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Draft UNCITRAL Model Law on Public Procurement

Proposals for revised chapter IV and an additional provision for chapter I

1. Introduction

1. At its sixteenth session, Working Group I entrusted the Secretariat to review a proposal for draft article 40 (Competitive dialogue) to be placed in chapter IV of the revised Model Law (the "Proposal") and to make the changes necessary to align the text with the rest of the proposed revised Model Law, as set out in document A/CN.9/WG.I/WP.69 and addenda (the "proposed revised Model Law") (A/CN.9/672, para. 13). The proposed revised Model Law is before the Commission at its forty-second session. The text of the Proposal and amendments thereto are contained in section 2 below. In the light of the strong support expressed in the Working Group for retaining two-stage tendering (article 46 of the 1994 Model Law) as a separate procurement method in the revised Model Law, it was the understanding in the Working Group that chapter IV of the revised Model Law would contain provisions on that procurement method along with article 40 (Competitive dialogue) (A/CN.9/672, paras. 48 and 66). The Commission may wish to note that the provisions of the 1994 Model Law on two-stage tendering are reproduced in draft article 38 in document A/CN.9/WG.I/WP.69/Add.3.

2. At the same session, Working Group I entrusted the Secretariat with the preparation of draft provisions on the following subjects, for consideration at a later stage: (a) the issue of a request for expressions of interest, to be used for an investigation of the market before launching procurement, and perhaps for other purposes; and (b) cancellation of the procurement proceedings before the deadline for presenting submissions. It was the Working Group's understanding that provisions on these subjects would be placed in chapter I of the revised Model Law, as being of general application (in proposed revised articles 6 and 16 respectively) (A/CN.9/672, para. 13). Suggested text for revised draft article 6 to address requests



for expressions of interest is set out in section 3 below. The revised draft article 16 in document A/CN.9/WG.I/WP.69/Add.2 includes a reference to the cancellation of the procurement.

3. Working Group I also requested the Secretariat to amend some provisions of chapter I of the proposed revised Model Law, such as on evaluation criteria (draft article 12), public notice of procurement contract awards (draft article 20), confidentiality (draft article 21), and the record of procurement proceedings (draft article 22), and the provisions of chapter II on clarifications and modifications of solicitation documents (draft article 28), in the light of the provisions on competitive dialogue (A/CN.9/672, para. 13), and upon their finalization.

4. Working Group I also heard suggestions that request for proposals without negotiations and competitive negotiations as envisaged in article 49 of the 1994 Model Law should be retained in the revised Model Law as separate procurement methods (A/CN.9/672, paras. 49 and 61). It also noted a concern of the observer of the World Bank that concurrent (simultaneous in the 1994 Model Law) format of negotiations would not be appropriate for some types of services, which should instead be procured through consecutive negotiations, perhaps with a focus on price only, as was envisaged in article 44 of the 1994 Model Law (A/CN.9/672, paras. 67 and 123). The Working Group did not formulate its position on these points. The Commission may wish to note that the provisions of the 1994 Model Law on request for proposals and on competitive negotiations are reproduced in draft articles 39 and 40 in document A/CN.9/WG.I/WP.69/Add.3. No provisions on consecutive negotiations were included in the proposed revised Model Law pending the consideration of the subject in the Working Group or in the Commission.

2. Provisions for chapter IV: draft article 40

5. Set out below is each paragraph of the Proposal (or group of paragraphs where appropriate) as formulated during Working Group I's sixteenth session, and each such paragraph or group is followed by the Secretariat's understanding, where necessary, of the amendments that should be made to align the text with other provisions in the proposed revised Model Law. For the ease of reference of the reader, each step of the procedure appears under a heading, which in accordance with normal presentation of UNCITRAL texts, would not feature in the revised Model Law itself.

(a) Conditions for use

Proposal paragraph (1):

“[Subject to approval by ... (the enacting State may designate an authority to issue the approval)], a procuring entity may engage in procurement by means of a request for proposals (RFP) with competitive dialogue if it is not feasible for the procuring entity to formulate a sufficiently comprehensive description, in order to obtain the most satisfactory solution to its procurement needs.”

Restated paragraph aligned with the proposed revised Model Law:

“(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 proposals with competitive dialogue if it is not feasible for the

procuring entity to formulate a sufficiently comprehensive description, and in order to [seek various possible means of meeting its needs [and]] obtain the most satisfactory solution [to them] [its procurement needs].”¹

(b) Prequalification or pre-selection

Proposal paragraph (2):

“As an optional matter, the procuring entity may pre-qualify suppliers or contractors before engaging in dialogue in accordance with articles 10 and 15, regarding prequalification.”

