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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law*

Note by the Secretariat

Addendum

This note sets out a proposal for the Preamble and articles 1-13 of chapter I (General provisions) of the revised Model Law.

The Secretariat's comments are set out in the accompanying footnotes.

* This document was submitted less than ten weeks before the opening of the session because of the Commission's request for inter-session informal consultations on the entire text (A/64/17, para. 281).



UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT¹

Preamble

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement so as to promote the objectives of:

- (a) Maximizing economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;
- (d) Providing for the fair and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process;
- (f) Achieving transparency in the procedures relating to procurement;

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application²

This Law applies to all public procurement.

Article 2. Definitions³

For the purposes of this Law:

- (a) “Currency” includes monetary unit of account;
- (b) “Domestic procurement” means procurement limited to domestic suppliers or contractors pursuant to article [8];⁴

¹ At the Working Group’s seventeenth session, 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 (A/CN.9/687, para. 17). The Secretariat suggests amending article 1 as in the current draft and introducing a definition of “public procurement” alongside the definition of “procurement” in article 2.

² The accompanying Guide text will point out that States in situations of economic and financial crisis might exempt the application of the Model Law through legislative measures (which would themselves receive the scrutiny of the legislature) (A/CN.9/668, para. 63).

³ The article will be supplemented in the revised Guide to Enactment by a more comprehensive glossary of terms used in the Model Law.

(c) “Electronic reverse auction” means an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves presentation by suppliers or contractors of successively lowered bids during a scheduled period of time;

(d) “Framework agreement procedure” means a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement;

(i) “Framework agreement” means an agreement or agreements between the procuring entity and the selected supplier(s) or contractor(s) concluded upon completion of the first stage of the framework agreement procedure;

(ii) “Closed framework agreement” means a framework agreement to which no supplier or contractor that is not initially a party to the framework agreement may subsequently become a party;

(iii) “Open framework agreement” means a framework agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties;

(iv) “Framework agreement procedure with second stage competition” means a procedure under an open framework agreement or a closed framework agreement in which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are to be established or refined through the second stage competition;

(v) “Framework agreement procedure without second stage competition” means a procedure under a closed framework agreement in which all terms and conditions of the procurement are established when the framework agreement is concluded;

(e) “Material change” means a change in the description of the subject matter of the procurement,⁵ in the criteria and procedures for examining, evaluating [and comparing]⁶ submissions and ascertaining the successful submission, in the relative weight of the evaluation criteria or in other terms and conditions of the procurement, as established by the procuring entity when first soliciting the participation of suppliers or contractors in procurement, that would make previously responsive submissions non-responsive, that would render previously non-responsive submissions responsive, that would change the status of suppliers or

⁴ Revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, paras. 19-20).

⁵ As this is the first time the term “subject matter of the procurement” is used in an article of the Model Law, the accompanying Guide text will cross-refer to the definition of “procurement” where the term is defined.

⁶ The Working Group may wish to consider whether the term “evaluation” already encompasses the notion of “comparison” and therefore the use throughout the Model Law of the latter term alongside the term “evaluation” is superfluous. The Secretariat put it in square brackets in all instances for the Working Group’s consideration.

contractors with regard to their qualification or that would change the ranking of submissions;⁷

[(f) “Pre-qualification documents” means documents issued by the procuring entity that set out the terms and conditions of the pre-qualification proceedings in accordance with article [16] of this Law];⁸

(g) “Procurement” means the acquisition by any means of goods, construction or services (the “subject matter of the procurement”);⁹

(h) “Procurement contract” means a contract or contracts¹⁰ resulting from the procurement proceedings and made between the procuring entity and supplier(s) or contractor(s);

(i) “Procurement involving classified¹¹ information” means procurement in which the procuring entity may be authorized by the procurement regulations or by other provisions of law of this State to take special measures and impose special requirements for the protection of classified information, including to determine which provisions of this Law calling for public disclosure shall not apply;¹²

⁷ Revised in the light of the deliberations at the Working Group’s seventeenth session. 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 (A/CN.9/687, para. 22).

⁸ This new definition is added as suggested at the Working Group’s seventeenth session (A/CN.9/687, para. 50). The accompanying Guide text will note that for avoidance of doubt this definition encompasses the “pre-selection documents” in the relevant context.

