

## Summary record of the 529th meeting

Monday, 6 June 1994, at 3 p.m.

[A/CN.9/SR.529]

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 3.05 p.m.

### NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

#### PROCUREMENT OF SERVICES (continued) (A/CN.9/392)

#### Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (continued)

##### Article 41 *sexies* (continued)

1. Mr. CHATURVEDI (India) said that he did not agree with the proposal made by the representative of Canada to delete the words "and whose proposals have not been rejected" from paragraph 3(a).
2. Mr. WALSER (Observer for the World Bank) said that, even though he favoured the deletion of paragraph 3, he recognized that most members supported its retention, in which case he sought a number of clarifications with respect to procedure. The provisions of subparagraphs (a), (b) and (c) were satisfactory, but subparagraph (d) did not clearly set out the manner in which the final evaluation should be made. The norm referred to the proposal which "best meets the needs of the procuring entity", which was correct in principle but lacked the clarity that ought to characterize procurement transactions. He wondered, in fact, whether the procedure provided for in subparagraph (d) was not the same as the one provided for in paragraph 2; he therefore proposed that it should simply state that, upon receipt of the suppliers' best and final offers, the offers would be evaluated in accordance with the procedures established in paragraph 2.
3. The CHAIRMAN said that the text of subparagraph (d) was sufficiently clear, if account was taken of the fact that article 41 *quater* gave the procuring entity the right to determine which proposal was best suited to its needs. He was therefore in favour of retaining the current wording of subparagraph (d), a view which most delegations appeared to share.
4. Mr. CHATURVEDI (India) said that he, too, was in favour of retaining the current wording of paragraph 3(d).
5. Mr. WALLACE (United States of America) said that, with regard to the comments made by the observer for the World Bank, the wording of subparagraph (d) was identical to that of article 38. Moreover, if it was correctly applied, the wording of subparagraph (d) would be satisfactory, since it mentioned the relative weight and the manner of application of those criteria, although it was true that the criteria were not rigorous.
6. In the wording of paragraph 3(a) proposed by the representative of Canada at the previous meeting, the words "acceptable proposals" had been suggested to replace "and whose proposals have not been rejected". In the practice of the United States, the words "technically acceptable" were used to make it clear that criteria other than price were also taken into account. That was crucial, since in the area of services, price was considered in second place or not at all. If the Commission decided to use that term, not only in paragraph 3(a) but also in paragraphs 2 and 4, it would clarify the question of a "threshold", since otherwise it would seem that the procedures were the same, which was probably not the Commission's intention. As the representative of the United Kingdom had noted, citing the relevant report (A/CN.9/392), the Working Group had not compared that procedure to the use of a threshold. However, he wondered whether it would not be better to make such a comparison, since the procedures were very similar. In essence, what was meant was that certain proposals would fail to meet the minimum requirements and would therefore be rejected; there would be no negotiations with such suppliers under paragraphs 3 and 4 and they could not be declared winners under paragraph 2, even though they might have offered the lowest bid. The concepts were identical, although they could be applied in different ways. Thus, if the wording proposed by Canada was further refined, it might be possible to bring all those norms into line with one another.
7. The CHAIRMAN agreed that the insertion of the word "technically" could make the article easier to understand.
8. Mr. AL-NASSER (Saudi Arabia), requesting clarification of paragraphs 2, 3 and 4, asked which norms would apply if the procuring entity did not use the procedures provided for in those paragraphs. It appeared that if the procuring entity did not use any of the three methods, there would be a legal vacuum.
9. The CHAIRMAN said that, in his view, the use of the conditional phrase "If . . ." at the beginning of paragraphs 2, 3 and 4 was in keeping with the very structure of the provision, which allowed any of those three methods to be used, as indicated in paragraph 1(a). It was a factual assumption of a conditional nature which had an objective legal effect.
10. Mr. WALLACE (United States of America), supported by Mr. WALSER (Observer for the World Bank), said that norms provided a coherent system. In accordance with article 16, chapter IV set out the preferred (although not necessarily the only) method to be used in the procurement of services. Consequently, if it was decided to use the commonly preferred method, reference would have to be made to chapter IV *bis*, in which case article 41 *sexies* would definitely have to be applied in the context of that chapter, given that paragraph 1(a) of that article stipulated that the procuring entity would use the procedure provided for in paragraphs 2, 3 or 4 that had been notified in the request for proposals. Thus, the request for proposals would have indicated which of the three procedures was to be used by the procuring entity. Depending on the method selected, the entity must proceed in accordance with the provisions of the relevant paragraph.
11. The CHAIRMAN said that, if he heard no objection, he would take it the Commission wished to refer article 41 *sexies*, paragraph 3, to the drafting group.
12. *It was so decided.*
13. Mr. WALLACE (United States of America), referring to paragraph 4(d), wondered whether it might not be useful to include that notion in the other methods (paragraphs 2 and 3) as

