

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 speci-

fications" 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 pro-

cedures 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.

5. It was surprising that article 37 referred back to article 16 ("Conditions for use of single-source procurement"), while articles 33-36 did not refer back to articles 14 and 15. Perhaps the appropriate references should be inserted in articles 33 to 36.
6. Mr. LEVY (Canada) felt that one could safely add the phrase "that is considered reliable by the procuring entity" at the end of article 37.
7. Mr. SAHAYDACHNY (Secretariat) suggested that, if such a phrase was added, the Commission might wish the drafting group to devise language that would ensure that, in assessing the reliability of a supplier or contractor, the procuring entity did not consider factors other than those whose consideration was envisaged in article 6.
8. Mr. JAMES (United Kingdom) said that, as he understood it, the Commission wished to allow the procuring entity to assess reliability, but not by means of the formal procedures provided for in article 6.
9. Mr. SAHAYDACHNY (Secretariat) said that the Working Group had moved article 6 into chapter I, "General provisions", because it had felt that it should apply to all methods of procurement. In any case, perhaps there was not much difference between the information which the procuring entity might seek pursuant to article 6 and the information which it might seek in assessing reliability in connection with requests for quotations and with single-source procurement.
10. Mr. WALLACE (United States of America), pointing out that the enumeration in article 6(2)(a) actually included "reliability", said that in the wording which was being sought a distinction should be made between article 6 and the criteria set forth in subparagraphs (2)(a) to (e) of that article.
11. Mr. LEVY (Canada) felt that in the case of requests for quotations and single-source procurement it was not necessary to refer to the criteria set forth in subparagraphs (2)(a) to (e) of article 6.
12. Perhaps one could add at the end of article 6(1) a phrase like "except for procurement made in accordance with articles 36 and 37".
13. Mr. TUVAYANOND (Thailand) said he understood that article 6 applied to all the procurement methods envisaged in the Model Law. Accordingly, he felt that articles 36 and 37 should be linked in some way to article 6, paragraph (2) of which was in any case not mandatory—as made clear by the words "the procuring entity may require" in the *chapeau*.
14. Mr. WALSER (Observer for the World Bank) said that use of the word "reliable" might open the way to subjective judgments and that he did not see why the criteria set forth in subparagraphs (2)(a) to (e) of article 6 should not apply to all procurement methods. The procurements envisaged by paragraph (2) were not very complicated.
15. Ms. PIAGGI-VANOSI (Argentina) supported the views expressed by the observer for the World Bank.
16. Mr. LEVY (Canada), agreeing that the words "the procuring entity may require" in the *chapeau* of paragraph (2) of article 6 meant that that paragraph was not mandatory, suggested that article 36(3) and article 37 might be drafted in such a way as to convey the idea that "the procuring entity may have regard to the criteria set forth in article 6(2)(a) to (e) if it so desires".
17. Mr. TUVAYANOND (Thailand), supporting the suggestion made by the representative of Canada, suggested that the expression "*mutatis mutandis*" be incorporated into the wording in question.
18. Mr. JAMES (United Kingdom) suggested for article 36(3) and article 37 a formulation on the lines of "supplier or contractor that is considered by the procuring entity to satisfy such of the criteria set forth in subparagraphs (a) to (e) of article 6(2) as the procuring entity considers appropriate in the circumstances".
19. Mr. TALICE (Uruguay) suggested that, given the non-mandatory character of article 6(2), one might speak in article 36(3) and article 37 of "full or partial compliance with the criteria set forth in article 6(2)".
20. The CHAIRMAN suggested that the Commission request the drafting group to devise wording on the lines of "supplier or contractor that is considered reliable and satisfies such requirements as stipulated in article 6(2)(a) to (e)".
21. Mr. LEVY (Canada) asked whether the Commission wished to redraft article 6(1) so as to exempt requests for quotations and single-source procurement from the scope of application of article 6.
22. Mr. TUVAYANOND (Thailand) said that, in his opinion, article 6 should remain as it stood.
23. Mr. HERRMANN (Secretary of the Commission) said that the inclusion in article 36(3) and article 37 of wording on the lines of "the procuring entity may have regard to the criteria set forth in article 6(2)(a) to (e) if it so desires" would result in doubts about the position as regards procurement methods other than requests for quotations and single-source procurement.
24. Mr. WALLACE (United States of America) suggested that no phrase about reliability be added to article 37 and that the words "and that is considered reliable by the procuring entity" in article 36(3) be deleted.
25. Mr. LEVY (Canada) supported the suggestion.
26. Mr. JAMES (United Kingdom) said that the suggestion made by the representative of the United States of America would sever the link between article 36(3) and article 37 on one hand and article 6 on the other. If there was to be no reference to reliability in article 36(3) and article 37, there should be a reference to qualifications.
27. Mr. TUVAYANOND (Thailand) said he would like to see a reference to reliability in both article 36(3) and article 37.
28. Mr. WALSER (Observer for the World Bank), agreeing with the United Kingdom representative, said he believed that there should be a reference to qualifications not only in article 36(3) and article 37, but also in articles 33 to 35.
29. Ms. PIAGGI-VANOSI (Argentina) supported the United States representative's suggestion that there should be no reference to reliability in article 36(3) and article 37 and the suggestion made by the representative of Thailand with regard to the addition of "*mutatis mutandis*".
30. Mr. WALLACE (United States of America) suggested asking the drafting group to devise a form of words for article 6 which would authorize the procuring entity to have maximum regard to the criteria set forth in subparagraphs (2)(a) to (e) of that article.