⁹ The accompanying Guide text will set out the substance of the definitions of the goods, construction and services from the 1994 text (article 2 (c) to (e)). The Guide will explain that the words “by any means” in the definition should not be read as referring to unlawful acts but intended to indicate that procurement is carried out not only through acquisition by purchase but also by other means such as lease (equivalent terms in article I.2 of the WTO Agreement on Government Procurement (1994, GPA) and the provisionally agreed text of the revised GPA article II.2 (b) refer to “purchase, lease and rental or hire purchase, with or without an option to buy”) (A/CN.9/668, para. 273).

¹⁰ The accompanying Guide text will note that reference to contracts in plural intends to encompass inter alia split contracts awarded as a result of the same procurement proceedings.

¹¹ The accompanying Guide text will explain that the term “classified information” intends to refer to information designated as classified by an enacting State in accordance with the relevant national law, and that the provision does not intend to confer any discretion on the procuring entity to expand the definition of “classified information”. The Guide will also explain that the term “classified information” being understood in many jurisdictions as information to which access is restricted by law or regulation to particular classes of persons, and that the term does not intend to refer only to the procurement in the sectors where “classified information” is most commonly encountered, such as national security and defence, but also to procurement in any other sector where protection of certain information from public disclosure may be permitted by law, such as in the health sector (for example procurement of vaccines in the case of pandemics in order to avoid panic) or where sensitive medical research and experiments may be involved. Because of the risk of abuse of exceptions to transparency requirements, the Working Group may wish to recommend in the Guide that the issues pertaining to the treatment of “classified information” should be regulated at the level of statutes in order to ensure appropriate scrutiny by the legislature.

¹² The accompanying Guide text will note that the definition, where it is used in the Model Law, is supplemented by the requirement in the article on the documentary record of procurement

(j) “Procurement regulations” means regulations to be enacted in accordance with article [4] of this Law;

(k) “Procuring entity” means:

(i) *Option I*

Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

Option II

Any department, agency, organ or other unit, or any subdivision thereof, of the (“Government” or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of “procuring entity”);¹³

(l) “Public procurement” means procurement carried out by a procuring entity;¹⁴

(m) “Socio-economic policies”¹⁵ means environmental, social, economic and other policies of this State authorized or required by the procurement regulations or other provisions of law of this State [or by ... (the enacting State specifies the relevant organ)]¹⁶ to be taken into account by the procuring entity in the procurement proceedings. (The enacting State may expand this subparagraph by providing an illustrative list of such policies);¹⁷

proceedings to include in the record the reasons and circumstances on which the procuring entity relied to justify the measures and requirements imposed during the procurement proceedings for protection of classified information, such as exemptions from public disclosure.

¹³ The accompanying Guide text will note that this definition may be read as encompassing more than one procuring entity engaged in the same procurement. For example, in the context of framework agreement procedures, it is common in some jurisdictions that more than one State department, agency, organ or other unit, or any subdivision thereof, becomes party to the same framework agreement.

¹⁴ The accompanying Guide text will cross-refer to the definitions of “procurement” and “procuring entity”.

¹⁵ The definition was revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, paras. 24-26).

¹⁶ The wording in square brackets appears in the light of the changes agreed to be made at the Working Group’s seventeenth session to the corresponding provisions in the article on evaluation criteria. The Working Group may wish to reconsider the inclusion of such wording since it is open to abuse unless appropriate safeguards are built in the administrative system of the enacting State to mitigate risks of such abuse. The aim of the provisions is to ensure that (a) socio-economic policies are of the Government and not determined on an ad hoc basis by the procuring entity, and (b) applied across all government purchasing, so that their costs and benefits can be seen. If there is to be an organ with the authority to decide the socio-economic policies, it should be operating under these constraints (and not allowing, for example, misuse and abuse through ad hoc adoption of policies, favouritism, etc).

¹⁷ The accompanying Guide text will contain an illustrative list of such policies, such as that contained in the 1994 Model Law (article 34 (4) (c) (iii)). The Guide will also describe the costs to procurement that recourse to such policies can bring, and that they are commonly considered to be appropriate only for the purposes of assisting development, such as capacity-building.

