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Report of Working Group I (Procurement) on the work of its seventeenth session (Vienna, 7-11 December 2009)

Contents

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the "Commission") entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh to thirteenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, New York, 21-25 May 2007, Vienna, 3-7 September 2007, and New York, 7-11 April 2008, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions (ERAs), including whether they should be treated as an optional phase in other procurement methods or a stand alone method, criteria for their use, types of procurement to be covered, and their procedural aspects.

3. At its seventh, eighth and tenth to twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders.

4. At its thirteenth and fourteenth (Vienna, 8-12 September 2008) sessions, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat. At its thirteenth session, the Working Group also discussed the issue of suppliers' lists and decided that the topic would not be addressed in the revised Model Law, for reasons that would be set out in the Guide to Enactment. At its fourteenth session, the Working Group also held an in-depth consideration of the issue of remedies and enforcement and addressed the topic of conflicts of interest.

5. At its fifteenth session (New York, 2-6 February 2009), the Working Group completed the first reading of the draft revised Model Law and although a number of issues were outstanding, including the entire chapter IV, the conceptual framework was agreed upon. It also noted that further research was required for

some provisions in particular in order to ensure that they were compliant with the relevant international instruments.

6. At its sixteenth session (New York, 26-29 May 2009), the Working Group considered proposals for article 40 of the revised Model Law, dealing with a proposed new procurement method — competitive dialogue. The Working Group agreed on the principles on which the provisions should be based and on much of the draft text, and requested the Secretariat to review the provisions in order to align the text with the rest of the draft revised Model Law. The Secretariat was also entrusted with revising the draft provisions for chapter I.

7. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the revised Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17 (Part one), para. 170, and A/63/17, para. 299). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the revised Model Law (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part one), para. 170). Pursuant to that recommendation, the Working Group, adopted the timeline for its deliberations at its twelfth and thirteenth sessions (A/CN.9/640 and A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17, para. 307).

8. At its forty-second session, in 2009, the Commission considered chapter I of the draft revised Model Law and noted that most provisions of that chapter had been agreed upon, although some issues remained outstanding. The Commission noted that the draft revised Model Law was not ready for adoption at that session of the Commission. It entrusted the Secretariat to prepare drafting suggestions for consideration by the Working Group to address those outstanding issues. At that session, the importance of completing the revised Model Law as soon as reasonably possible was highlighted (A/64/17, paras. 283-285).

II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its seventeenth session in Vienna, from 7 to 11 December 2009. The session was attended by representatives of the following States members of the Working Group: Algeria, Armenia, Belarus, Bolivia (Plurinational State of), Bulgaria, Canada, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Iran (Islamic Republic of), Lebanon, Mexico, Morocco, Namibia, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore,

Spain, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela (Bolivarian Republic of).

10. The session was attended by observers from the following States: Albania, Argentina, Belgium, Côte d'Ivoire, Croatia, Democratic Republic of the Congo, Iraq, Kuwait, Libya, Oman, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Slovakia, Sweden, Turkey, and Uruguay.

11. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: African Development Bank, European Bank for Reconstruction and Development, European Space Agency, European Union, International Development Law Organization (IDLO) and Organization for Economic Cooperation and Development/Support for Improvement in Governance and Management (SIGMA);

(c) *International non-governmental organizations invited by the Working Group*: American Bar Association (ABA), European Law Students' Association (ELSA) and International Federation of Consulting Engineers (FIDIC).

12. The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON (Sweden)[1]

Rapporteur: Mr. Duncan MUHUMUZA LAKI (Uganda)

13. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP. 70);

(b) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law (A/CN.9/WG.I/WP.71 and Add.1-8).

14. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

III. Deliberations and decisions

15. At its seventeenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law.

[1] Elected in his personal capacity.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

16. The understanding in the Working Group was that, unless comments were made with respect to any text in square brackets in the draft revised Model Law contained in document A/CN.9/WG.I/WP.71/Add.1-8 (hereinafter referred to as the "draft revised Model Law"), the text would remain as proposed in the draft revised Model Law, without square brackets.

A. Chapter I. General provisions (A/CN.9/WG.I/WP.71, paras. 8-10, 24, 25, 28, 30-31 and 32 (a), (d) and (e), and A/CN.9/WG.I/WP.71/Add.1 and 2)

Title and preamble (also A/CN.9/WG.I/WP.71, para. 32 (a))

17. The suggestion was made that an inconsistency between the title (which referred to "public procurement") and the rest of the draft revised Model Law (which referred to "procurement") should be clarified. The Secretariat was requested to amend article 1 or 2 (f) accordingly, as appropriate.

Article 1. Scope of application (also A/CN.9/WG.I/WP.71, paras. 30-31)

18. No comments were made with respect to the article.

Article 2. Definitions (also A/CN.9/WG.I/WP.71, paras. 8, 24, 25 and 32 (d) and (e))

19. The Working Group noted proposed changes in the draft article, in particular the addition of a number of new definitions and that the definitions were set out in alphabetical order. It was agreed that the definitions should not include substantive provisions.

20. It was agreed to replace the word "decides" with the word "establishes" in the definition of "domestic procurement". Subsequently, it was agreed that the substantive point made after the cross-reference to article 8 would be removed to that article. The understanding was that consequential changes would be made to article 8 to ensure that it covered all cases justifying recourse to domestic procurement, including the case of low-value procurement (see further paragraph 42 below).

21. It was suggested that the words "subsequently become a party" in the definition of "closed framework agreement" should be replaced with the words "compete for the procurement contract pursuant to the framework agreement". Reservations were expressed about this suggestion, as the objective was to define the parties to the framework agreement and because a second-stage competition would not necessarily take place. An alternative suggestion was that the suggested text, as raising a substantive issue, should be included in the provisions regulating framework agreements or in the Guide but not in the definition. It was agreed that the issue should be deferred until after the provisions on framework agreements had been considered.

22. It was agreed that the definition of "material change" would be amended to replace the word "includes" with the words "may include", and the words "and that" with the words "or that". The point was made that the second sentence was not intended to be exhaustive, but sought to clarify the first sentence and perhaps should state that it was an illustrative list. The alternative suggestion, which eventually prevailed, was to move the second sentence to the Guide. It was also agreed that the words "or the ranking of their submissions" be added after the words "with regard to their qualification". It was the understanding in the Working Group that since the phrase "terms and conditions of the procurement" was not defined in the Model Law, that phrase should be explained in the Guide, in particular in relation to the sources where the terms and conditions of the procurement could be found, such as in the solicitation documents.

23. It was agreed that the definition of "electronic reverse auction" should be retained.

24. It was suggested that in the definition of "socio-economic factors" the word "includes" should replace the word "means". Doubts were expressed regarding that suggestion. The prevailing view was to retain the word "means", which was considered to be more accurate in conjunction with the reference to "other considerations" in the definition. It was also agreed that the words "in setting the description of the subject matter of the procurement and the terms and conditions of the procurement contract or the framework agreement" should be added after the words "comparing submissions".

25. A query was raised as to whether the definition of "socio-economic factors" intended to define "socio-economic" as an adjective rather than "socio-economic factors" as a term, in the light of frequent use in the draft revised Model Law of the related term "socio-economic policies". It was agreed that reference to "socio-economic" before "policies" should be deleted.

26. With reference to footnote 13, support was expressed for setting out an illustrative list of examples of "socio-economic factors" in the Guide to allow flexibility in defining them at the national level.

27. It was agreed to replace the phrase "solicitation from a restricted number" with the phrase "solicitation from one or a restricted number" in the definition of "direct solicitation".

28. It was agreed that the Secretariat should consider rephrasing the notion of "intended decision" in the definition of "standstill period".

29. The need for the definition of "successful submission" was questioned. The issue remained open.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

30. No comments were made with respect to the article.

Article 4. Procurement regulations

Paragraph (2)

31. The Working Group was invited to consider whether it was appropriate to address issues pertaining to a code of conduct of procurement officers in the article on procurement regulations. It was noted that in some jurisdictions those issues were regulated at the level of statutory law.

32. The Working Group entrusted the Secretariat with redrafting the provisions so that different approaches to regulating these issues in various jurisdictions could be appropriately accommodated.

Paragraph (3)

33. The Working Group noted that paragraph (3) was new and was proposed to be added by the Secretariat in the light of the new definition of "socio-economic factors" in article 2.

34. The Working Group agreed to delete the paragraph on the understanding that the definition of "socio-economic factors" alone was sufficient.

Article 5. Publication of legal texts

35. No comments were made with respect to the article.

Article 6. Information on possible forthcoming procurement

36. The Working Group noted that the article was revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 80-87).

37. The suggestion was made to shorten the article by deleting paragraphs (1) and (2) and reflecting their content in paragraph (3). Reservations were expressed about that suggestion, because to do so would weaken the article as a whole. It was agreed that the provisions should be retained. It was the understanding that the Guide would explain the media where this type of information was usually published.

Article 7. Communications in procurement

38. The Working Group noted that the article was revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 121-143).

39. Concern was raised about the use of the term "classified information" in the provisions of this article and elsewhere in the draft in the light of difficulty with translating that term in other languages of the United Nations (see further paragraph 74 below). No other comments were made with respect to the article.

Article 8. Participation by suppliers or contractors (also A/CN.9/WG.I/WP.71, paras. 24 and 25)

40. The Working Group noted that the article had been revised further to consultations with experts, so that it allowed the procuring entity to limit participation in procurement proceedings on the basis of nationality on

socio-economic grounds, and for other reasons, such as set-aside programmes for minorities, small and medium enterprises or indigenous groups.