Restated paragraph aligned with the proposed revised Model Law:

“(2) ²[As an optional matter] [Where a procuring entity intends to limit the numbers of suppliers or contractors from which it will solicit proposals],³ the procuring entity [may/shall] engage in prequalification proceedings in accordance with article[s 10 and] 15 of this Law or [may/shall] engage in a pre-selection procedure in accordance with this paragraph. In the latter case:

(a) The provisions of article 15, except for its paragraphs (8) to (10), shall apply to the pre-selection procedure;

(b) The invitation to pre-qualify and the prequalification documents shall state, in addition to the information listed in [article 15 (3) and (5)], [the information listed in paragraph (3) (c) and (d) of this article],⁴ and that the procuring entity intends upon completion of the pre-selection procedure to issue a request for proposals to a limited number of pre-selected suppliers or contractors that best meet the prequalification criteria;

(c) The invitation to pre-qualify and the prequalification documents shall in addition state the maximum number of pre-qualified suppliers or contractors [from which the proposals will be solicited] [to be pre-selected to

¹ To be supported by commentary in the Guide to Enactment regarding the approval requirement, the nature of the dialogue (i.e. that it is not seeking technical improvements or price reductions, and the circumstances in which this method is appropriate (A/CN.9/672, paras. 33 (b) and (d), 35 and 36). Working Group I deferred its consideration of how to address the overlap between the conditions for use of this method and for the use of two-stage tendering (A/CN.9/672, para. 37).

² Working Group I requested that paragraph (2) of the proposal before it at the sixteenth session (the “Proposal”), addressing a Request for Expressions of Interest, be relocated to Chapter I of the Model Law (A/CN.9/672, para. 73). See, further, paragraph 6 below. The Working Group also decided that the provisions addressing limitation of numbers through a pre-selection procedure should be conformed to the provisions in the PFIPs Instruments (A/CN.9/672, para. 55). Accordingly, this paragraph (which was not in the proposal before Working Group I at its sixteenth session) provides for such a procedure, and draws on the PFIPs instruments as reflected in Option 3 for draft article 34 (see A/CN.9/WG.I/WP.69/Add.3).

³ The Commission may consider that prequalification is not guaranteed to limit the number of participants, unlike pre-selection. However, if it wishes to make the aim of the procedure clear, the Commission may nonetheless wish to retain the second formulation in square brackets.

⁴ The information set out in paragraphs (3) (c) and (d) of this article is not included in article 15. The Commission may wish to consider whether to amend article 15 to ensure that all relevant information is set out in that article, to avoid cross-referencing beyond this article wherever possible.

participate further in the proceedings], which shall be at least [three], and the manner in which the selection of that number will be carried out;

(d) The procuring entity shall rate the suppliers or contractors that meet the prequalification criteria on the basis of the [objective]⁵ criteria applied to assess their qualifications and draw up the list of suppliers or contractors [that have been pre-selected to participate further in the proceedings] [from which the proposals will be solicited]. In drawing up the list, the procuring entity shall apply only the manner of rating that is set forth in the invitation to pre-qualify and the prequalification documents. The procuring entity shall [select suppliers or contractors from whom to solicit proposals in a non-discriminatory manner and it shall] select a sufficient number of suppliers or contractors to ensure effective competition;

(e) The procuring entity shall promptly notify each supplier or contractor whether or not it has been pre-selected and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been pre-selected. The procuring entity shall upon request communicate to suppliers or contractors that have not been pre-selected the grounds therefor.”⁶

(c) First notice of the procurement if there is no prequalification or pre-selection

Proposal paragraph (3):

“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 the first notice soliciting participation in the procurement. The notice must set out, at least:

(a) The subject matter of the procurement in detail appropriate to ensure maximum practicable market participation by potential vendors;

(b) What the procedure will consist of [here describe intended stages ending with competitive dialogue, including, if the procuring entity intends to limit the number of offerors, a statement to that effect];

⁵ In the PFIPS Instruments, Model Provision No. 7 provides that “In order to qualify for the selection proceedings, interested bidders must meet objectively justifiable criteria that the contracting authority considers appropriate in the particular proceedings, as stated in the pre-selection documents. These criteria shall include at least the following:

(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) Sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.”