(n) “Solicitation” means an invitation to participate in the procurement proceedings:¹⁸

[(i) “Direct solicitation”¹⁹ means the [exceptional]²⁰ solicitation addressed directly to one or a restricted number of suppliers or contractors. This excludes solicitation addressed to a restricted number of suppliers or contractors following pre-qualification or pre-selection proceedings];

(o) “Solicitation documents” means documents issued by the procuring entity, including any amendments thereto,²¹ that set out the terms and conditions of the given procurement;

(p) “Standstill period”²² means the period before the entry into force of the procurement contract, during which the suppliers or contractors whose submissions have been examined may seek review of the anticipated²³ decision of the procuring entity to accept the successful submission;

(q) “Submission(s)” means tender(s), proposal(s), offer(s), quotation(s) and bid(s) referred to collectively or generically;

[(r) “Successful submission(s)” means ...;]²⁴

(s) “Supplier or contractor” means, according to the context, any potential party or any party to the procurement proceedings with the procuring entity;

¹⁸ This definition was revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, para. 19). The definition of “open solicitation” was removed because the term is not used in the current draft.

¹⁹ This definition was revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, para. 19).

²⁰ Although the suggestion was made at the Commission’s forty-second session to highlight the exceptional nature of direct solicitation in the definition (A/64/17, para. 63), the Working Group may consider that direct solicitation is exceptional when the procuring entity has a choice between open and direct solicitations, which in the current draft revised Model Law is only in the request for proposals procedures. Direct solicitation is inherent in other methods of procurement, such as restricted tendering, request for quotations, competitive negotiations or single-source procurement, and cannot therefore be considered exceptional in those methods. See further section II of chapter II of this draft.

²¹ The accompanying Guide text will need to explain the difference in the meaning of “solicitation documents” in various procurement methods. With respect to the amendments, it will cross-refer to the relevant provisions of the Model Law, such as articles 13 bis, 14, 42 and 43 of this Law.

²² This definition was revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, para 19).

²³ Revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, para 28). The Guide will explain the phrase “anticipated decision” in the light of provisions of article 20.

²⁴ The definition is to be considered in the light of article 20 and the provisions of the Model Law defining the successful submission(s) in the context of various procurement methods and procedures. At the Working Group’s seventeenth session, the need for this definition was questioned (A/CN.9/687, para 29).

(t) “Tender security”²⁵ means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in article [15 (1) (f)] and includes such arrangements as bank guarantees, surety bonds, standby letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]²⁶

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) Treaty or other form of agreement to which it is a party with one or more other State,

(b) Agreement entered into by this State with an intergovernmental international financing institution, or

[(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,]

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

Article 4. Procurement regulations²⁷

The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.²⁸

²⁵ The accompanying Guide text will explain that although the Model Law refers to “tender security”, as the commonly-used term in the relevant context, this should not imply that this type of security may be requested only in the tendering proceedings. It will also explain that the definition does not intend to imply that multiple tender securities can be requested by the procuring entity in any single procurement proceedings that involve presentation of revised proposals or bids (A/64/17, para. 57).

²⁶ The accompanying Guide text will explain that the texts in square brackets in this article are relevant to, and intended for consideration by, federal States. It will also alert enacting States that the provisions of the article might need to be adapted to constitutional requirements or should not be enacted at all if they conflict with the constitutional law of the enacting State (A/64/17, paras. 75-78).

²⁷ The accompanying Guide text will contain a list of cross-references to all provisions of the Model Law where requirements about the content of the procurement regulations are found.

²⁸ The article was revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, paras. 31-32). The provisions on a code of conduct that were in this article in the earlier drafts were moved to a separate article 23 bis, in order to avoid giving impression that issues pertaining to conduct of procuring officers are necessarily always addressed in the

Article 5. Publication of legal texts

(1) Except as provided for in paragraph (2) of this article, the text of this Law, procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

(2) Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public and updated if need be.²⁹

Article 6. Information on possible forthcoming procurement

(1) Procuring entities may publish information regarding planned procurement activities for forthcoming months or years.³⁰

(2) Procuring entities may also publish an advance notice of possible future procurement.³¹

(3) Publication under this article does not constitute a solicitation, does not oblige the procuring entity to issue a solicitation and does not confer any rights on suppliers or contractors.³²

Article 7. Communications in procurement

(1) Any document, notification, decision or any other information generated in the course of a procurement and communicated as required by this Law, including in connection with review proceedings under chapter [VIII] or in the course of a meeting, or forming part of the record of procurement proceedings under article [23], shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

procurement regulations.

²⁹ The accompanying Guide text will explain that laws and regulations of the enacting State will regulate which State agency is responsible for fulfilling the obligations under this article.