41. It was agreed that consistency should be ensured between paragraphs (1) and (4), and that paragraphs (4) and (5) should be merged and the resulting merged provisions should specify the media where the referred information was to be published (or alternatively should be accompanied by Guide text to such effect). The suggestion was also made that the Model Law should require the procuring entity to notify suppliers or contractors, promptly upon request, of the reasons justifying the procuring entity's decision to have recourse to domestic procurement, to ensure effective review of that decision.

42. In the light of the amendments agreed to be made to the definition of "domestic procurement" (see paragraph 20 above), the Secretariat was requested to amend article 8 to include a reference to low-value procurement as a reason justifying recourse to domestic procurement.

Article 9. Qualifications of suppliers and contractors

43. A concern was expressed about the use of the term "possess" in paragraph (2) (i), when referring to "ethical standards" and to personnel, and the Secretariat was requested to rephrase the requirement.

44. It was added that the same paragraph or supporting Guide text should make it clear that the procuring entity should be entitled to satisfy itself that suppliers or contractors had all the required insurances, and to impose security clearances where necessary. The Secretariat was entrusted with drafting appropriate provisions.

45. In the context of the same paragraph, it was also noted that the provisions, by imposing the requirement that suppliers or contractor must possess the "necessary equipment and other physical facilities", might inadvertently restrict participation of small and medium enterprises in public procurement. It was noted that often such enterprises would not themselves possess the required equipment and other physical facilities but rather ensure through their subcontractors that the required equipment and facilities were available for the implementation of the procurement contract. It was the understanding in the Working Group that the Guide would explain that no such restriction was intended.

46. Concern was expressed that the requirement on suppliers or contractors to present references might restrict market access, in that newcomers might not be able to present such references. It was also noted that the provisions were subjective. It was therefore proposed that the word "references" should be deleted. In response, it was stated that the right of the procuring entity to request references was essential and should be retained, and that only references that were objectively justifiable and proportionate to the subject matter of the procurement were permitted under paragraph (6) of the article. To emphasize this latter point, the suggestion was made that the chapeau provisions of paragraph (2) should be amended to read "appropriate and relevant".

47. It was recalled that the word "references" replaced the word "reputation" used earlier in that context. The point was made that if the word were deleted, the Guide or the Model Law itself should ensure that self-declaration as regards the past positive experience would not be sufficient and suppliers or contractors would be

required to demonstrate the evidence to the satisfaction of the procuring entity. In this regard, a distinction was drawn between the terms "reputation" and "references" in relation to the involvement of third parties. It was also noted that the term "references" would be understood differently in different jurisdictions, and that the use of references to demonstrate qualifications would be normal practice in the construction sector. A preference was expressed for retaining the term insofar as it meant to check the "credibility" of suppliers or contractors.

48. The prevailing view was that the word "references" should be deleted in paragraph (2) (i) in the light of paragraph (3) of the article that allowed the procuring entity to call for documentary evidence to verify suppliers' compliance with requirements as to qualifications. It was agreed that the Guide text to paragraph (3) should explain the interaction between these paragraphs.

49. In response to concerns that no explicit reference to environmental considerations was made in the provisions, it was explained that the provisions in fact envisaged the possibility of considering environmental aspects in ascertainment of the qualifications. Reference in this context was made to the definition of "socio-economic factors", article 8 and a cross-reference to article 8 in paragraph (6) of article 9. The Secretariat was entrusted with redrafting the provisions to make reference to environmental standards more explicit.

50. It was suggested that the Guide text to paragraph (2) (v) should refer to the World Bank's guidelines on suspension procedures. It was also suggested that, in the light of repetitive use of the term "prequalification documents", article 2 could include the definition of that term along the following lines: "'Prequalification documents' means all documents for the selection of suppliers or contractors to whom the solicitation documents were to be issued".

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement

51. The suggestion was made that paragraph (3) of the article should be redrafted by replacing "may" with "shall as a minimum include" and by referring in the latter context only to the items that would have to be always included in the description of the subject matter of the procurement as opposed from those that would be included depending on the procurement. It was also proposed that article 10 should more explicitly regulate the way the socio-economic factors were to be taken into account in setting out the description of the subject matter of the procurement and the terms and conditions of the procurement contract or a framework agreement.

52. The alternative view was that these issues proved to be difficult to regulate in a law and might therefore be better addressed in the Guide.

Article 11. Rules concerning evaluation criteria and procedures (also A/CN.9/WG.I/WP.71, paras. 24-25)

53. The Working Group noted that the article had been revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 149-174) and in the light of the Secretariat's informal consultations with experts and the new definition of "socio-economic factors" in draft article 2.

54. The suggestion was made and supported that the opening phrase of paragraph (1) (a) should be redrafted to refer to all exceptions envisaged in paragraph (2).

55. A query was raised as regards the chapeau provisions of paragraph (1) (b): whether it should read "it shall include only", "it may include only", "it shall include" or "it may include". The latter two formulations were preferred on the ground that it would be fruitless to attempt to draft any exhaustive list of evaluation criteria, even if such a list contained generic references. Support was expressed for the phrase "it shall include" as indicating that the evaluation criteria listed in the paragraph might be expanded by any additional criteria that complied with the requirement of paragraph (1) (a). In the subsequent discussion, support was expressed for the phrase "it may include" to avoid ambiguity. It was considered that the general requirement in paragraph (1) (a) that the evaluation criteria ought to relate to the subject matter of the procurement set out sufficient safeguards against any abuses.

56. The Working Group was invited to consider whether "performances in environmental protection" in paragraph (1) (b) (iv) should be retained as a separate evaluation criterion or it would be sufficient to address environmental considerations as part of socio-economic factors under paragraph (2) (a) of the draft article. It was noted in this context that the definition of "socio-economic factors" in draft article 2 already made reference to environmental considerations. It was explained that removing reference to environmental considerations from the definition of "socio-economic factors" in article 2 would have implications on consideration of environmental considerations under articles 8 (in conjunction with e.g., set-aside projects/qualifications) and 10 (in conjunction with the assessment of responsiveness of submissions). It was further noted that if "performance in environmental protection" would stay as a separate evaluation criterion, it would mean that "performances in environmental protection" would always relate to the subject matter of the procurement. It was also noted that if the issue of environmental considerations were to be addressed only in paragraph (2) (i.e., as part of socio-economic factors), environmental considerations could be considered in the evaluation of submissions only if the requirements in the chapeau of paragraph (2) were met (i.e., they had to be authorized by procurement regulations and applied subject to approval by a designated organ).

57. In the light of the developments in the area of environment protection, including in the international arena, and evolution towards green procurement worldwide, the prevailing view was that the procuring entities should be allowed to consider environmental factors in the evaluation of submissions even if such factors had not been authorized by procurement regulations or approved by a designated organ. It was therefore proposed either to retain paragraph (1) (b) (iv) as drafted or reflect otherwise its content in paragraph (1) (b). It was explained that retaining reference to environmental considerations only in paragraph (2) in the context of the definition of "socio-economic factors" would imply that considering such considerations was an exceptional measure, when in reality it was increasingly being done as a matter of practice. Subsequently, it was agreed to delete paragraph (1) (b) (iv) and instead refer to environmental characteristics in paragraph (1) (b) (ii).

58. It was recognized at the same time that environmental considerations would not necessarily have to be always considered in the evaluation of the submissions. It was noted that the proposed redrafting of paragraph (1) (b), chapeau provisions (see paragraph 55 above), would provide for sufficient flexibility in this respect.

59. It was also recognized that not all environmental considerations would be linked to the subject matter of the procurement. The point was made that when they were not so linked, they could still be considered but under the conditions of paragraph (2) of the article as part of other socio-economic factors. As regards the conditions imposed under paragraph (2), the preference was expressed for the redraft along the following words: "If authorized by procurement regulations or … (the enacting State designates an organ to issue the approval)".

60. It was emphasized that since paragraph (2) referred to general policies of the State, there might be no discretion on the part of the procuring entity in deciding whether or not to consider the factors listed in the paragraph. It was therefore proposed and agreed that the chapeau provisions of paragraph (2) should be redrafted to encompass not only discretionary but also mandatory consideration of the factors listed in that paragraph.

61. The Working Group was invited to consider whether reference to "national defence and security considerations" in paragraph (2) (c) remained appropriate. The preference was either for deleting paragraph (2) (c) or replacing them with the appropriate general principles. In this regard, the decision of the Working Group to draft provisions of a revised Model Law not on the basis of what or in which sector was procured but on the complexity of the procurement was recalled. Concern was also expressed that the current wording did not refer to sensitive procurement in general so that encompass for example public safety considerations. The Working Group agreed to delete paragraph (2) (c) on the understanding that the draft revised Model Law already provided for other means to accommodate "national defence and security considerations", such as through the selection of an appropriate procurement method.

62. A link between provisions of articles 10 and 11 was underscored. It was proposed that reference to article 10, in particular to the requirement of compliance with the terms and conditions of the procurement contract or framework agreement, should be added in the end of article 11.

Article 12. Rules concerning estimation of the value of procurement

63. The Working Group noted that the draft article was new and had been proposed by the Secretariat in the light of its consultations with experts. It was recalled that the provisions of the draft article were based on the equivalent provisions of the Governmental Procurement Agreement of the World Trade Organization (the "WTO GPA") (article II.2 and 3 of the 1994 version and article II.6 of the 2006 version). It was explained that the provisions were relevant in the context of low-value procurement and thresholds envisaged by the draft revised Model Law for recourse to domestic procurement, restricted tendering or request for quotations proceedings.