31. The CHAIRMAN said that the drafting group could be asked to redraft article 6(1). The Commission still had to decide whether there should be references to reliability in article 36(3) and article 37.

32. Mr. TUVAYANOND (Thailand) said he would not press his view if article 6 could be construed as permitting the procuring entity to take account of the reliability of the supplier or contractor.

33. The CHAIRMAN asked the United States representative whether, in his opinion, a supplier or contractor could meet the standards of article 6(2)(a) to (e) without being reliable.

34. Mr. WALLACE (United States of America) said he thought that article 6 could be modified in such a way as to address the point made by the representative of Thailand and the point made by the observer for the World Bank.

35. Mr. TALICE (Uruguay) suggested that, if the last phrase of article 36(3) was to be deleted, article 6(1) be modified so as to indicate that all procurement methods fell within the scope of application of article 6.

*The meeting was suspended at 3.35 p.m. and resumed at 4.15 p.m.*

36. Mr. SAHAYDACHNY (Secretariat) proposed the insertion, near the beginning of article 6, of a sentence on the lines of "No procurement shall be entered into unless the supplier or contractor is qualified". He also proposed that paragraph (2) include a provision on the lines of "Suppliers or contractors shall be deemed qualified to perform the procurement contract if they meet such of the following criteria as the procuring entity deems appropriate in the particular case", followed by the criteria set forth in subparagraphs (2)(a) to (e).

37. The intention behind those proposals was that all methods of procurement should be covered, but that the procuring entity should not be required to carry out exhaustive assessments of qualifications. There would be due regard to the importance of reliability in the context of requests for quotations and single-source procurement without, however, any reference to reliability in article 36(3) or article 37.

38. Mr. LEVY (Canada) and Mr. TUVAYANOND (Thailand) welcomed the proposals.

39. The CHAIRMAN took it that the Commission wished to adopt article 37 in the light of those proposals.

40. *It was so decided.*

41. Mr. WALLACE (United States of America), recalling the decisions taken by the Commission at its previous meeting regarding article 32(6) and article 11(1)(b), said that the Commission appeared not to have dealt with the comment of the Japanese Government (in document A/CN.9/376/Add.2) that "this requirement of publication should . . . be extended to other methods of procurement, including single-source procurement".