³⁰ The accompanying Guide text will emphasize the need for proper procurement planning.

³¹ The accompanying Guide text will explain that the reference to “an advance notice of possible future procurement” is made to enable procuring entities to assess the market for complex procurement, without using a term that might be confused with a notice seeking expressions of interest that is usually published in conjunction with request for proposals proceedings.

³² The accompanying Guide text will explain that the provisions of this article may be applied regardless of the procurement method, and will also highlight the importance of the provisions in the light of the United Nations Convention against Corruption (UNCAC), as ensuring transparency throughout the process and eliminating any advantageous position of suppliers or contractors that otherwise may gain access to procurement planning phases in a non-transparent manner. The Guide will also explain the media where the type of information covered by the article is usually published (A/CN.9/687, para. 37).

- (2) Direct solicitation³³ and communication of information between suppliers or contractors and the procuring entity referred to in articles [15 (1) (d),³⁴ 16 (6) and (9),³⁵ 35 (2) (a),³⁶ 37 (1)³⁷ and 44 (...)³⁸]³⁹ may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.
- (3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:
- (a) Any requirement of form;
 - (b) In procurement involving classified information, if the procuring entity considers it necessary, measures and requirements needed to ensure the protection of classified information at the requisite level;
 - (c) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf;
 - (d) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and
 - (e) The means to be used to hold any meeting of suppliers or contractors.
- (4) The procuring entity may use only those means of communication that are in common use by suppliers or contractors in the context of the particular procurement. In any meeting held with suppliers or contractors, the procuring entity shall use only those means that ensure in addition that suppliers or contractors can fully and contemporaneously participate in the meeting.⁴⁰
- (5) The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned.

³³ Corresponds to references in article 9 of the 1994 Model Law to articles 37 (3) and 47 (1) of that text.

³⁴ Id., as regards reference to article 32 (1) (d) of the 1994 text.

³⁵ Id., as regards reference to article 7 (4) and (6) of the 1994 text.

³⁶ Id., as regards reference to article 31 (2) (a) of the 1994 text.

³⁷ Id., as regards reference to article 34 (1) of the 1994 text.

³⁸ The missing reference should correspond to article 44 (b) to (f) of the 1994 text (selection procedure with consecutive negotiation). It will be updated in the light of the revisions to chapter V.

³⁹ It was decided that the other references in the 1994 text (to articles 36 (1) (notice of acceptance of the successful tender), and to article 12 (3) (notice of the rejection of all submissions)) would be deleted (A/64/17, para. 122).

⁴⁰ The changes to this paragraph are intended to make it clear that the requirements as to communications are obligatory (including where there is a meeting with suppliers and contractors), but that there is no obligation to hold such a meeting. The earlier wording of this paragraph inadvertently conveyed an obligation to hold meetings with suppliers or contractors.

Article 8. Participation by suppliers or contractors⁴¹

(1) Suppliers or contractors shall be permitted to participate in procurement proceedings without regard to nationality, except:

(a) Where the value of the procurement is less than the threshold set out in procurement regulations authorizing the procuring entity to have recourse to domestic procurement;⁴²

(b) Where the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on other grounds specified in the procurement regulations or according to other provisions of law of this State.⁴³

(2) Except when required to do so by the procurement regulations or according to other provisions of law of this State,⁴⁴ the procuring entity shall establish no other requirement aimed at limiting participation of suppliers or contractors in procurement proceedings that discriminates⁴⁵ against or among suppliers or contractors or against categories thereof.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare whether participation of

⁴¹ The article was revised pursuant to the consideration at the Working Group's seventeenth session (A/CN.9/687, paras. 19-20 and 40-42).

⁴² This provision is new and is based on the part of the definition of the "domestic procurement" in article 2 that was before the Working Group at its seventeenth session and agreed to be moved from that definition to the relevant substantive provisions of the revised Model Law (A/CN.9/687, paras. 20 and 42). Some experts expressed concern that low-value procurement as a justification for the domestic procurement will be abused in order to avoid international procurement. The Working Group may wish to consider whether (a) to retain the 1994 approach that provides that the procurement below the threshold as established in the procurement regulations automatically authorizes the procuring entity to have recourse to the domestic procurement; or (b) add some value judgement, in which case the use of discretion may give rise to liability on the part of the procuring entity.