64. As regards paragraph (1), the suggestions were made to add in the end of paragraph (1) the following words "or otherwise avoiding obligations under this

Law" and to replace the words "with the intention" with "with the result [or with the effect]". Doubts were expressed as regards the latter suggestion.

65. A suggestion to refer to the options to renew or extend contracts in paragraph (2) did not gain support, being outside the scope of the Model Law (i.e., relating to contractual implementation). It was suggested instead that the wording from the WTO GPA addressing this issue, reading "where the procurement provides for the possibility of option clauses, the estimated maximum total value of the procurement, inclusive of optional purchases", should be included in the Guide.

66. In response to a query as to whether these provisions were useful in that there were relatively few thresholds in the Model Law as compared with other instruments, the preference stated was to retain the provisions as drafted to avoid anti-competitive behaviour, whether by artificially reducing or increasing contract size.

Article 13. Rules concerning the language of documents

67. No comments were made with respect to the article.

Article 14. Clarifications and modifications of solicitation documents

68. The Working Group noted that the proposed article had been moved from the chapter on Tendering in the 1994 Model Law. The Working Group was invited to consider establishing limits to the extent of modification permitted under paragraph (2) of the article, drawing for example on the concept of a "material change", as defined in article 2 of the draft revised Model Law. The view was expressed that no such limits should be established in the light of the other provisions of the Model Law that already set out sufficient safeguards against abuse.

69. The suggestion was made that the Guide text accompanying paragraph (2) of the article should cross-refer to the provisions of article 34 of the draft revised Model Law on the need to extend the deadline for presentation of submissions where the solicitation documents were modified.

70. A concern was raised in response to a suggestion that the words in paragraph (3) "at the meeting" should be replaced with the words "at or before the meeting", in that this suggested wording would change the scope of the article. It was suggested, for that reason, that the substance of the suggestion should be reflected in the Guide or elsewhere in the text.

Article 15. Submission securities

71. No comments were made with respect to the article.

Article 16. Prequalification proceedings

72. The Working Group was invited to reconsider its earlier decision to use the term "modalities" as a technologically neutral substitute for the term "place". The Working Group noted and expressed its agreement with concerns of experts conveyed through the Secretariat that the new term would make the text more difficult to understand. The Working Group agreed that the original term "place" should be restated in this and other relevant provisions.

73. The need for the additional wording proposed in paragraph (9) to accommodate procurement involving classified information and in similar provisions elsewhere was questioned, in the light of the provisions of article 23 (4). Concern was expressed that the provisions might allow the procuring entity not to follow a court decision ordering public disclosure under article 23 (4), though it was agreed that no such consequence was intended. In response, the utility of the proposed provisions in paragraph (9) and elsewhere was emphasized, as they would give guidance to enacting States as to which provisions of the revised Model Law might require exemptions to the public disclosure requirements. The Working Group entrusted the Secretariat to reconsider the proposed wording in the light of the suggestions made.

74. The Working Group recalled that concern had been raised about difficulties in conveying the meaning of the term "classified information" into all languages of the United Nations (see paragraph 39 above), as the term might not be self-explanatory in other languages. It was therefore proposed that the revised Model Law might draw on any definition used in the United Nations or in the European Union directives. The need for consistency in the use of the term throughout the Model Law and in all languages was underscored.

75. With respect to paragraph (4), and in response to a query as to whether the changes to the 1994 text might indicate that higher costs than previously permitted could be charged, it was agreed that the Guide should make it clear that development costs (including consultancy fees and advertising costs) were not to be recovered through this provision. It was elaborated that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate).

76. It was agreed that in paragraph (10) the words "upon request" should be deleted.

Article 17. Cancellation of the procurement

77. The Working Group noted that the article had been revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 183-208). It also noted a number of issues raised by experts consulted by the Secretariat in connection with the provisions, such as adding the following text to paragraph (1): "[, provided that the circumstances giving rise to the cancellation [were not foreseeable by] [did not arise as a consequence of irresponsible or dilatory conduct on the part of] the procuring entity]". It was explained that the consultations also indicated that, even in such circumstances, the public interest might be better served if the procurement were cancelled, but that such cancellation should entail consequences (such as compensation for the costs of tendering). The Working Group was invited thus to consider whether the suggested wording should be included in paragraph (1) or in paragraph (3) in conjunction with the issue of liability. The Working Group was invited in addition to consider whether cancellation might give rise to liability only towards suppliers or contractors whose submissions had been opened. It was noted in this regard that, according to the experts consulted by the Secretariat, it had always been recognized that suppliers or contractors presented their submissions at their own risk, and bore the related expenses, but that this position changed once submissions had been opened.

78. It was agreed that paragraph (1) would be retained without change; the words "upon request" would be deleted in paragraph (2); the content of footnote 14 would be reflected in the Model Law though without giving the impression that any explicit or implicit pre-condition for invoking paragraph (1) was imposed; and the content of footnote 16 would be reflected in the Guide. In addition, it was agreed that the article would not address issues of damages and other remedies, although it was recognized that the article as redrafted would have implications for the review provisions of the Model Law.

79. As regards paragraph (3), three issues were identified: whether there should be an ability to cancel the procurement before and after bids were opened (which was answered in the affirmative); whether there should be a justification at either of those stages, and if so, what justification would be required; and what liability might arise as a question of contract law or otherwise. The view was expressed that the issues of liability were outside the scope of the Model Law, and so should not be addressed in the article. The preference was for the Guide to explain that the procuring entity might face liability for cancelling the procurement under other branches of law.

80. After discussion, it was proposed that in paragraph (3) the suggested text in square brackets would be deleted and instead an opening phrase would be added reading "unless the cancellation of the procurement was a consequence of irresponsible or dilatory conduct on the part of the procuring entity". It was noted that the proposed wording also addressed unforeseeable events and that liability would arise in exceptional circumstances.

81. The purpose of the article was seen to draw the right balance between the discretion of the procuring entity to cancel the procurement at any stage of the procurement process covered by the Model Law and the need to accord appropriate protection to the market against irresponsible acts by the procuring entities. It was noted that some procuring entities did in practice abuse discretion to cancel procurements to investigate market conditions. It was agreed that the Guide to this article would address these issues.

Article 18. Rejection of abnormally low submissions

82. No comments were made with respect to the article.

Article 19. Rejection of a submission on the grounds of inducements from suppliers or contractors, an unfair competitive advantage or conflicts of interest

83. The Working Group noted that paragraph (1) of the article had been revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 214-222).

84. The suggestion was made to delete the words "as an inducement" in paragraph (1) (a), to encompass bribes and gratuities as those terms were understood in some jurisdictions, and to ensure consistency with article 8 of the United Nations Convention against Corruption[2] (which covered broadly all corrupt acts). While some support was expressed for deletion of this phrase, concern was expressed that

[2] United Nations, *Treaty Series*, vol. 2349, No. 42146.

the proposed amendment would on the one hand have the opposite effect of excluding the application of the provisions to bribes, and on the other hand would allow rejection of submissions for gratuities of insignificant value, which could not influence the behaviour of the procuring entity.

85. In response to those concerns, the point was made that the provisions of the article should be made subject to other branches of law where the issues of anti-corruption were regulated and that this point should be reflected in the Guide. The relevance of article 3 was emphasized in this regard. It was felt that regulating the issues addressed in article 19 without cross-referring to other appropriate branches of the law might create unnecessary confusion, inconsistencies and wrong perceptions about anti-corruption policies of an enacting State. Caution was expressed however that such cross-referencing should not inadvertently convey the erroneous meaning that a criminal conviction would be a pre-requisite for rejection of a submission.

86. The preference was for the wording contained in the French and Spanish texts, to reflect the "influence" that the gratuity produced on the behaviour of the procuring entity. Another suggestion was to refer to "improper inducement".

87. The prevailing view was that the words "as an inducement with respect to" should be replaced with the words "so as to influence".

88. The suggestion was made that paragraph (1) (b) should refer to the "established" unfair competitive advantage in order to avoid excluding suppliers or contractors still under investigation. It was felt however that the point was relevant to all cases listed in the paragraph and was implicit in all situations in the article.

89. In response to a query raised about the content of footnote 19, it was agreed that the Guide would address issues of unjustified rejection and the establishment of a process including a dialogue to discuss potential conflicts of interest, drawing on the provisions of article 18 regulating procedures for investigating abnormally low submissions.

90. Suggestions were made that the accompanying provisions of the Guide should address, for example: (i) applicable standards (e.g., consultants involved in drafting the solicitation documents should be prohibited from participating in the procurement proceedings where those documents were used); (ii) difficulties with establishing the fact of corruption as opposed to a bribe as the former might consist of a chain of actions over time rather than a single action; (iii) that combining provisions on conflicts of interest (which referred to a situation) and corruption (which was a wrongdoing) might lead to confusion, and should be avoided; and (iv) how the situation of a subsidiary would be treated.

Article 20. Acceptance of the successful submission and entry into force of the procurement contract (also A/CN.9/WG.I/WP.71, para. 28)

91. It was noted that greater simplification and standardization would be achieved by consolidating all provisions on restrictions on disclosure of information, such as those contained in paragraph (2) (b), in a single article (see further paragraph 102 below). For the same purpose, all provisions referring to information to be included in the record of procurement proceedings, such as those in paragraph (3), should be reflected only in article 23 on the documentary record of procurement proceedings,

with the Guide text to the relevant provisions cross-referring to the content of article 23.