well. He noted that subparagraph (e) referred to “face-to-face” negotiations. Under that method, if negotiations with the supplier that had made the best offer did not lead to an agreement on price, the procuring entity would move on to the next supplier and so on. If no agreement had been concluded by the time the final supplier was reached, the temptation to resume negotiations with the first supplier might arise. Some members of the Working Group had firmly rejected that option, since it would be tantamount to making the procedure into an auction. In the case of services for which tendering was not possible, a balance must be struck between quality and price, since none of the procedures provided for, not even the procedure set out in paragraph 2(b)(i), allowed the procuring entity simply to choose the lowest price, since the offer had to be technically acceptable. Consequently, it must be made clear that the procuring entity could not resume negotiations with the best supplier in an attempt to obtain a better price.

14. Mr. WALSER (Observer for the World Bank) said that, at the World Bank, engineers preferred the procedure set out in paragraph 4 because they considered that the selection should be made solely on the basis of the proposal’s technical merits, without considering the price, and that afterwards the procuring entity must negotiate an acceptable price with the best supplier. The World Bank had always proceeded in that way. Nevertheless, he himself and other staff of the World Bank firmly believed that price must be taken into account, which was why they preferred the wording of paragraph 2. He recognized, however, that the World Bank accepted the method contained in paragraph 4 and that it currently used both the procedure in paragraph 2 and the procedure in paragraph 4. The problem posed by paragraph 4 was how to determine, in accordance with subparagraph (e), that negotiations would not result in a contract. Although the Bank had experience with what might constitute an acceptable price for specific types of engineering projects or management services, it was still not clear where the line should be drawn. The norm did not give the procuring entity clear guidelines for determining that the fees demanded by the best supplier were outrageous and that, consequently, it was time to reject that offer and move on to the next supplier. Greater clarity was needed on that point; once the first supplier had been rejected and negotiations begun with the second, it should not be possible to go back.

15. The CHAIRMAN said that, with respect to paragraph 4(d), the Commission had to choose between promoting transparency, in which case the obligation set out in that paragraph must also be reflected in paragraphs 2 and 3, and ensuring that the procuring entity was not overwhelmed, in which case subparagraph (b) should be deleted.

16. Mr. CHATURVEDI (India) said that paragraph 4 was acceptable, with the exception of subparagraph (e), which should be deleted in order for the text to be consistent.

17. Mr. LEVY (Canada) said that no other provision of the draft Model Law contained the obligation provided for in paragraph 4(d). Moreover, it should be borne in mind that the procurement method provided for in chapter IV *bis* was not the same as the others. For example, the question did not arise in respect of tendering, since the draft Model Law provided that the parties should be present when the proposals were opened. Further, paragraph 4(d) was not analogous to chapter IV, article 35, paragraph 6, in that the latter dealt with the duty of the procuring authority to give notice of entry into force of the contract with one tenderer to the others. In any event paragraph 4(d) was acceptable.

18. The CHAIRMAN said that article 11 *ter* included an obligation similar to that provided for in paragraph 4(d).

19. Mr. WALLACE (United States of America) agreed that paragraph 4(d) imposed a responsibility on the procuring entity, but saw nothing wrong with that. In fact the aim of the draft Model Law was to promote transparency, competition and fairness and to encourage enacting States to modify their procurement practices. In other words, the paragraph imposed a responsibility on procuring entities, but the responsibility was useful and could even be expanded by, for example, also indicating that the procuring entity must explain to suppliers why they had not attained the required threshold level. In any event, the obligation provided for in the paragraph should also be included in paragraphs 2 and 3.