⁴³ The accompanying Guide text will explain the difference between subparagraphs (a) and (b) by pointing out that whereas subparagraph (a) covers domestic procurement, subparagraph (b) may deal not only with cases of domestic procurement (e.g. to cover situations where nationalities subject to international or bilateral sanctions are excluded). Although socio-economic policies would most likely justify recourse to exceptions provided for in this subparagraph, the reference only to the socio-economic policies of an enacting State was not considered sufficient since limiting participation in procurement proceedings on the basis of nationality may occur on grounds other than socio-economic policies of this State, such as safety and security.

⁴⁴ The accompanying Guide text will explain that this paragraph intends to cover situations when limitation of participation in procurement proceedings is not on the basis of nationality or not solely on that basis (e.g. set-aside programs in some jurisdictions for small and medium enterprises or coming from disadvantaged areas). The paragraph may cover, as paragraph (1) (b) does, domestic procurement (e.g. procurement with participation of only suppliers or contractors coming from disadvantaged areas within the same State) or international procurement limited to certain groups of suppliers or contractors (e.g. persons with disabilities).

⁴⁵ The accompanying Guide text will explain that, apart from clearly discriminatory measures, in practice some measures may be taken that produce inadvertently discriminatory effect on suppliers or contractors.

suppliers or contractors in the procurement proceedings is limited pursuant to this article and on which ground. Any such declaration may not later be altered.⁴⁶

(4) [A procuring entity that decides to limit participation of suppliers or contractors in procurement proceedings pursuant to this article shall include in the record of the procurement proceedings a statement of the reasons and circumstances on which it relied.]⁴⁷

(5) The procuring entity shall make available to any member of the general public, upon request, its reasons for limiting participation of suppliers or contractors in the procurement proceedings pursuant to this article.⁴⁸

Article 9. Qualifications of suppliers and contractors

(1) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

(2) [In order to be awarded the procurement contract],⁴⁹ suppliers or contractors must meet such of the following criteria as the procuring entity considers appropriate and relevant⁵⁰ in the circumstances of the particular procurement:⁵¹

(i) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities,⁵² managerial capability, reliability,

⁴⁶ The accompanying Guide text would specify the media where the declaration would be published.

⁴⁷ At the Working Group's seventeenth session, the suggestion was made that this type of provisions should be moved from articles where they were found and that they should be instead consolidated in the article on documentary records of procurement proceedings. It was also suggested that the Guide to the articles from where these provisions would be moved might cross-refer to the relevant requirement found in the article on documentary records of procurement proceedings (A/CN.9/687, para. 91). The Working Group did not make a decision on this suggestion. The Secretariat retained the provisions in square brackets for further consideration by the Working Group. From the standpoint of the users of the revised Model Law, it may be helpful to follow the 1994 approach by keeping the record-related provisions not only in the article on the documentary record of procurement proceedings but also in the relevant articles.

⁴⁸ It is suggested that the Guide text that will discuss transparency requirements of the Model Law should list separately all public disclosure requirements found in the Model Law.

⁴⁹ This opening phrase is suggested to be added as a result of consultations with experts. It replaces the 1994 opening phrase reading: "In order to participate in procurement proceedings". The Working Group may wish to consider whether the new wording is adequate to describe also situations where suppliers or contractors are qualified or disqualified very early in the process, such as at the pre-qualification stage, and thus not allowed to participate or further participate in the procurement proceedings. The previous draft did not contain any opening phrase.

⁵⁰ The words "and relevant" were added pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 46).

⁵¹ The phrase "in the circumstances of the particular procurement" replaced the phrase used in the 1994 Model Law "in the particular procurement proceedings", to align with the wording used in the similar context throughout the draft revised Model Law.

⁵² At the Working Group's seventeenth session, it was agreed that the Guide to these provisions should explain that the requirement that suppliers or contractor must possess the "necessary

experience and the personnel, and that they meet applicable ethical and other standards,⁵³ to perform the procurement contract;⁵⁴

(ii) That they have legal capacity to enter into the procurement contract;

(iii) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;⁵⁵

(v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.⁵⁶

(3) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide appropriate documentary evidence or other information to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (2).⁵⁷

(4) Any requirement established pursuant to this article shall be set out in the pre-qualification documents, if any, and in the solicitation documents, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this Law.

equipment and other physical facilities” was not intended to restrict inadvertently participation of small and medium enterprises in public procurement. The Guide will note 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 made available for the implementation of the procurement contract (A/CN.9/687, para. 45).