92. The Working Group noted that paragraph (2) (c) had been revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 230 and 237). The suggestion was made, and supported, that the paragraph should be further redrafted to refer to a standstill period of reasonable duration reflecting the conditions of the particular procurement, rather than setting any specific duration.

93. The Working Group considered the issue of debriefing generally under the draft revised Model Law and in the specific context of paragraph (2) and footnote 25. The suggestion made at the Commission's forty-second session, that the issues of debriefing of unsuccessful suppliers or contractors might be usefully addressed in the Guide rather than regulated in the Model Law (A/64/17, para. 240), was recalled and reiterated. It was explained that debriefing procedures varied significantly not only from jurisdiction to jurisdiction but also from procurement to procurement, and that provisions on debriefing were not easily enforceable. The Working Group agreed that the Guide only would address the issue of debriefing.

94. In response to a concern expressed that the article implied that there would be always only one successful submission, the point was made that the issue would be addressed through the definition of the successful submission (as had been done with respect to the "procurement contract").

95. In the context of paragraphs (3) and (11) and footnote 31, the Working Group considered whether the article as a whole or only some of its provisions should apply to framework agreements and if so to which type and at which stage. The Working Group noted that, at the Commission's forty-second session, the consideration of paragraphs (3) and (11) of the article in the context of framework agreements was deferred (A/64/17, paras. 242, 243 and 247). The Working Group recalled that views had so far varied as regards the advisability of providing for a standstill period at the stage of the award of procurement contracts under framework agreements (A/CN.9/668, paras. 141-144). The Working Group was invited to consider an option to provide for a short standstill period, which might alleviate the concerns expressed regarding the speed of award appropriate for framework agreements, and which, given the more limited concerns that the award of a procurement contract thereunder might pose, might also provide sufficient time for suppliers. It was noted that in electronic framework agreements, the period could be very short and in an open framework agreement no standstill period might be needed.

96. After discussion, it was agreed that competitive stages of framework agreements procedures, i.e. the award of closed framework agreements, and the award of procurement contracts following second-stage competition under all framework agreements, would be subject to an appropriate standstill period. Where the second stage might not involve the real competition but rather the selection of the best price from the available list of offers, the standstill provisions would not apply, and the Guide would make appropriate reference.

97. The suggestion was also made that standstill provisions in the context of framework agreements should be dealt with in chapter VII, so as to accommodate the different types of framework agreement. The Working Group's understanding

was that these issues would have to be considered again in detail when the provisions on framework agreements were considered.

98. The Secretariat was requested to clarify the reasons for including references to the requesting ministry in paragraph (6) and to delete them if no justification for those references in the drafting history of the provisions were found.

Article 21. Public notice of awards of procurement contract and framework agreement

99. The Working Group noted that the article had been revised pursuant to the consideration at the Commission's forty-second session (A/64/17, para. 265) and the Secretariat's consultations with experts.

100. The preference was for retaining in paragraph (3) the word "periodic" as allowing for more flexibility to enacting States, and deleting reference to quarterly notices, but that the Guide should stress that "periodic" should not be interpreted as allowing unreasonably long periods. The suggestion was made that the Guide should state that the notices under paragraph (2) (a) should be published at least once a year.

Article 22. Confidentiality

101. The Working Group noted that the article had been revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 248-266) and the Secretariat's consultations with experts. The Working Group also noted that reference to "the review body or a competent court" should be considered in conjunction with article 23 (4) where the same issue was outstanding.

102. The Working Group recalled the suggestion made earlier at the session that all provisions referring to disclosure of information, including restrictions on disclosure of classified information, should be consolidated in a single article (see paragraph 91 above). Support was expressed for that suggestion. The Working Group entrusted the Secretariat with drafting such a consolidated article.

103. With reference to "the review body or a competent court", the point was made that in all provisions where the issue appeared, reference should always be made to the competent court and in addition to any other competent body as designated by the enacting State. It was proposed that the Guide would indicate such other possible bodies, including those referred to in chapter VIII of the draft revised Model Law. The alternative view was that the Model Law, not the Guide, should list the options from which the enacting State would choose.

Article 23. Documentary record of procurement proceedings

104. It was agreed that in the opening sentence of paragraph (1) the words "that includes" should be used instead of "containing, at a minimum". Reservation was expressed about deleting the words "at a minimum" since this would eliminate flexibility and would require the provisions to be exhaustive. In response, it was observed that the suggested wording did not imply that the provisions would be exhaustive.

105. It was agreed that in paragraph (1) (r), the word "claim" should be replaced with the word "complaint", since the latter term was used in chapter VIII.

106. The Working Group noted that the proposed paragraph (5) was new and was added at the suggestion of experts during consultations with the Secretariat, and reflected the relevant requirements of the United Nations Convention against Corruption. It was suggested that the Guide to the article could explain the need for preservation of documents, and cross-refer to any applicable rules on documentary records and archiving. It was further noted that, if the enacting State considered that applicable internal rules and guidance should also be stored with the documents for a particular procurement, it could include a requirement to such effect in the regulations.

B. Chapter II. Methods of procurement and their conditions for use (A/CN.9/WG.I/WP.71, paras. 9 and 11-14, and A/CN.9/WG.I/WP.71/Add.2)

Article 24. Methods of procurement

107. It was recalled that the Working Group had decided to provide in the revised Model Law a toolbox of procurement methods to accommodate various types of procurement. It was recognized that in the light of a variety of types of procurement in practice, the list of available procurement methods was extensive. The suggestion to shorten the list by eliminating some procurement methods or grouping them following the approach in the WTO GPA did not gain support.

108. Concern was expressed that the draft revised Model Law introduced concepts not found in the 1994 Model Law, such as open tendering. In response, it was noted that the term "open tendering" was the same as "tendering" under the 1994 text, but the adjective "open" had been added both to harmonize with other procurement texts and to contrast the method with restricted tendering.

109. It was observed that all procurement methods envisaged under the draft revised Model Law should be listed in paragraph (1), and that for ease of reading, the last words of that paragraph "under the conditions of articles 25 to 27" should be moved to the chapeau provisions of paragraph (1).

Article 25. General rules applicable to the selection of a procurement method

110. Concern was expressed that paragraph (1) altered the content of article 18 (1) of the 1994 Model Law, which mandated tendering for the procurement of construction and goods, but not for the procurement of services, though it was recalled that the Working Group had decided to delete the distinction between the procurement of goods, construction and services. In response, it was noted that the reasons for the current formulation included that the 1994 methods for goods and services were procedurally similar, and the differences between them arose mainly in terms of degree of precision in specifications and the degree of flexibility permitted as regards evaluation criteria. It was explained that, as these issues were addressed in the articles on description of the subject matter of the procurement and evaluation criteria (articles 10 and 11) of the draft revised Model Law, as a matter of general principle, the procedures and choice among them could accordingly be streamlined in the manner suggested in the draft revised Model Law.

111. The suggestion was made that paragraph (1) of the article could alternatively apply to procurement in which specifications could be drafted at the outset of the procurement. At the same time, it was recognized that the draft revised Model Law preserved the general thrust of article 18 in signalling that the recourse to open tendering was the best way to ensure competition and transparency.

112. The Secretariat was requested to revise the article to provide a recognition in the text that the use of open tendering in the procurement of non-quantifiable advisory or intellectual services would not be appropriate.

Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)

113. As regards paragraph (2), a preference was expressed for the use of the phrase "economy and efficiency", taken from the preamble of the Model Law. A further query was raised about the value of referring to "economy and efficiency" at all in the article, because these considerations applied to all procurement. Other suggestions were to delete the proviso referring to "economy and efficiency", replacing it with the phrase "where necessary for reasons of economy and efficiency" as it appeared in the 1994 Model Law, and to include the reference to economy and efficiency in article 25 (2). It was noted that the result of so doing would be that the phrase would apply to all procurement methods. Reservations were expressed about whether implying that economy and efficiency were the primary considerations in the selection of procurement methods under articles 27 to 29.

114. Concern was also expressed that retaining a reference to economy and efficiency introduced two layers of conditions in paragraph (2), which were not necessarily consistent with each other. It was noted that the first layer of conditions was contained in subparagraphs (a) and (b) of that paragraph, while the second was in the requirement to maximize economy and efficiency. The point was made that whereas the conditions listed in subparagraph (b) reflected the notion of maximizing economy and efficiency, the conditions listed in subparagraph (a) were not in reality connected to maximizing economy and efficiency. A further comment was made that the implications of referring to economy and efficiency only in this article might either imply that other methods were considered less economical and efficient, or that, in the choice of restricted tendering, these objectives were considered the primary ones.

115. The view prevailed that the reference to economy and efficiency should be removed from the provisions of paragraph (2).

116. As regards paragraph (3), it was suggested that a reference to all applicable financial thresholds for the choice of a procurement method or type of solicitation under the draft revised Model Law should be set out in article 24.

117. As regards paragraph (4), it was confirmed that provisions were intended to permit the procurement of simple quantifiable services, where awards were made on the basis of the lowest priced responsive submission, in some cases within a fixed budget (see further paragraph 177 below). Concern was expressed, however, that no specific conditions for use were specified for recourse to this method (see further paragraph 174 below).

118. With reference to a query raised in footnote 58, preference was expressed for the use of the term "financial", rather than "commercial" or "price", so as to encompass life cycle costs, operational costs and financing terms as well as the price itself. However, it was queried whether this approach would be consistent with the provisions of article 41. It was agreed that the drafting of these latter provisions and article 26 (4) should be harmonized.

