption. However, article 7 made prequalification proceedings optional, and it was not clear to him what would happen if there were no prequalification proceedings. To deal with that point, the amendment suggested by the observer for Australia might be justified. He would welcome clarification from the Secretariat.

5. Mr. SAHAYDACHNY (Secretariat) noted that, under article 29 (3)*(a)*, a tender submitted by a supplier or contractor that was not qualified must be rejected.

6. Mr. WALSER (Observer for the World Bank) said that, in that case, he felt that the suggested amendment was unnecessary.

7. Mr. WALLACE (United States of America) said that there was a logical structure to the draft Model Law and that the question of qualifications, which was adequately covered by articles 6 and 7 and article 29 (3)*(a)*, should be kept separate.

8. Mr. PRIESTLEY (Observer for Australia) said that his delegation had raised the point in order to hear the views of others and would not press the suggestion which he had made at the previous meeting.

9. The CHAIRMAN said he took it that the Secretariat's suggestion for an amendment to subparagraph (4)*(d)* (see document A/CN.9/377) was accepted.

10. *It was so decided.*

11. *Paragraph (4) of article 29, as amended, was adopted.*

12. Mr. MORAN BOVIO (Spain), referring to paragraph (5), noted the amendment to that paragraph proposed by the Secretariat in document A/CN.9/377. The proposal seemed a good one; however, he wondered whether the rest of the paragraph could not be simplified by saying merely that the tender prices of all tenders were to be converted to the currency specified in the solicitation documents, without referring to the expression of prices in "two or more currencies".

13. Mr. PEREZNIETO CASTRO (Mexico), supporting that suggestion, asked what would happen if no currency were specified in the solicitation documents.

14. Mr. MORAN BOVIO (Spain) noted that article 21*(r)* required the solicitation documents to state the currency that was to be used for the purpose of evaluating and comparing tenders. Without that information, the solicitation documents would be incomplete.

15. Mr. JAMES (United Kingdom) supported the Secretariat's proposal and the suggestion made by the representative of Spain. The wording could be finalized by the drafting group.

16. Mr. WALLACE (United States of America), welcoming the reference to article 21*(r)* contained in the Secretariat's proposal, agreed with what had been said by the representative of the United Kingdom.

17. Ms. CRISTEA (Observer for Romania) wondered whether the reference was necessary, since there was a reference to article 29(5) in article 21*(r)*.

18. The CHAIRMAN said that the Secretariat's proposal and the suggestion made by the representative of Spain seemed to be acceptable in principle, but that it would be for the drafting group to finalize the wording. He suggested that paragraph (5) be adopted on that understanding.

19. *It was so decided.*

20. *Paragraphs (6), (7) and (8) were adopted.*

*Article 30*

21. *Article 30 was adopted.*

*Article 31*

22. Mr. RAO (India), drawing attention to the commentary on article 31 in the draft Guide to Enactment (document A/CN.9/375), said that the article seemed to address only the interests of suppliers and contractors. There was a need, however, to address also the interests of the procuring entity when suppliers or contractors were engaging in price-fixing.

23. In India, the Government did not resort to negotiation as a general rule. However, when there was evidence that a cartel of suppliers or contractors had caused unreasonable prices to be quoted, the Government did enter into negotiations with all tenderers.

24. Accordingly, he felt that the article should be amended through the addition of a phrase on the following lines: "except when the procuring entity has reason to believe that the supplier or contractor has entered into a price-fixing arrangement".

25. Mr. WALLACE (United States of America), noting that the representative of India had raised an interesting point, said that the purpose of article 31 was to preserve the integrity of competitive tendering. The article, which was based on the assumption that honest suppliers and contractors would not participate in competitive tendering if they thought that the procuring entity might try to force them to lower their prices, removed the temptation for the procuring entity to attempt to obtain a lower price—thereby perhaps ending up with a poorer product or a poorer job.

26. Article 33, which was extremely strict, complemented article 21, which stated what solicitation documents should contain. If the procuring entity could not provide solicitation documents containing all the requisite information, it should not proceed with competitive tendering but choose another procurement method.

27. Cartels could be dealt with under article 30, which provided for the rejection of all tenders—for example, if the procuring entity believed it was faced with a price ring. Moreover, the draft Model Law did not exclude recourse to criminal law, and it referred to the disqualification of suppliers and contractors found to have acted improperly.

28. Mr. MORAN BOVIO (Spain), agreeing with the representative of the United States of America, said that, if tender prices could be changed through negotiation, instability would result.

29. Mr. WALSER (Observer for the World Bank), agreeing with the representatives of the United States of America and Spain, said that the prohibition of negotiation was central to competitive tendering, where suppliers and contractors knew that they had just one chance to quote their best possible price.

30. In countries where negotiations were permitted, suppliers and contractors might quote prices 5-10 per cent above their best possible prices in the knowledge that they could come down by 3-4 per cent in the course of negotiations and still earn more than they would if no negotiations were permitted.