The Commission may wish to consider whether any further clarification as regards objective and non-discriminatory criteria should be included in the text, such as set out above, or whether further discussion in the Guide would be sufficient.

⁶ The Commission may wish to consider whether pre-selection should apply to any other procurement method, such as restricted tendering (as proposed in Option 3 for draft article 34 in A/CN.9/WG.I/WP.69/Add.3), and accordingly whether a pre-selection procedure should be included in the revised Model Law as a general procedure (to be located in Chapter I).

- (c) The means of obtaining the solicitation documents and the place from which they may be obtained;
- (d) The fee (if any) to obtain the solicitation documents; and
- (e) The deadline for submitting responses.”

Restated paragraph aligned with the proposed revised Model Law:

“(3) Where it does not engage in prequalification proceedings in accordance with article 15 of this Law or in the pre-selection procedure in accordance with paragraph (2) of this article,⁷ 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 the notice soliciting participation in the procurement. The notice must set out, at a minimum, the following information:

- (a) The name and address of the procuring entity;⁸
- (b) A description of the subject matter of the procurement to the extent known, and the desired or required time and location for the provision of such subject matter [in detail appropriate to ensure maximum practicable market participation by suppliers or contractors];⁹
- (c) [[A statement that] [whether] the procuring entity is seeking proposals as to various possible ways of meeting its needs;]¹⁰
- (d) The intended stages of the procedure leading to competitive dialogue;¹¹

⁷ The introductory phrase is new, and the Commission may wish to consider its inclusion to complement draft paragraph (2) above.

⁸ The subparagraph is new and is included in order to conform the text to other provisions of the Model Law.

⁹ This subparagraph has been expanded from paragraph (3) (a) of the Proposal, in order to conform it to other provisions of the Model Law (such as articles 37 and 38 (g) of the 1994 text). The Commission may wish to consider whether the phrase in square brackets would be more appropriately located in the Guide to Enactment, with further elaboration as appropriate.

¹⁰ As footnote 8, above. The Commission may wish to consider whether seeking proposals in this manner is the basis of the procurement method, rather than an option, and reflecting a main distinction between competitive dialogue and two-stage tendering (in which one technical solution is ultimately sought).

¹¹ The reference in paragraph (3) (b) of the Proposal to limiting numbers of suppliers or contractors has been removed from this draft text, as any such limitation at this stage of the procedure will take place through prequalification or pre-selection (see draft article 15 and draft para. 2 above, the latter having been drafted to reflect the considerations of Working Group I in A/CN.9/672, paras. 75-77). The Commission may wish to consider (a) whether the notice should include a statement that further limitation may take place at a later stage, either through qualification, or through the elimination of solutions, if relevant; and (b), if so, whether the applicable criteria should be set out so that the provisions are consistent with the transparency requirements of UNCAC and the GPA. The elimination could arise pursuant to qualification, to the examination of proposals and rejection of non-responsive solutions, or if initial proposals fail to meet a threshold with respect to quality and technical aspects (applying the principles of articles 38 (l), 41, 42 and 44 of the 1994 text).

(e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [10 (2)], and any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(f) 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 [9 (1)], as the case may be;

(g) The means, manner and modalities of obtaining the request for proposals;^{12, 13}

(h) The price, if any, charged by the procuring entity for the request for proposals;

(i) Except where procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law, the currency and terms of payment for the request for proposals;

(j) Except where procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law, the language or languages in which the request for proposals are available and in which the competitive dialogue will be held;

(k) The manner, modalities and deadline for the submission of proposals. The deadline for the submission of proposals shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and submit their proposals, taking into account the reasonable needs of the procuring entity.”¹⁴

(d) Request for proposals

Proposal paragraph (4):

“[The solicitation documents] [request for proposals] must be issued to as many suppliers or contractors as practicable, but to not fewer than three, if possible.”

¹² In the Proposal, the term “solicitation documents” is used. Although the defined term “solicitation documents” in article 2 would include a request for proposals, the Commission may consider that using the term “request for proposals” might be preferable in this procurement method.

¹³ The Commission may wish to include an express reference to require the publication of the request for proposals at this stage of the procedure, or a statement in the Guide to Enactment to the effect that a link should be given to the website at which the request for proposals can be found, or a paper-based equivalent. The aim would be to ensure full publication of the request, even if the number of suppliers or contractors that can present proposals is ultimately limited. The wording of this subparagraph has been conformed to the text for similar provisions agreed by Working Group I at its fifteenth session.