119. Another view was that reference to "price" only should be retained in the light of the provisions of article 41 (8) (a) and practices in some jurisdictions to consider in two-envelope systems just the price following the evaluation of technical aspects of the submissions. The view prevailed that the term "financial" should be used. (See further paragraph 176 below; for the subsequent discussion of chapter IV procurement methods, see paragraphs 159-181 below.)

Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, and competitive negotiations)

120. A general question was raised as to the grouping of procurement methods under articles 26 and 27. For example, two-stage tendering was considered to be a variant of open tendering and, it was said therefore, would more appropriately be located within article 26 than in article 27. A further view expressed was that this grouping indicated a different approach to selection of procurement methods from that set out in article 19 (1) (a) of the 1994 text.

121. In response, it was stated that the main division between the procurement methods described in articles 26 and 27 was whether or not an adequate description could be drafted at the outset of the proceedings. However, it was acknowledged that whether or not it was feasible for the procuring entity to draft specifications in a comprehensive manner was not the defining criterion for all the circumstances envisaged in article 27. In this regard, it was observed that the need for the procuring entity to engage in dialogue or negotiations with suppliers could arise either as a consequence of the fact that the procuring entity was unable to draft its specifications, or because negotiations or dialogue were otherwise needed to conduct the procurement under article 27 (1) (b) to (d) and article 27 (2).

122. It was noted that article 26 (1) referred to a "detailed" description of the subject matter of the procurement, whereas article 27 (1) (a) referred to a "sufficiently comprehensive" description, and the point was made that the references should be conformed. (For a further amendment agreed to be made in article 27 (1) (a) as a result of the subsequent discussion of chapter V procurement methods, see paragraph 193 below.)

123. After discussion, in which the experiences of procurement involving dialogue and negotiations were shared, it was agreed that the broad division between articles 26 and 27 in the text before the Working Group would be preserved, and that this distinction indeed reflected the approach set out in article 19 (1) (a) of the 1994 text.

124. It was stressed that the procurement methods listed in article 27 were presented as a part of the toolbox approach. Views differed as to the appropriate manner in providing for this approach: some considered that the broad variety of factual situations that would be encountered in practice indicated that all the tools

envisaged by the article should be available in a flexible manner; others considered that article 27 in its current formulation should differentiate between the various procurement methods addressed and should provide for conditions for use for each of them, among other things to avoid abuse.

125. In this regard, it was queried whether sufficient guidance was provided in the draft text: norms and standards were in place to assist in choosing among other procurement methods, but were not provided when making such a choice under article 27. It was also observed that the conditions for use could not entirely address the considerations raised by the selection of the procurement method, and indeed that it might not be appropriate for them to do so. It was added that the selection might in practice not be amenable to challenge, and the main issue should be to enable structured decision-making on the part of the procuring entity and to manage the risks that such decisions might entail. It was agreed that these questions would be considered when or after the Working Group addressed the procedures for each method concerned. It was also agreed that detailed commentary in the Guide addressing the issues in selecting among the methods in article 27 would be necessary, from the perspective both of legislators and of procuring entities. In addition, the guidance should address the elements of that choice that could not be addressed in a legislative text and should draw on real-life examples.

126. The Working Group was urged to preserve continuity of law to the extent commensurate with enhancing the text through reform, so as to minimize difficulties in and to bear in mind the costs of implementing the reforms, and to avoid misuse and confusion in those States that had enacted the 1994 text, particularly as regards the introduction of new procurement methods.

127. As regards the procurement methods described in article 27, the following issues were raised: two-stage tendering would normally involve a process to define the procuring entity's needs before the commencement of the procurement, perhaps involving consultant experts. The method would normally, but need not, involve a dialogue during the first stage to develop the specifications for the second stage. As regards the request for proposals with dialogue, part of the design and the development stages might be conducted within the procurement itself, using dialogue with the market. It was observed that this latter approach had been developed largely since the 1994 text was issued, and that it could usefully be accommodated within the draft revised text with the aim of enhancing economy and efficiency. It was added that the procedures for these two procurement methods were similar, with one significant difference being that two-stage tendering would ultimately involve one technical solution, while request for proposals with dialogue would lead to proposals that might have different solutions.

128. The issue was raised as to whether all the methods envisaged in the article should be retained, and whether some should be reserved for particular types of procurement, such as advisory or consultancy services. The Working Group agreed to address this issue when considering the procedures for each procurement method, and in conjunction with the appropriate conditions for use of each method, but confirmed its understanding that in principle all procurement methods were available for all types of procurement. In addition, the Working Group agreed to consider at a later stage whether competitive negotiations should be available for some or all the circumstances identified in article 27, particularly in the light of its unstructured and unregulated procedure.

129. It was recalled that competitive negotiations were available for urgent procurement under article 27 (2), as was single-source procurement under article 29 (b). It was agreed that the appropriate selection between these methods should reflect the degree of urgency confronting the procuring entity, and the Secretariat was requested to reflect this point in the text. (For the subsequent discussion of chapter V procurement methods, see paragraphs 182-210 below.)

Article 28. Conditions for use of an electronic reverse auction

130. Some inconsistency between certain language versions and the English version of the text was noted, in particular as regards the reference to the feasibility of formulating a description of the subject matter of the procurement. The Secretariat was requested to ensure that all language versions were consistent.

Article 29. Conditions for use of single-source procurement

131. It was agreed that the conjunction "or" should be added after paragraph (d). It was also recalled that it was agreed that article 29 (b) should refer to a higher degree of urgency than article 27 (2) (see paragraph 129 above).

C. Chapter III. Open tendering (A/CN.9/WG.I/WP.71/Add.3)

Article 30. Procedures for soliciting tenders

132. It was agreed that the number of the paragraph should be deleted and that the text should begin with the phrase "unless prequalification was involved", which would replace the current reference to article 16.

Article 31. Contents of invitation to tender

133. The Working Group recalled its decision as regards the phrase "at a minimum" in the context of article 23 (1) (see paragraph 104 above). The understanding was that the same change would be made in article 31 and elsewhere in the same context.

Article 32. Provision of solicitation documents

134. The Working Group recalled its decision as regards the Guide text that would elaborate on the costs of providing documents to suppliers or contractors (see paragraph 75 above). It was agreed that the same discussion should appear in the guide text to article 32.

Article 33. Contents of solicitation documents

135. It was the understanding that the change agreed to be made earlier in the session as regards the words "at a minimum" should also be made in article 33 (see paragraph 104 above).

136. It was agreed that in paragraph (d), the words "ordered" and "performed" should be replaced with the word "procured" and a reference to the location where the goods to be delivered should be added. The suggestion was made to reinstate the wording from the 1994 Model Law, which referred to the nature and required

technical and quality characteristics of the goods, construction or services, and which had been replaced with the defined term "the description of the subject matter of the procurement" combined with a cross-reference to article 10. A concern was raised regarding the phrase the "quantity of services".

137. With reference to the "quantity of goods", a query was raised as to whether the provisions intended to convey that the quantity of goods was always to be fixed in the solicitation documents, which would prevent the procuring entity from envisaging options for the purchase of additional quantity of goods. A distinction was drawn between this common practice and the cases specified in article 29 (c). It was recalled that the draft revised Model Law required certainty as regards quantities, with the exception of its provisions on framework agreements, which would mean that the solicitation documents should set out at least the maximum quantity of the goods envisaged to be procured under all options.

138. In response to a query about the phrase "the desired or required time, if any", it was confirmed that the provisions indeed envisaged that the procuring entity would have flexibility in defining the time for delivery of the subject matter of the procurement, to reflect its needs.

139. It was recalled that changes would need to be made in paragraphs (n) and (q) as regards the word "modalities" (see paragraph 72 above). The Secretariat was also requested to redraft paragraph (v) to improve clarity.

Article 34. Presentation of tenders

140. A reservation was expressed about the suggestion to add in paragraph (4) after the word "promptly" the words "at the same time". The understanding was that the word "promptly" would address the meaning intended to be conveyed by the suggested phrase.

141. Concern was expressed that the provisions of paragraph (6) were rigid. The drafting history of the provisions and the accompanying Guide text were recalled, which indicated that the provisions were drafted in this manner to provide for necessary safeguards against abuse.

Article 35. Period of effectiveness of tenders; modification and withdrawal of tenders

142. The Working Group recalled that at its fifteenth session it had deferred the consideration of the article, which was based on article 31 of the 1994 Model Law, in the light of divergent views expressed regarding the suggestion to delete the second sentence in paragraph (2) (a) (A/CN.9/668, paras. 175-176).

143. The point was made that, although the provisions proposed to be deleted were technically superfluous, they were found in some procurement laws and there might be value in retaining them as an indication to enacting States of the consequences arising if suppliers or contractors refused a procuring entity's request to extend the period of effectiveness of their tenders. The view prevailed that the part of the sentence starting with the words "and the effectiveness" until the end should be deleted, and the content of the deleted part should be reflected in the Guide.

144. The suggestion was made that the term "submission security", not "tender security", should be consistently used throughout the revised Model Law. The view

was expressed that the Working Group should defer the issue of terminology to a later stage.

Article 36. Opening of tenders

145. The common understanding was that it was good practice, for the reasons explained in the Guide to article 33 of the 1994 Model Law, not to allow any time to elapse between the deadline for presenting tenders and the time for their opening. The additional benefits of this provision were also noted, in particular that it would enable suppliers to keep control of their tenders prior to the opening, and so would encourage participation and presence at the opening.