*Articles 15 bis and 36 bis*

42. The CHAIRMAN, recalling the discussion on article 18(3) during the Commission's 502nd meeting, opened for discussion the articles on restricted tendering proposed by the Inter-American Development Bank in document A/CN.9/XXVI/CRP.5. He said that, if the two articles were adopted, article 18(3) would be deleted.

43. Mr. SAHAYDACHNY (Secretariat) said that, if the two articles were adopted, their wording would need to be aligned

with the terminology used elsewhere in the Model Law; unless matters of substance were involved, that task could be left to the drafting group.

44. It might be helpful to compare paragraphs (a) to (d) of article 15 *bis* with paragraph 3 of the commentary on article 18 in the Guide to Enactment (document A/CN.9/375). In that connection, he recalled that during the Commission's 502nd meeting several members had felt that the phrase "for reasons of economy and efficiency" in article 18(3) should be made more explicit.

45. Mr. MORAN BOVIO (Spain), commending the idea of including articles on restricted tendering in the Model Law, said that details of wording could be settled by the drafting group.

46. Mr. LEVY (Canada) said he had doubts about making restricted tendering so visible, but if the Commission wished to accept the proposals before it, he would not object.

47. He presumed that the last phrase of paragraph (2) of article 36 *bis*—"except that publicity requirements shall not apply"—was intended to refer to the early stages of tendering, since publicizing of the outcome was required with all other procurement methods.

48. Mr. GRIFFITH (Observer for Australia) said that, like the Canadian representative, he was not sure about the wisdom of including separate articles on restricted tendering. The draft Model Law already contained provisions relating to restricted tendering which the Commission had discussed at length without reaching agreement. In such circumstances, he preferred that the existing language be left as it stood since it had the sanction of the Working Group.

49. If the Commission did decide to adopt the two articles, the reference to "small quantities" in paragraph (d) of article 15 *bis* should be brought into line with the corresponding phrase in paragraph (b) of article 17, which the Commission—at its 501st meeting—had decided to change from "low amount or value" to "small quantity or low monetary value".

50. Mr. AZZIMAN (Morocco), commending the proposal submitted by the Inter-American Development Bank, said that it would result in the Model Law's having a more logical structure—open tendering, the preferred method, accompanied by certain derogations dependent on specific conditions.

51. Noting that the language of the proposed articles would need to be harmonized with that employed elsewhere in the Model Law, he suggested that in paragraph (c) of article 15 *bis* and paragraph (2) of article 36 *bis* "public tendering" be replaced by "open tendering" (in contrast to restricted tendering) and that in paragraph (2) the word "prior" be inserted before "publicity".

52. Mr. JAMES (United Kingdom) said he too was not sure whether the introduction of two new articles was the best way of dealing with restricted tendering.

53. If article 15 *bis* was to be adopted, it would require a paragraph (e) dealing with "any other exceptional cases". He was not convinced that paragraphs (b) and (c) of article 15 *bis* provided valid reasons for recourse to restricted tendering. Nor did he see the point of the reference to "small quantities" (or something on the lines of "small quantity or low monetary value") in paragraph (d) given the basic principle that restricted tendering was justifiable only if the value of the contract and the costs of the procurement procedure were so out of balance as to render open tendering undesirable.

54. The second sentence in paragraph (1) of article 36 *bis* would need to be examined in the light of the decision taken earlier in the meeting with regard to article 6.

55. Mr. TUVAYANOND (Thailand) agreed with the representative of the United Kingdom about the need, in article 15 *bis*, for a paragraph (e) dealing with "any other exceptional cases".

56. Regarding paragraph (b) of article 15 *bis*, he considered the words "duly justified" to be unnecessary; it was for the national authorities of enacting States to decide what constituted an "urgent need".

57. Like the observer for Australia, he did not like the formulation "small quantities" in paragraph (d) of article 15 *bis*; perhaps

that paragraph might be amended to read "the procurement is of minor significance".