31. To his knowledge, price-fixing did not occur in international trading. If it ever should occur, the procuring entity could reject all bids under article 30 and resort to two-stage tendering, a request for proposals or competitive negotiation under article 14*(d)*. Certainly article 31 should not be modified in order to provide for such an occurrence.

32. Mr. LEVY (Canada), recognizing the importance of the point raised by the representative of India, said it was facile to say that the procuring entity could reject all tenders; it might not be immediately apparent that they were not in order. Procuring entities often did not realize until after the conclusion of a contract that there had been collusion among the suppliers or contractors. In Canada, investigators had on two occasions discovered the existence of a cartel only about a year after conclusion of the contract.

33. The problem was a serious one, and he had not found any way of dealing with it in procurement law. To allow negotiations would not solve it, and article 31 should therefore be kept as it stood.

34. Mr. PEREZNIETO CASTRO (Mexico) said that there should be no negotiation in the competitive tendering process and that the Model Law provided for negotiation within the framework of other procurement methods.

35. The CHAIRMAN said it seemed that the Commission's view was that the prohibition of negotiation as reflected in article 31 should be retained as the Model Law provided for a variety of methods other than competitive tendering whereby negotiation could take place. If that was so, article 31 could be adopted as it stood.

36. *Article 31 was adopted.*

*Article 32*

37. *Paragraphs (1) and (2) were adopted.*

38. Mr. SAHAYDACHNY (Secretariat), introducing the amendment to paragraph (3) proposed by the Secretariat in document A/CN.9/377, said the intention was to make it clear that, if approval by a higher authority was required, the requirement—reflected in article 21*(x)*—should be referred to in the solicitation documents.

39. *Paragraph (3) was adopted with the amendment proposed by the Secretariat.*

40. *Paragraphs (4) and (5) were adopted.*

41. Ms. ZIMMERMAN (Canada), noting the Secretariat's proposal in document A/CN.9/377 relating to paragraph (6), recalled that, under article 11(2), a portion of the record of procurement proceedings was available for inspection by any person. Extending the disclosure requirement provided for in paragraph (6) of article 32 did not therefore seem very useful, and it might even result in an onerous duty for the procuring entity. Her delegation would prefer that paragraph (6) be left unchanged.

42. Mr. WALLACE (United States of America) said that, having examined a similar proposal made by Japan (in document A/CN.9/376/Add.2), he considered the Secretariat proposal to be useful. Publication of a notice of the procurement contract need not be an onerous duty; an official gazette or a similar journal could be used.

43. Mr. LEVY (Canada) said it was not clear from the Secretariat's proposal whether a notice would have to be published even in the case of a very small contract.

44. With regard to the idea of publishing in an official gazette or a similar journal, the notice would probably appear too late to serve any purpose, and official gazettes and the like were normally read only by civil servants.

45. Ms. CRISTEA (Observer for Romania) said that, although she was in favour of promoting transparency in the procurement process, she doubted whether States would agree to publish the notice of a procurement contract—for instance, by advertising in a national newspaper—if the contract had a bearing on national security.

46. Mr. JAMES (United Kingdom) said that, as article 11(2) required that a portion of the record of procurement proceedings be made available for inspection by any person, the concern behind the Secretariat's proposal could perhaps be met if the name and address of the successful tenderer were also included in the record.

47. He agreed with the observer for Romania that States were likely to be extremely reluctant about publishing the notice of a procurement contract which had a bearing on national security. Under article 1, however, procurement involving national security could be excluded from the Model Law's scope of application if the State so decided.

48. Mr. KOMAROV (Russian Federation), expressing support for the Secretariat's proposal, said, with regard to the point raised by the observer for Romania, that in cases of restricted tendering (provided for in article 18(3)) the obligation to publish would be restricted.

49. Mr. LEVY (Canada) suggested that article 11(1)*(b)* be amended along the lines envisaged by the United Kingdom representative. As to the point raised by the observer for Romania, he was not sure that it was adequately met by article 11 as currently drafted.

50. Mr. WALLACE (United States of America), having also referred the observer for Romania to article 1, said that the requirement to publish the notice of a procurement contract might in some cases be burdensome, but the burdens imposed by the Model Law were in the interests of—*inter alia*—greater transparency. In any case, the provision could be worded in such a way as to ensure that the requirement was not unreasonable.

51. He agreed with the comment of the Japanese Government that the publication requirement should be extended to other procurement methods, including single-source procurement.

52. Mr. SHIMIZU (Japan) expressed support for the Secretariat's proposal.

53. Ms. ZHANG Yuejiao (China) said her delegation was in favour of transparency provided that there was no conflict with considerations of public interest, law enforcement and national security.

54. She suggested that, in order to meet any concerns about publication costs, wording on the lines of ". . . the procurement contract shall be made publicly available" might be used; publication would then not be necessary, but it should be possible for interested parties to obtain the information they wanted.

55. The CHAIRMAN said he took it that the Commission wanted paragraph (6) to allow for publication of the notice of a procurement contract, but in a manner that would not involve undue expense for the procuring entity, and article 11(1)*(b)* to be amended by the addition of the words "and the name and address of the supplier or contractor to which the contract is awarded".