146. It was observed that paragraph (1) did not necessarily reflect practice. It was also noted that risks of improprieties after the deadline for presenting tenders were lower than those before the deadline. It was therefore suggested that the provisions should be redrafted. One suggestion was that the provisions should state only that: "Tenders shall be opened at the time specified in the solicitation documents". Another suggestion was to redraft paragraph (1) along the following lines: "Tenders shall be opened at the time specified in the solicitation documents. The solicitation documents shall specify the time, date, place, manner and procedures for opening the tenders."

147. Another suggestion was to replace the words "at the time" with the words "promptly after the time". In explanation of this suggestion, it was stated that the current wording of paragraph (1) was inaccurate, as it referred to the opening of tenders at the deadline, rather than the time immediately thereafter.

148. Objections were expressed to the proposed amendments to the 1994 wording, which was viewed as a key requirement in procurement that encouraged the procuring entity to exercise greater diligence in setting the deadline for presenting submissions, keeping in mind that this deadline would also be the time for opening tenders. It was emphasized that it was essential to provide for certainty by establishing in the solicitation documents the precise moment for the opening of tenders, which should coincide with the deadline for presenting tenders.

149. It was considered that the suggested alternatives would weaken the 1994 requirement. Specifically as regards the proposed words "promptly after the time", it was stated that the phrase was subjective and might be interpreted too broadly. A query was raised whether the alternative wording "promptly at the time" would be preferable. Another suggestion was that the provisions could start with: "The opening of tenders shall start at the time".

150. It was agreed that the 1994 wording would be retained. The understanding was that the Guide would explain risks of departing from the requirements of the Model Law and practical considerations that should be taken into account in implementing that requirement.

Article 37. Examination, evaluation and comparison of tenders

151. Support was expressed for reinstating the 1994 wording of paragraph (1) (b) and deleting the proposed paragraph (3) (b). In the subsequent discussion, it was decided also to reinstate the 1994 wording of paragraph (3) (b). In the context of these paragraphs, the suggestion was made that the Guide should

explain the rules and principles applicable to the correction by the procuring entity of arithmetical errors. A query was raised as to whether it might be useful to require the solicitation documents to specify the manner in which arithmetical errors would be corrected.

152. With respect to paragraph (2) (a), support was expressed for deleting the word "only" and retaining the word "shall" (for the reasons explained in footnote 32) and the text "to all requirements set forth in the solicitation documents in accordance with article 11 of this Law".

153. Suggestions were made and agreed to delete in paragraph (4) (b) (i) the reference to margins of preference, and to accommodate the situation in paragraph (4) (b) (ii), also deleting the words "if the procuring entity has so stipulated in the solicitation documents" in that paragraph. A reservation was expressed as to the suggestion to replace the term the "lowest evaluated tender" with the term the "most advantageous tender". The term the "lowest evaluated tender" was considered to be the least ambiguous and had been used in the 1994 text among other things to emphasize the importance of price in tendering proceedings. It was proposed that the Guide might explain that in some countries other terms might be used that intended to convey the same meaning.

154. There was no disagreement that the current term and proposed alternatives intended to convey the meaning that the procuring entity sought best value for money. The current term was considered by most delegations to be confusing in this respect. It was confirmed that in many jurisdictions the terms "most economically advantageous tender" or "most advantageous tender" were used, or the law described the best value for money concept by listing the considerations to be taken into account by the procuring entity in the evaluation process and by specifying the way those considerations should be taken into account.

155. The view prevailed that the current term should be replaced with the term "most advantageous tender" or a similar term. In support of that view, it was explained that the proposed change would highlight evolution in procurement practices since 1994, in particular that the procuring entity was expected to obtain the best and not necessarily the cheapest solution. It was the understanding that the Guide would elaborate on these evolutions.

156. The opposition of two delegations to introducing any alternative to the term "lowest evaluated tender" in the revised Model Law was noted. It was suggested that such a change would go beyond the mandate given to the Working Group by the Commission, and the alternative terms proposed could be presented in the Guide. It was also observed that any such change would have a negative and costly impact on States that had already enacted their laws and that had built capacity on the basis of the 1994 version.

157. With respect to paragraph (5), it was suggested that the provisions should refer to the exchange rate at the date of the opening of tenders to reflect that rates fluctuated. The alternative view was that the solicitation documents should specify the applicable date. Concern was also raised that the provisions did not address the currency to be used in evaluating the tenders. The attention of the Working Group was drawn to article 33 (s), where these issues were addressed. The Secretariat was entrusted with redrafting provisions of articles 37 (5) and 33 (s) as necessary to take into account the views expressed at the current session.

Article 38. Prohibition of negotiations with suppliers or contractors

158. The point was made that, while the principle in the context of tendering was not challenged, its application in the context of other procurement methods would be analysed in due course.

D. Chapter IV. Procurement methods not involving negotiations (Restricted tendering, Request for quotations and Request for proposals without negotiation) (A/CN.9/WG.I/WP.71, paras. 15-20 and 28, and A/CN.9/WG.I/WP.71/Add.4)

Article 39. Restricted tendering

159. The Working Group's attention was drawn to document A/CN.9/WG.I/WP.69/Add.3, which set out the three options for the article previously considered by the Working Group. It was noted that the draft revised Model Law set out only one option, which reflected the Secretariat's consultations with experts, the draft submitted to the Secretariat by the informal drafting party in July 2009, and the provisions on conditions for use of restricted tendering set out in article 26 of chapter II of the draft revised Model Law.

160. The circumstances addressed in paragraphs 1 (a) and (b) were considered. The point was made that paragraph (1) (b) when read together with paragraph (2) would in fact be a procedure comprising open tendering with prequalification. The point was also made that subparagraph (b) read together with paragraph (3) would not achieve the desired objective of saving time and cost. Another view was that paragraph (1) (a) should be deleted, because of subjectivity in the identification of the suppliers to be invited to participate and in the light of the increasing use of e-commerce techniques. The prevailing view was that both paragraphs should be retained, but that the Guide might provide examples of the exceptional cases in which the first ground would apply.

161. A clarification was sought about paragraph (2), which referred both to prequalification and pre-selection. The point was made that these terms should not be used interchangeably and that therefore a cross-reference to article 16 on prequalification was misleading. A reservation was expressed about introducing the concept of "pre-selection" and pre-selection procedures in the revised Model Law, noting that the intended result of limiting a number of pre-qualified suppliers could be achieved through the prequalification procedures if the prequalification requirements were sufficiently demanding.

162. The alternative view was that it was useful to introduce pre-selection in this procurement method; and that no confusion with prequalification should arise, as pre-selection would operate as an optional final stage of prequalification. As a result, the reference in paragraph 2 (b) to "completion of the pre-selection proceedings" should be to "completion of prequalification proceedings". In this respect, the provisions of subparagraphs (a) to (c) that addressed issues specific to the pre-selection procedure, and a cross-reference to the procedures in article 16 were considered appropriate. The point was made that paragraph (2) (a) to (c) set out procedures to implement the principle in paragraph 1 (b) that any limited number of suppliers or contractors should be selected in a non-discriminatory

manner. The lack of guidance in the 1994 Model Law on this principle, which gave much discretion to the procuring entity in selecting a limited number of suppliers or contractors, was noted. It was agreed that the final sentence of paragraph 2 (b) was superfluous and could be deleted.

163. In response to a query as to how the pre-selected suppliers would be identified, it was noted that this selection could be done through ranking, or through raising the threshold for prequalification, examples taken from practice. It was observed that the text did not set standards to ensure that the selection was undertaken in an appropriate manner, and it was agreed that this aspect should be provided for. Other points made were that the paragraph should not prescribe pre-selection in all cases of restricted tendering and its procedures should not be prescriptive. Although pre-selection might be justifiable in cases stipulated in paragraph (1) (b), it was noted that the procedure might defeat the goal of avoiding disproportionate time and costs in those cases. An additional observation was that paragraph (2) (a) (iii) alone would provide the appropriate flexibility.

164. In response to these concerns, it was agreed that paragraph (2) should not describe complex pre-selection procedures. The suggestion was made that the chapeau provisions of paragraph (2) might be redrafted along the following lines: "the procuring entity may engage in pre-selection as appropriate in the circumstances of any given procurement" with the deletion of the rest of the text in subparagraphs (a) to (c). It was suggested that the content of the deleted text would be reflected elsewhere in the text or in the Guide, which might also provide examples of various manners of conducting pre-selection. It was added that the standards set out in prequalification proceedings should apply to pre-selection proceedings, and that at a minimum, pre-selected suppliers should be notified of their pre-selection.

165. The point was made that some of these provisions, such as those in paragraph (2) (a) and (c), contained essential transparency requirements, and that they should be retained in the Model Law. In response, it was observed that transparency might be ensured through other provisions of the Model Law, such as paragraph (3) of the article or article 23 on the documentary record of procurement proceedings.

166. After the subsequent discussion, the Secretariat was entrusted with redrafting the provisions of paragraph (2), taking into account the need to preserve flexibility and transparency in regulating pre-selection.

167. As regards paragraph (3), which was based on the 1994 wording, it was clarified that the provisions intended to refer to an advance notice rather than the notice of contract awards dealt with in article 21 of the draft revised Model Law, or an invitation to tender.

168. The benefits of advance notices were considered, but some delegations supported restricting the application of paragraph (3) to the cases specified in paragraph (1) (a). Other delegations were of the view that the 1994 approach of applying the requirement of an advance public notice to situations referred to in both subparagraphs (a) and (b) should be retained. This requirement was considered to be essential in the fight against corruption and as a means to achieve transparency. It was also pointed out that different public notice regimes in the same article might create unnecessary confusion.

169. The view prevailed that the provisions of paragraph (3) should be retained unchanged. The suggestion was made that it could be moved to the beginning of the article to make it clear that it applied to both situations covered under paragraph (1).