58. With regard to paragraph (1) of article 36 *bis*, he questioned the use of the word "reputable" in the second sentence as it might lead to discrimination against new firms to the benefit of established ones. He thought that "reasonable" would be more appropriate than "sufficient" in the third sentence.

*The meeting rose at 5.05 p.m.*

### Summary record of the 508th meeting

Wednesday, 14 July 1993, at 9.30 a.m.

[A/CN.9/SR.508]

Chairman: Mr. MOHAMMED (Nigeria)

*The meeting was called to order at 9.40 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, A/CN.9/378 and Add.1, A/CN.9/XXVI/CRP.5)

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

*Articles 15 bis and 36 bis (continued)*

1. Mr. PEREZNIETO CASTRO (Mexico) supported the proposal by the Inter-American Development Bank as restricted tendering would thereby be treated as a method of procurement in chapter II and not buried in chapter III among the tendering proceedings. With regard to article 15 *bis*, he proposed that paragraphs (b), (c) and (d) be replaced by a new paragraph (b) reading as follows: "the time and cost of the examination and evaluation of a large number of tenders would be disproportionate to the value of the goods or construction to be procured". That wording was derived from paragraph 3 of the commentary on article 18 in the draft Guide to Enactment (document A/CN.9/375).

2. With regard to article 36 *bis*, he proposed the deletion of "except that publicity requirements shall not apply".

3. Mr. WALLACE (United States of America) said that—like the representatives of Canada and the United Kingdom and the observer for Australia, who had expressed their views towards the end of the previous meeting—he had doubts about the advisability of introducing two articles on restricted tendering; one should not give it unwarranted publicity. He would have preferred to make the provisions of article 18(3) more stringent.

4. If it was the wish of the Commission to adopt the proposed articles, however, he would support the Mexican representative's proposal for amending article 15 *bis* and reserve the right to propose additional changes in that article.

5. He agreed that the reference to publicity requirements in article 36 *bis* should be deleted, although it should be made clear that the aim of the deletion was to remove the need for advance publicity as opposed to *ex post facto* publicity.

6. Mr. PARRA-PEREZ (Observer for Venezuela), expressing strong support for the proposal of the Inter-American Develop-

ment Bank, said that in Latin America restricted tendering was widely used as a procurement method intermediate between single-source procurement and totally open tendering.

7. If the Model Law did not provide for restricted tendering, it was possible that Latin American countries would resort increasingly to single-source procurement. The proposal of the Inter-American Development Bank would therefore promote—rather than inhibit—competition and freedom of trade.

8. The proposals just made by the Mexican representative would have to be studied. Meanwhile, he felt that in paragraph (d) of article 15 *bis* the words "for small quantities" should be changed to something like "of low value".

9. Ms. PIAGGI-VANOSI (Argentina) said that the possibility that the procuring entity would resort to restricted tendering should be reduced as far as possible. She therefore supported the proposals made by the representative of Mexico, and particularly the deletion of the last phrase of article 36, for publicity should be as wide as possible in cases of restricted procurement.

10. Mr. SHIMIZU (Japan), also supporting the Mexican proposal to delete the last phrase of article 36, referred to the suggestion made by the Japanese Government regarding article 18 in document A/CN.9/376/Add.2 and said that publicity was particularly important in the case of restricted tendering; people had access to the record, but only after the event. He would therefore favour the publication of some kind of notice in an official gazette or a similar journal, it being understood that the notice would not be published too late to be of anything but historical interest.

11. With regard to the burden on the procuring entity resulting from publicity requirements, he associated himself with what the United States representative had said at an earlier meeting about such burdens being in the interests of transparency.

12. Mr. GRIFFITH (Observer for Australia) expressed misgivings about the proposed introduction of two new articles into the Model Law at such an advanced stage in the Commission's examination of the draft. There might not be sufficient time to reflect on the consequences of introducing the two articles, and the Commission might afterwards find that it had made a mistake.