¹⁴ Subparagraphs (e) to (k) are based on similar provisions in other articles of the proposed revised Model Law.

Proposal paragraph (5):

“The solicitation documents [request for proposals] must set out the process by which the suppliers or contractors will pass into the competitive dialogue phase. Where there is more than a sufficient number of suppliers or contractors suitable to be selected to participate in the negotiations, the procuring entity may limit the number of suppliers or contractors which it intends to invite to participate in the negotiations provided that the solicitation documents specify:

(a) the objective and non-discriminatory criteria to be applied in order to limit the number of suppliers or contractors in accordance with this paragraph; and

(b) the minimum number of suppliers or contractors, which shall be not less than three, [if possible,] which the procuring entity intends to invite to participate in the negotiations and, where appropriate, the maximum number.”

Proposal paragraph (6):

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

(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 in accordance with article 12, 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.”

Restated paragraphs aligned with the proposed revised Model Law:

“(4)¹⁵ The request for proposals shall be issued as follows:

(a) Where prequalification has taken place in accordance with article 15 of this Law, the procuring entity shall issue a request for proposals to all pre-qualified suppliers or contractors in accordance with the invitation to pre-qualify and that pays the price, if any, charged for that request;

(b) Where the procuring entity has followed the pre-selection procedure in paragraph (2) of this article, it shall issue a request for proposals to all pre-selected suppliers or contractors in accordance with the invitation to pre-qualify and that pays the price, if any, charged for that request;

¹⁵ Paragraph (4) of the proposal before Working Group I at its sixteenth session, which read “As an optional matter, the procuring entity may pre-qualify suppliers or contractors before engaging in dialogue in accordance with articles 10 and 15, regarding prequalification” has been removed from this draft text in the light of paragraphs (2) to (4) above.

(c) Where the procuring entity commences the proceedings by issue of the notice set out in paragraph (3) of this article, it shall issue a request for proposals to all suppliers or contractors that request them in accordance with the notice soliciting the participation in the procurement and that pays the price, if any, charged for that request.”¹⁶

“(5)¹⁷ The request for proposals shall include at least the following information:¹⁸

(a)¹⁹ A description of the procurement need to the extent known, 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;

(b) The criteria for evaluating the proposals, 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 proposals;²⁰ and

(c)²¹ Where the procuring entity intends to limit the number of suppliers or contractors that it will invite to participate in the competitive dialogue:

¹⁶ Paragraph 5 of the Proposal, which stated: “The solicitation documents must be issued to as many suppliers or contractors as practicable, but to not fewer than three, if possible,” has been removed from this draft text, because of the introduction of pre-selection to limit numbers. If the Commission considers that a further reduction of numbers at this stage should be permitted, a further provision addressing the criteria that will be applied would be needed (so that the provision complies with the transparency requirements of UNCAC and the GPA). The Commission may wish to consider whether any step other than a further pre-selection would be possible at this stage, since only prequalification documents or an expression of interest would have been received.

¹⁷ The introduction to paragraph (5) of the Proposal, which stated: “The solicitation documents must set out the process by which the suppliers or contractors will pass into the competitive dialogue phase” has been removed from this draft; limiting the number of suppliers or contractors is now addressed later in this paragraph.

¹⁸ The Commission may wish to consider the draft proposal in this regard by comparison with the much more extensive provisions of article 38 of the 1994 text, and whether the proposal should be lengthened accordingly. If so, the Commission may wish to follow the structure of the proposed chapter II (tendering) or chapter V (electronic reverse auctions) or chapter VI (framework agreements) where the provisions on a procurement method/technique are presented in separate articles. If that approach is followed, then chapter IV would be divided in separate sections: one dealing specifically with the proposed procurement method.

¹⁹ The reference to the name and address of the procuring entity in paragraph 7 (a) of the Proposal has been removed from this draft, because this information will have been provided earlier in the proceedings.

²⁰ The Commission may wish to consider whether all aspects of this requirement, which reflect the general requirements for evaluation criteria under article 12 (including the use of sub-criteria), is practicable in the context of competitive dialogue, and accordingly whether a modification to this paragraph (or to article 12) might be required. In addition, the Commission may wish to remove this paraphrasing of the requirements of article 12, in order to avoid unnecessary repetition (as per Working Group I’s decision regarding confidentiality at its sixteenth session), and to avoid any inconsistency and any confusion that might arise because this matter is highlighted only in this procurement method.