Article 40. Request for quotations

170. It was agreed to add the words "as set out in the request for quotations" at the end of paragraph (3).

171. With reference to footnote 6, the Working Group was invited to consider whether a notice of the request for quotations proceedings should be required to be published and whether the article should therefore contain provisions similar to the ones in the proposed article 39 (3) and (4). The Working Group considered that it would not be appropriate to require publishing an advance notice of the request of quotations in the light of the nature and low value of the subject matter of the procurement addressed by the article.

172. A query was raised on whether the provisions should include the wording similar to that contained in article 39 (referring to the need to ensure transparency, non-discrimination and competition in the proceedings). The view was expressed that the provisions of the preamble of the Model Law, the nature of the subject matter of this type of procurement and modern techniques of requesting quotations already provided sufficient safeguards. The point was made that the Guide to the article might address those issues.

Article 41. Request for proposals without negotiation

173. The Working Group recalled that the draft article was based on article 42 of the 1994 Model Law, which was limited to the procurement of services. It was also recalled that the provisions had been presented at the earlier session of the Working Group as two-envelope tendering. A query was raised whether the procurement method covered by the article as amended was intended to be a variant of tendering or a request for proposals procedures. If the latter, it was queried whether it would be advisable to include it in chapter IV, since a request for proposals presupposed that it was not possible to define specifications.

174. In response to concerns that conditions for use of this procurement method were not clear, it was explained that the conditions were those specified in article 26 (1) and (4). It was agreed that the word "will" in article 26 (4) should be replaced with the words "needs to" to convey the meaning that the procuring entity would need to follow that approach in some type of procurement, such as that operating under a fixed budget.

175. The suggestion was that paragraph (1) should be removed to chapter II or elsewhere in the revised Model Law and consolidated with similar provisions of other articles of the draft revised Model Law as appropriate. Concern was raised that the reference to direct solicitation in paragraph (1) (b) would be difficult to reconcile in the context of request for proposals without negotiation. In the context of paragraph 1 (c) and footnote 8, the Working Group was invited to consider whether, as a general rule, the procuring entity shall be required to publish a notice of procurement (similar to the one required under draft article 39 (3)), even in the case of direct solicitation (subject to the exemption envisaged in draft article 39 (4)). It was agreed that this question would apply to all cases of direct

solicitation, and would be considered in the context of general provisions on open and direct solicitation.

176. The Working Group was invited to consider which of the suggested terms in square brackets was the most appropriate in the context of paragraph 2 (d) and subsequent paragraphs where the same terms appeared. The Working Group recalled that the 1994 Model Law referred in the same context only to "price". The agreement was that the term "financial" should be used throughout the text in preference to "price" or "commercial".

177. In the context of paragraphs 2 (b) and (8) and footnote 9, the Working Group was invited to consider whether a reference to maximum price should be included, to accommodate procurement within a fixed budget. The prevailing view that it would not be appropriate for the Model Law to encourage or require including such reference in the solicitation documents. The dangers of doing so were highlighted, in particular difficulties with obtaining best value for money. Recognizing that there might be specific circumstances justifying including reference in the solicitation documents to the maximum price that the procuring entity could afford to pay, the Working Group agreed to address the matter in the Guide with possible examples, emphasizing that in such cases competition was on quality, and the price was not the determining factor. The point was made that this procedure was commonly used for well-defined services that were neither complex nor costly, such as the development of curricula. These services, it was added, were usually outsourced because procuring entities generally lacked the internal capacity to undertake this type of work.

178. It was agreed to retain in paragraph (5) the provisions requiring reasons for rejection to be provided, which would be an example of good practice and would set the background for any debriefing.

179. Some support was expressed for a suggestion to delete paragraph (8) (a). It was explained that paragraph (8) (b), together with the requirement that the solicitation documents would establish the manner of combining the results of the evaluation of technical aspects with price, would be sufficient to cover all the situations referred to in paragraph (8): i.e. both where the award was made on the basis of the lowest price and where it was based on the combination of price and other criteria. It was further explained that the provisions were misleading, as they highlighted only one possible way of combining price with other criteria, and they highlighted price in this procurement method, when it was not normally the primary concern. The Guide, it was continued, could refer to the manner of evaluation envisaged in paragraph (8) (a) as an example of one way of evaluating proposals, and with the explanation that it could be used only if the solicitation documents specifically provided for it.

180. The view prevailed that paragraph (8) (a) that was based on the 1994 wording should be retained in the revised Model Law, in the light of the considerations listed in the 1994 Guide accompanying those provisions, existing practices in some jurisdictions and the value of providing various options from which the procuring entity would be able to choose. The Working Group requested the Secretariat to reverse the order of listing subparagraphs (a) and (b), in order to emphasize that in the procurement method covered by the article quality and technical characteristics prevailed over price considerations. It was also emphasized that the accompanying

provisions of the Guide should be significantly strengthened by highlighting that the procuring entity could award on the basis of the lowest price only if it indeed satisfied itself with the quality and technical characteristics of the proposals by setting the relevant threshold sufficiently high.

181. A query was raised whether paragraph (8) (b) should be redrafted in the light of the decision made earlier at the session to use the term the "most advantageous tender". Opposition was expressed to redrafting paragraph (8) (b) in the light of that decision since the latter concept was not relevant to the provisions. It was agreed to retain the wording as it appeared in the 1994 Model Law.

E. Chapter V. Procurement methods involving negotiations (A/CN.9/WG.I/WP.71, paras. 21-23, and A/CN.9/WG.I/WP.71/Add.5)

Article 42. Two-stage tendering

182. It was recalled that the article was based on article 46 of the Model Law. It was recognized that some jurisdictions used this procurement method and caution therefore was expressed as regards suggestions to remove it from the revised Model Law or to substantially modify it. The point was made that variants of this method were used, and it was noted that these variants could be set out in the Guide, but the article would focus on the essential characteristics of this method that would accommodate all these variants.

183. As regards paragraph (3), it was noted that the provisions should not require negotiations since the latter were not always necessary. The understanding was however that when the procuring entity decided to engage in negotiations, it must extend an equal opportunity to negotiate to all suppliers or contractors concerned.

184. With reference to the term used for the interaction between the procuring entity and suppliers in paragraph (3), the view was expressed that a neutral term (such as "contacts") should be used. After discussion, the Working Group agreed to use the term "discussions" in preference to "negotiations" or "dialogue", in order to reflect the iterative nature of the process but at the same time distinguish this method from those in the following articles where price was also part of negotiations and/or where real bargaining was involved. The view was expressed that the discussions in two-stage tendering should not be limited to any particular aspect of the procurement (but that the discussions would not involve price).

185. The Secretariat was requested to ensure that the cross-references in paragraph (3) were appropriate and accurate. In particular, the view was expressed that a cross-reference to the article on abnormally low submissions should be deleted, because price was unknown at that stage.

186. As regards paragraph (4), the extent of permissible modifications to the technical or quality characteristics and to the evaluation criteria was questioned. It was recalled that the modifications could be amendments, additions or deletions. It was also recalled that the aim of this procedure was to refine and finalize the specifications set out in the initial notice, i.e. to enhance precision and to narrow down the possible options that would meet its needs. Reference was made to the Guide text addressing the equivalent 1994 provisions, which made this intention

clear and should guide the extent of permissible modifications. Concerns were also expressed that unfettered discretion to modify both characteristics and evaluation criteria would be risky and inappropriate, because some suppliers would already had been excluded, and might involve an entirely new specification being presented at the second stage. In this regard, it was noted that a change to the fundamental characteristics should indicate a new procurement. In support of these concerns, it was noted that, at a minimum, the Guide should explain the relevant risks, in particular high risk of collusion, posed by this procurement method.

187. It was agreed that the concerns raised by permitting modifications to the characteristics of the subject matter of the procurement and those to the evaluation criteria were different. The discussion first considered modifications to the characteristics of the subject matter, and whether modifications that could make non-responsive tenders responsive and vice versa should be permitted. Recalling that the Model Law permitted tenders that presented alternatives to the technical characteristics as a general matter, it was agreed that the permissible modifications to the subject matter should not be limited, because the changes as to whether tenders were responsive or not might be perfectly appropriate. Suggestions to permit changes to the characteristics (but not additions or deletions) and to add text to indicate that the aim of the changes was to enhance precision were not taken up, but it was agreed that a discussion of this aim should be included in the Guide.

188. As regards the permissible modifications to evaluation criteria, a request was made for examples of the discussions and modifications in practice to be provided. The concern raised by these modifications was that they might facilitate abuse by allowing a particular supplier to be favoured, and did not encourage best practice. The following options as regards these modifications were discussed: (i) to restrict changes to evaluation criteria to those that would not constitute a material change; (ii) not to allow changes to evaluation criteria (by deleting a part of the second sentence of paragraph (4) starting with the words “and any criterion” to the end); and (iii) to allow only those changes to the evaluation criteria that were strictly necessary as a result of changes to technical or quality characteristics. A proposal was made to implement the third option by adding the words “insofar as they relate to the changes in technical or quality characteristics” after the words “ascertaining the successful tender” in paragraph (4). Concern was expressed about that proposal, which did not envisage deleting the latter part of the sentence reading “and may add new characteristics or criteria that conform with this Law”, which conferred much discretion on the procuring entity as regards permitted modifications to the evaluation criteria. The preference was expressed instead for a wording such as “any related criteria” or “any criteria [strictly related to] [strictly needed as a result of deletion, modification or addition of] the technical and quality characteristics of the subject matter of the procurement” to replace the part of the second sentence of paragraph (4) addressed in the first proposal for the second option above.