20. With respect to paragraph 4(e), he agreed that it would be useful to explain to the procuring entity the procedure for determining when it was appropriate to discard the proposal from the supplier or contractor with the highest rating and consider the proposal in second or third place. Under no circumstances must the procuring entity reconsider a proposal which it had already discarded, since that would result in a kind of competitive tendering process which did not correspond to the spirit of the strict method provided for in chapter IV *bis*.

21. Mr. JAMES (United Kingdom) said that the Working Group had included paragraph 4 in the draft since it had been convinced that it was important to inform suppliers or contractors that they were above the threshold level. That consideration was less important in the cases covered under paragraphs 2 and 3. In any event, the aim of the draft Model Law was to promote fairness and justice and ensure that the parties concerned were aware of what had happened to their tenders or proposals. It might thus be appropriate to indicate in article 11 that a register should be kept of all suppliers or contractors whose proposals were above the required threshold level. Such a solution would promote transparency without imposing an excessive burden on the procuring entity.

22. Mr. LEVY (Canada) said that he had no substantive reservations with respect to paragraph 4(d), although it could be merged with paragraph 4(c). In any event he agreed that paragraph 4 was not analogous to paragraphs 2 and 3.

23. With regard to paragraph 4(e), he agreed that it must be made clear that once a procuring entity had discarded one or more proposals it must not subsequently reconsider them. It was also important, however, to avoid formulas that were so strict that they deprived the procuring entity of the discretion necessary for it to act in accordance with the national interest.

24. Mr. WALLACE (United States of America), supported by Mr. CHATURVEDI (India), endorsed the proposal to resolve the question of paragraph 4(d) by rewording article 11 along the lines proposed by the representative of the United Kingdom, as well as the comments of the representative of Canada on paragraph 4(e), the current wording of which could be retained.

25. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve article 41 *sexies* as currently worded, subject to the reservation that the drafting group might reconsider paragraph 4(d), should it deem it necessary.

26. *It was so decided.*

*Article 41 septies*

27. Mr. CHATURVEDI (India) said that he did not agree with the first sentence of article 41 *septies*, by which the procuring entity must not disclose the contents of proposals to competing suppliers or contractors. Article 40 provided for the holding of

negotiations, during which it might be useful to reveal the contents of proposals.

28. Mr. HUNJA (International Trade Law Branch) recalled that the Working Group had thought it important to maintain confidentiality, particularly where there were negotiations between suppliers and the procuring entity to discuss aspects of the proposals. The aim was to maintain the integrity of the procurement proceedings and to protect any trade or other secrets contained in the proposal that suppliers or contractors would not wish to have disclosed to their competitors. The procuring entity could discuss any details of a proposal with the supplier or contractor that had submitted it and could seek clarification, but must avoid discussion of the terms of each proposal with other suppliers or contractors. Article 39, paragraph 3, contained a similar provision, and the drafting group might consider whether the provision under consideration was clear.

29. Mr. CHATURVEDI (India) said that, if the point was to protect trade secrets, it would have to be made clear that the matter could be discussed with the party submitting the proposal. It was understandable that the contents of a proposal should not be made known to other parties in tendering proceedings, but in the case of services there should be no limitation on negotiation by the procuring entity of the price or other relevant factors.

30. Mr. WALLACE (United States of America) said that the question was extremely delicate, and it would be preferable for the report not to reflect the existence of doubts on the matter. The provision was taken from article 38, paragraph 6, relating to requests for proposals, which provided for confidentiality. It was true that article 38, paragraph 5, provided for the possibility of modification or clarification, but in that case negotiations would take place with various suppliers simultaneously and there would be no question of setting some against others. Article 39, paragraph 3, also stated that negotiations should be confidential, and paragraph 2 referred to clarifications. The structure of the Model Law was thus coherent.

31. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve article 41 *septies*.