²¹ This provision sets out the substance of paragraph (5) of the Proposal (other than the

(i) The objective and non-discriminatory criteria to be applied in order so to limit the number of suppliers or contractors;²² and

(ii) The minimum number of suppliers or contractors, which shall be not less than three, [if possible,] which the procuring entity intends to invite to participate in the negotiations and, where appropriate, the maximum number.

[The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the dialogue is sufficient to guarantee effective competition;]²³

(d) Instructions for preparing and submitting proposals;

(e) 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;

(f) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings;

(g) [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 request for proposals and to the procurement proceedings.]²⁴ [The desired format and any instructions,

introduction referred to in footnote 17 above), reformulated to suit a notice provision.

²² The Commission may wish to consider the basis or bases on which any further reduction or elimination of suppliers or contractors or solutions may be made after the submission of initial proposals, such as a further demonstration of qualifications pursuant to article 10 (8) (e.g., following a sudden bankruptcy), or on the basis of responsiveness, as described in footnote 11 above. In either case, it may be considered necessary for transparency reasons that the process and criteria be set out in the request for proposals, and that express reference be made to qualification or responsiveness, or evaluation criteria as the case may be.

²³ The Commission may wish to stipulate that any further limitation must be subject to a qualification that the procuring entity should ensure that the number of suppliers or contractors invited to participate further is sufficient to guarantee effective competition (applying the substance of revised article 44 (6) (on electronic reverse auctions)). The Commission may also wish to set this provision out in a separate paragraph, as it is a substantive provision rather than an item to be included in the request for proposals.

²⁴ This formulation has been suggested to reflect similar provisions elsewhere in the Model Law (1994 text, which has been retained in the proposed revised text). The notion of a timetable in the formulation before Working Group I at its sixteenth session is new to the Model Law, and the Commission may wish to consider whether further clarification may be needed. For example, under the 1994 text, the procuring entity was required to specify the deadline for submission of proposals, or other offers, without any obligation to complete a certain step in the procurement process by a specified date. The only other deadlines imposed on the procuring entity are in the context of review proceedings, and the Commission may wish to consider whether requiring the procuring entity to set the timetable in advance for the entire procurement process in a way that cannot subsequently be modified might be too restrictive for this type of procedure.

including any relevant timetables applicable in respect of the procurement process.]”²⁵

(e) Modifications and clarifications prior to dialogue procedure

Proposal paragraph (7):

“Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (...) of this article, shall be communicated to all suppliers or contractors participating in the proceedings. Such modifications or clarifications must be in writing and must be given to all prospective suppliers or contractors to whom a request for proposals was issued under paragraph (...) sufficiently before the submission deadline to allow the suppliers or contractors to address them in their proposals.”

Restated paragraph aligned with the proposed revised Model Law:

“(6) 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 request for clarification by a supplier or contractor, modify the request for proposals, including the description of the subject matter of the procurement or evaluation criteria, by issuing an addendum, provided that such modification does not constitute a material change to the request for proposals.²⁶ Any such modification or clarification shall be communicated promptly and simultaneously in writing to all suppliers or contractors to whom a request for proposals was issued and shall be binding on those suppliers or contractors.”²⁷

(f) Dialogue procedure

Proposal paragraph (8):

“The procuring entity shall engage in dialogue with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in the dialogue is extended to all suppliers or contractors that have submitted proposals and that remain in the dialogue process.”

²⁵ The Commission may wish to consider whether the Law should require the procuring entity to set out in the request for proposals all aspects of the procurement identified by the procuring entity as non-negotiable, to assist suppliers or contractors in deciding whether to participate in the procurement at all, and in formulating initial proposals.

²⁶ A/CN.9/672, paragraph 99.

²⁷ The wording of paragraph (8) of the Proposal has been aligned with other provisions of the Model Law. The Commission may wish to consider whether the modification should be published as the initial solicitation (A/CN.9/672, para. 98), such as on the website at which the request for proposals was initially published (see para. 3 (g) and footnote 10, above). In addition, the Commission may wish to extend the same requirement to all modifications under the Model Law.

Restated paragraph aligned with the proposed revised Model Law:

“(7) The procuring entity shall engage in dialogue with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals. The opportunity to participate in the dialogue shall be extended to all suppliers or contractors invited to and remaining in the dialogue[, in accordance with the procedure and criteria specified in the request for proposals].”²⁸

Proposal paragraph (9):

“The dialogue between the procuring entity and a supplier or contractor shall be confidential as provided in article [21]”.