189. The first option did not gain support. As regards the second option, it was stated that modifications to the characteristics would arise in the procedure, but that modifications to evaluation criteria should not be necessary. Further, any fundamental modifications should lead to a new first stage, it was said, because the suppliers would have submitted their initial tenders on the basis of the stated evaluation criteria, and they should be permitted to resubmit them. In addition, it was observed, this approach would have the benefit of simplicity and would

discipline the procuring entity at the outset. On the other hand, and in support of the third option, it was stated that technical or quality characteristics changes would necessarily require changes to the evaluation criteria, as otherwise the evaluation criteria at the second stage would not reflect the applicable technical and quality criteria.

190. It was agreed that paragraph (4) would permit additions, modifications or deletions to or from the technical and quality characteristics, but that the changes in evaluation criteria should be restricted to those necessary to implement the additions, modifications or deletions to or from the characteristics, and the Secretariat was requested to draft appropriate provisions. The Guide should clarify the policy considerations, it was said, so as to enable procuring entities to tailor this process to their needs.

191. It was also observed that this solution would enable modifications to the terms and conditions of the procurement that were not of a financial character (which could have a bearing on responsiveness) and those that were not material, so that there would be no effect on the evaluation of the tenders themselves.

Article 43. Request for proposals with dialogue

192. Specific concerns were highlighted about this proposed procurement method. It was noted that in countries that might be the main users of the revised Model Law, very often the procuring entity did no possess skills or tools to match those of their counterparts in dialogue, and therefore they were in a disadvantaged bargaining position. The other major concern about the proposed method was that it presupposed that supply side of the market, not the procuring entity, would take a lead in defining the needs of the procuring entity.

193. In response to those concerns, it was suggested and agreed that article 27 (1) (a) should be redrafted by replacing the words “in order” with the following text “after an assessment that the dialogue or negotiation is needed”. The view was expressed that the amendment improved the text and should be coupled with a discussion in the Guide about the risks and benefits of the method. The suggestion was made that article 27 (1) should also envisage approval by a higher-level authority, but it was agreed that this point should be made in the Guide alone, as an option for the enacting State to consider.

194. In response to a query, differences between articles 42 and 43 were clarified. The first difference related to the issue of pre-selection. The importance of holding pre-selection under article 43 was highlighted, since it was widely recognized that holding dialogue with a high number of suppliers made the process unmanageable and time-consuming. Although it was acknowledged that pre-selection usually took place in the procurement method under article 43, it was considered undesirable for the Model Law to require it. The agreement was therefore to retain the provisions of paragraph (3) as an option. It was also observed that numbers could be limited by selecting suppliers on the basis of whether the contents of the initial proposals were responsive. In this regard, the Working Group’s attention was drawn to article 43 of the 1994 Model Law that allowed the procuring entity to negotiate with any supplier that presented acceptable proposals, but did not regulate how acceptable proposals would be identified.

195. The other differences highlighted related to the scope of discussions and as to whether it was feasible or desirable to seek to draft a single set of specifications. As regards the former, it was noted that first-stage discussions in article 42 focused on technical aspects only, while in dialogue under article 43 price would also be addressed in the negotiations/dialogue. The aim of the discussions under article 42 would be to arrive at a single set of specifications in the end of the discussions, against which tenders would be submitted. On the other hand, under article 43, various technical solutions would exist at the end of the dialogue and would be presented by suppliers in their best and final offers (BAFOs). It was stated that the latter distinction should be made clearer in the draft. A query was raised whether the latter distinction was in fact accurate since through the dialogue some minimum technical requirements would be established, against which BAFOs would be eventually presented and evaluated. Assuming that even a minimum set of specifications could not be formulated by the procuring entity after the dialogue phase, it was said, would substantiate the concern that the method would be used as a simple way to shift the responsibility of defining the procuring entity's needs to the market.

196. Finally, it was recognized that article 43 provided less flexibility to the procuring entity to modify its requirements than the 1994 version of the article on two-stage tendering. It was recalled that this would change in the light of the Working Group's relevant decisions on article 42 (see paragraphs 186-191 above).

197. The Working Group also noted differences between the procurement methods in articles 43 and 44. Concern was expressed that conditions for the selection of one method over the other were not clear. It was stated that the procedural and substantive differences between these two methods should guide a procuring entity in the selection. The understanding was that the Guide would elaborate on those differences.

198. The Working Group proceeded with the consideration of provisions of article 43. The proposal was made that the term "dialogue", not "discussions", should be used throughout the article.

199. It was agreed that paragraph (1) should be redrafted to make it clearer that pre-selection, not prequalification, was relevant in the context of this procurement method, that the pre-selection phase was optional, and that the procedure would always commence with a public notice.

200. As regards paragraph (2), it was queried whether the provisions should require the procuring entity to establish minimum requirements, rather than simply allowing it to do so. It was agreed to make the provisions mandatory. The suggestion was made that the opening phrases should be removed to the end of the provisions, and the Secretariat was requested to revise the paragraph accordingly.

201. As regards paragraph (3), it was agreed that the substance of the second sentence of paragraph (8) as amended at the current session (see paragraph 205 below) should be inserted at the end of the first sentence of paragraph (3), as a precondition for engaging in pre-selection procedures. The point was made that the idea reflected in paragraphs (3) (a) and (6) (c), of a possible maximum number of pre-selected suppliers and a possible maximum number of suppliers to be invited to a dialogue, should be retained. It was noted that a possible minimum number was also relevant in the latter context.

202. The Working Group recalled its consideration of pre-selection and prequalification in the context of article 39 on restricted tendering (see paragraphs 161-166 above). In response to queries, it was explained that the intention was to use pre-selection the same way as prequalification — before the solicitation of proposals. Concerns and open issues about the use of pre-selection as highlighted in the footnotes accompanying the relevant provisions were recognized. It was agreed that provisions of paragraph (3) (b) should be amended by deleting the reference to exceeding minimum requirements as being superfluous.

203. A query was raised as to whether paragraph (3) should be consistent with article 39 (2) as amended by the Working Group at the current session (see paragraphs 161-166 above). The understanding was that regulating pre-selection procedures in greater detail was appropriate in article 43.

204. As regards the manner of pre-selection, the suggestion was made that article 43 (3) should be replaced with the substance of article 39 (2), the latter as proposed by the Secretariat in document A/CN.9/WG.I/WP.71/Add.4, and that the paragraph should reflect the discussion at the current session in the context of article 43. Whether to retain an express minimum number of "5" suppliers in article 39 (2) (a) (ii) was questioned. The Working Group considered whether the Model Law should specify the number, or require the enacting State to specify it in its national law or should not require that the law specified the number. Support was expressed for deleting the words "which shall be at least [five]" on the understanding that the issue of the minimum number would have to be considered in the light of the specific procurement. The other suggestion was to retain the wording but delete reference to "five", the understanding being that the specific number would be filled in by the enacting State itself depending on the conditions in the local market. The Secretariat was requested to revise the subparagraph to the latter effect.

205. It was agreed that paragraph (6) (i) should be deleted and that the second sentence of paragraph (8) should be redrafted to refer "to ensure effective competition".

206. The point was made that the article should not require that all suppliers that were invited to dialogue would then be invited to submit BAFOs. In response, it was noted that the conclusion of the experts consulted by the Secretariat had been that the risks of abuse in allowing for such additional reduction in participants would outweigh the benefits of the flexibility.

207. The following wording was proposed to replace paragraph (10): "during the course of the dialogue, the procuring entity shall not modify the subject matter of the procurement, nor any qualification, or evaluation criterion, nor any element of the procurement that is not subject to the dialogue as notified in the request for proposals". Support was expressed for this wording and the Working Group agreed to proceed with the consideration of the provisions on the basis of that text. A reservation was expressed about this proposed wording, in that it would not allow sufficient flexibility to the procuring entity and might defeat the purpose of the procedure.

208. Recalling that it would be critical that the provisions be easily understood to avoid problems with varied interpretations and implementation, it was noted that the deliberations indicated that this procedure was not as yet sufficiently clearly

defined. Another concern was that the draft revised Model Law proposed too many methods involving negotiations, which might inadvertently indicate that negotiations in public procurement were a matter of usual practice rather than something exceptional to be permitted only in very exceptional cases. Preference was therefore expressed by one delegation for limiting procurement methods in chapter V to two: two-stage tendering and one other more flexible method involving negotiations. The Working Group decided to take up these issues once it had considered the procedural aspects of all procurement methods in chapter V.

Article 44. Request for proposals with consecutive negotiations

209. The efficacy of the procedure was questioned, in that the highest-ranked supplier might be unwilling to negotiate, particularly as regards price, because it would be aware of its preferred status. In response, it was observed that this method had proved effective in practice, and the discipline on the supplier would be that failure to negotiate would lead to the permanent exclusion of that supplier. The procedure was contrasted with simultaneous negotiations, in which suppliers were not excluded during the negotiations. The concern was raised that the procedure contemplated in article 44 would allow the rejection of the proposal that might turn out to be the best for the procuring entity, and it was said that this possibility might compromise the objectives of the Model Law. In response, it was observed that a risk of rejecting of what in fact could be the best proposal would discipline the procuring entity during the process.

210. Experience in using this method in various systems was shared, in particular for design, engineering, architectural and advisory services, and it was stressed that all aspects of the proposals would be included in the negotiations. Safeguards applied to the negotiations in some cases were also shared, such as that fundamental changes to the terms of reference or to key personnel proposed by the supplier would not be permitted.