56. *It was so decided.*

*Articles 33 and 34*

57. *Articles 33 and 34 were adopted.*

*Article 35*

58. Mr. WALLACE (United States of America) noted that in document A/CN.9/377 the Secretariat proposed the addition in paragraph (4) of the sentence "The procuring entity shall select the successful offer on the basis of the best and final offers." He suggested that the end of the sentence be amended to read ". . . on the basis of such best and final offers".

59. *Article 35, as amended, was adopted.*

*Article 36*

60. Mr. SAHAYDACHNY (Secretariat) said that, on reflection, the Secretariat wished to withdraw the proposal made in document A/CN.9/377 for amending paragraph (1).

61. Mr. KOMAROV (Russian Federation) suggested that the problem of deciding what elements were to be included in the price could be resolved by a reference, in the Guide to Enactment, to INCOTERMS, published by the International Chamber of Commerce (ICC).

62. Ms. CRISTEA (Observer for Romania) and Mr. MORAN BOVIO (Spain) agreed with the representative of the Russian Federation.

63. The CHAIRMAN said that a reference to INCOTERMS could be included in the Guide to Enactment and took it that the Commission wished to adopt paragraph (1) as submitted by the Working Group in document A/CN.9/371.

64. *It was so decided.*

65. Paragraph (2) was adopted.

66. Mr. WALLACE (United States of America), in response to the representatives of Mexico and Thailand, said that the word "reliable" in paragraph (5) related to "the supplier or contractor".

67. Mr. TUVAYANOND (Thailand) said he found the phrase "responsive to the needs" in paragraph (3) too vague; who decided on the needs of the procuring entity?

68. Mr. WALSER (Observer for the World Bank) said that the phrase "considered reliable" was vague and suggested instead "considered qualified".

69. Also, he suggested the replacement of "responsive to the needs of the procuring entity" by "responsive to specifications".

70. Mr. KOMAROV (Russian Federation) supported the suggestions made by the observer for the World Bank.

71. Mr. SAHAYDACHNY (Secretariat) said that the words "responsive to specifications" would be in line with the intention of the Working Group. However, the words "considered qualified" might imply that requests for quotations involved the full panoply of provisions of articles 6 and 7.

72. Mr. LEVY (Canada), supporting the remarks made by the representative of the Secretariat, said that "responsive to specifications" might represent an improvement, but not "considered qualified".

73. Mr. WALLACE (United States of America) said he felt that the words "responsive to specifications" implied too much formality; as indicated in article 15, requests for quotations were made for the procurement of "readily available goods that are not specially produced to the particular specifications of the procuring entity".

74. He shared the opinion of the Secretariat regarding the words "considered qualified".

75. Mr. JAMES (United Kingdom), referring to the words "responsive to specifications", said that it would be wrong to use wording which suggested that requests for quotations could be used in procuring goods other than readily available ones.

76. Ms. ZIMMERMAN (Canada) agreed with the representative of the United Kingdom.

77. Mr. WALLACE (United States of America) suggested that perhaps the concerns of the representative of Thailand could be met by replacing "responsive to the needs" by "meeting the needs".

78. Mr. TUVAYANOND (Thailand) welcomed the suggestion made by the representative of the United States of America.

79. The CHAIRMAN said that he took it that the Commission wished to adopt paragraph (3) with "responsive to the needs" replaced by "meeting the needs".

80. *It was so decided.*

*The meeting rose at 12.30 p.m.*

## Summary record of the 507th meeting

### Tuesday, 13 July 1993, at 2 p.m.

[A/CN.9/SR.507]

*Chairman:* Mr. MOHAMMED (Nigeria)

*The meeting was called to order at 2.10 p.m.*

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377; A/CN.9/XXVI/CRP.5)

**Consideration of draft Model Law on Procurement *(continued)***

*Article 37*

1. Mr. GRIFFITH (Observer for Australia) said that it might be appropriate for article 37 to become part of article 16, so that single-source procurement was dealt with entirely in article 16 rather than in two articles.

2. Mr. HERRMANN (Secretary of the Commission) said that, during the Commission's previous session, the drafting group had felt that there should be a clear separation between the conditions for using different procurement methods (dealt with in chapter II) and the procedures for procurement methods other than tendering (dealt with in chapter IV). There was little to be said about procedures in the case of single-source procurement, but for the sake of consistency it had been felt that an article concerning that method should appear in chapter IV.

3. Mr. WALLACE (United States of America) suggested that, like article 36(3), article 37 conclude with a phrase concerning the reliability of the supplier or contractor. He could go along with the words "considered qualified", which had been considered at the previous meeting in connection with article 36(3), provided it was understood that, in the present case also, they did not imply that all the provisions of articles 6 and 7 would come into play.

4. Mr. WALSER (Observer for the World Bank) said that, in his opinion, the words "considered qualified" did not mean that the procuring entity would have to ascertain the qualifications of suppliers and contractors or engage in prequalification proceedings. Perhaps a phrase like "that is qualified as defined in article 6(2)" at the end of article 37 would be appropriate as it appeared to be generally agreed that article 6(2) should apply whatever procurement method was used.