32. *It was so decided.*

33. Mr. SHI Zhaoyu (China) said he wished to raise three points in connection with the structure of chapter IV *bis*. Firstly, in his view, the title was inappropriate; it should clearly reflect the aim of the chapter as well as its relationship to other chapters and provisions of the Model Law. The drafting group should make the necessary changes in that regard. Secondly, the chapter contained only one article, and it should be divided so that its provisions were clearer. Lastly, under article 16, the procuring entity, with certain specific exceptions, was supposed to apply chapter IV *bis*, but that provision also indicated that, in similar circumstances, the methods provided for in articles 17 to 20 could be applied. Article 17 dealt with two-stage tendering, requests for proposals or competitive negotiation, whereas article 38 contained specific rules relating to requests for proposals. Actually, in the procurement of services the provisions of chapter IV *bis* and of article 38 were not identical, but both used the criterion of a threshold. He asked what the relationship was between chapter IV *bis* and article 38, and reserved the right to speak again on chapter IV *bis*.

34. Mr. GRIFFITH (Observer for Australia) said that the time had come to review what had been done so far in connection with the text modifying the Model Law on Procurement of Goods and Construction. Chapter IV *bis* was supposed to be the principal text in connection with services, but it contained elements and procedures that referred not only to tendering but also to other methods

of procurement. The draft added a series of options on the procurement of goods and construction and of services, and it was not always easy to understand the relationship between them or their differences. The most radical means of simplifying the text would be simply to delete chapter IV *bis* entirely, adopt the text on goods and construction and add appropriate provisions on the procurement of services, particularly in connection with the principal method. In any event, he wished to suggest three other possibilities. The first would be to delete article 16, paragraph 3(b), so that articles 17 to 20 would not be considered part of the text relating to services, thereby emphasizing that chapter IV *bis* was the basic provision relating to the procurement of services. The second would be to delete article 16, paragraph 3(b), but indicate in a footnote that a State party so wishing could adopt provisions similar to those set forth in the paragraph, with the consequent amendments to articles 17 to 20. Lastly, article 16, paragraph 3(b), could remain in brackets, with the consequent amendments to articles 17 to 20, but with the addition of a note to the effect that States that did not wish to have so many options could refrain from enacting the provisions in brackets. In view of the importance of the matter, the Commission must anticipate the criticisms that States might reasonably formulate later on.

*The meeting was suspended at 4.40 p.m. and resumed at 5.05 p.m.*

35. Mr. WALLACE (United States of America), referring to the proposal made by the representative of China, said that it would be necessary to change not only the title of chapter IV *bis*, but also its place, so that it came after chapter III, which dealt with tendering. The new title could be "Preferred method for services". The title of the current chapter IV could also be changed to "Alternatives".

36. Although his delegation would accept any of the proposals made by the observer for Australia, the references in articles 19 and 20 to quotations and to single-source procurement should not be deleted.

37. The CHAIRMAN recalled that the drafting group had already decided to leave chapter IV *bis* after the chapter on tendering proceedings.

38. Mr. JAMES (United Kingdom) said that he agreed with China and Australia on the need to simplify and streamline the text of the Model Law. However, if chapter IV *bis* was deleted, it would be necessary to make the wording of article 16 more specific, since it was possible to use tendering as a method of procurement for many services. It would also be necessary to specify which methods should be used in cases in which tendering was not appropriate.

39. To solve those problems, either chapter IV *bis* or article 17 should be bracketed. In any case, the references in articles 19 and 20 to request for quotations and to single-source procurement should not be deleted. There was broad acceptance of the method of request for quotations in the procurement of services on a small scale.

40. The Model Law represented a compromise solution; while not ideal, it was acceptable and, rather than introducing substantive changes, its contents should be clarified in the commentary.

41. Mr. LEVY (Canada) said that the question raised by China had been resolved by the Working Group and that the solution proposed by Australia was simplistic. As he had indicated, it was necessary to provide for a system of request for quotations and single-source procurement of services. However, not all systems of procurement had been covered in chapter IV *bis*. He did not share the view that articles 38 and 39 were unnecessary because