Proposal paragraph (10):

“Competitive dialogue shall be [conducted by the same representatives of the procuring entity, and shall be] concurrent.”²⁹

(g) Modifications during dialogue procedure

Proposal paragraph (11):

“There shall be no modifications to the evaluation criteria after the initial proposals are submitted. Any other modification shall be within the stated scope of the procurement. Any requirements, guidelines, documents, clarifications or other information relative to the dialogue that are communicated by the procuring entity to a supplier or contractor [but which are not specific or exclusive to that supplier or contractor] shall be communicated at the same time on an equal basis to all other participating suppliers or contractors.”

Restated paragraphs aligned with the proposed revised Model Law:

“(10) During the course of the dialogue, the procuring entity shall not modify [the description of the subject matter of the procurement] any qualification, or evaluation criterion[, any element of the procurement that is not subject to dialogue as notified in the request for proposals] [or the criteria to define the competitive group] and shall not introduce any material change to [the description of the subject matter or] any other terms and conditions of the procurement.”³⁰

²⁸ This paragraph has been aligned with the instructions of Working Group I as regards the limiting of numbers after the submission of initial proposals (A/CN.9/672, paras. 75-77 and 86). The wording has been aligned with the terms used in the 1994 text of the Model Law.

²⁹ A/CN.9/672, paragraphs 108-110. Paragraphs (9) and (10) of the Proposal do not require further alignment with the text of the Model Law.

³⁰ A/CN.9/672, paragraph 114. The Commission may wish to conform the reference in this paragraph to criteria that cannot be modified with those that were used to limit the numbers participating in the dialogue (whether through prequalification, pre-selection, qualification or examination of proposals: see footnote 11 above, rather than through a reference to the competitive group, or to include earlier in this text a definition of this latter term). The Commission may also wish to consider whether any change should be permitted to

(11) Subject to the confidentiality requirements of article [21], any requirements, guidelines, documents, clarifications or other information generated during the dialogue that are communicated by the procuring entity to a supplier or contractor [but that are not specific or exclusive to that supplier or contractor] shall be communicated at the same time on an equal basis to all other participating suppliers or contractors.”

(h) Best and final offers and award of procurement contract

Proposal paragraph (12):

“Following the dialogue, the procuring entity must [shall] request each remaining supplier or contractor to submit its best and final offer in respect of the solutions or solution identified through the dialogue process. The request shall be in writing, shall specify the date and time by which offers must be submitted. Any award by the procuring entity shall be [based upon the relevant best and final offers, and 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 out 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.”

Restated paragraphs aligned with the proposed revised Model Law:

“(12) Following the dialogue, the procuring entity shall request each remaining supplier or contractor to submit its best and final offer with respect to all aspects of its proposal.³¹ The request shall be in writing, and shall specify the date and time by which offers must be submitted.

(13) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set out 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.”³²

3. New provisions for chapter I: draft article 6 (2)

6. Request for expressions of interest

“(2) A procuring entity may issue a request for expressions of interest before commencing procurement proceedings under this Law. [Such a request shall be published in ... (the enacting State specifies the official gazette or other official publication in which the request is to be published). The request shall also be published, in a language customarily used in international trade, in a

non-negotiable aspects of the procurement during the dialogue.

³¹ The wording of paragraph (13) of the Proposal has been conformed to similar provisions in the Model Law.

³² The Commission may wish to consider whether this paragraph is necessary, in light of the draft provisions that govern the award of the procurement contract to the supplier that provided the successful submission (draft articles 12 (setting out the successful submission) and 19 (addressing its acceptance and entry into force of the procurement contract)). Draft article 19 is formulated such that only reference to the successful submission is required in individual procurement methods.

newspaper of wide international circulation or in a relevant trade publication or relevant technical or professional journal of wide international circulation.[, except where the procurement proceedings are intended to be limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law.] Neither the request nor any response shall confer any rights on suppliers or contractors, including any right to have a submission evaluated; nor does the notice oblige the procuring entity to issue a solicitation.”³³

³³ The Commission may wish to consider whether provision for domestic publication should be made, and whether the paragraph should stipulate where an advertisement should be placed. Such a stipulation is made for mandatory publications under draft article 5 (Publication of legal texts), but is not made for optional publication under draft article 6 (Information on planned procurement activities).