⁵³ The provisions were revised in the relevant part pursuant to the deliberations at the Working Group’s seventeenth session (A/CN.9/687, paras. 43-44). The Guide to these provisions would explain with reference to “other standards” that the procuring entity should be entitled for example to satisfy itself that suppliers or contractors have all the required insurances, and to impose security clearances or consider environmental aspects where necessary (A/CN.9/687, paras. 44 and 49).

⁵⁴ The word “references” was deleted in this paragraph, pursuant to the deliberations at the Working Group’s seventeenth session (A/CN.9/687, paras. 46-48).

⁵⁵ The accompanying Guide text will explain the effect of this provision on foreign suppliers or contractors, with a cross-reference to article 8 that prevents imposing requirements other than those stipulated in the procurement regulations or other provisions of law of the enacting State, to deter participation in the procurement proceedings by foreign suppliers or contractors.

⁵⁶ It was suggested that the accompanying Guide text should refer to the World Bank’s guidelines on suspension procedures (A/CN.9/687, para. 50).

⁵⁷ At the Working Group’s seventeenth session, it was agreed that the accompanying Guide text should explain the interaction between paragraphs (3) and (2), in particular paragraph (2) (i), of this article (A/CN.9/687, para. 48).

(5) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set out in the pre-qualification documents, if any, and in the solicitation documents.

(6) Other than any criterion, requirement or procedure that is imposed by the procuring entity in accordance with article [8] of this Law, the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable.⁵⁸

(7) Notwithstanding paragraph (6) of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission to demonstrate its qualifications for the particular procurement. In doing so, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

(8) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false;

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;

(d) The procuring entity may require a supplier or contractor that was pre-qualified in accordance with article [16] of this Law to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate its qualifications again if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate its qualifications again as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.⁵⁹

⁵⁸ The accompanying Guide text will note that, despite this statement in the Model Law, some practical measures, such as a choice of the language, although objectively justifiable, may lead to discrimination against or among suppliers or contractors or against categories thereof.

⁵⁹ The Guide to these provisions may note that in most procurement (with the exception perhaps of complex procurement requiring long negotiations), these provisions should be limited to the winner as envisaged in article 37 (6) and (7) and in the context of electronic reverse auctions.

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement⁶⁰

(1) The procuring entity shall set out in the pre-qualification documents, if any, and in the solicitation documents the description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.⁶¹

(2) Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article [8] of this Law, no description of the subject matter of a procurement that creates an obstacle to the participation of suppliers or contractors in the procurement proceedings, including any obstacle based on nationality, shall be included or used in the pre-qualification documents, if any, or in the solicitation documents.

(3) The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements, including concerning testing and test methods,⁶² packaging, marking or labelling or conformity certification, and symbols and terminology.

(4) To the extent practicable, any description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical and quality characteristics or the performance characteristics⁶³ of that subject matter. There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as “or equivalent” are included.

(5) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the subject matter of the procurement shall be used, where available, in formulating any description of the subject matter of the procurement to be included in the pre-qualification documents, if any, and in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement and the

⁶⁰ At the Working Group’s seventeenth session, it was agreed that the Guide to this article should elaborate the way the socio-economic factors can 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 (A/CN.9/687, para. 51).

⁶¹ The accompanying Guide text will explain that the minimum requirements intend also to cover thresholds referred to in the provisions on request for proposals without negotiation and consecutive negotiations.

⁶² The accompanying Guide text will explain that the requirements may include those relevant to environment protection or other socio-economic policies of the enacting State.

⁶³ The accompanying Guide text will explain that the relevant technical and quality characteristics or the performance characteristics may also cover characteristics relevant to environment protection or other socio-economic policies of the enacting State.

procurement contract or the framework agreement to be entered into as a result of the procurement proceedings, and in formulating other relevant aspects of the pre-qualification documents, if any, and solicitation documents.

Article 11. Rules concerning evaluation criteria and procedures⁶⁴

(1) Except for the criteria set out in paragraph (4) below, the evaluation criteria shall relate to the subject matter of the procurement.

(2) The evaluation criteria may include:

(a) The price;

(b) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the characteristics of the subject matter of the procurement, such as the functional characteristics of goods or construction and the environmental characteristics of the subject matter,⁶⁵ the terms of payment and of guarantees in respect of the subject matter of the procurement;

(c) Where relevant in procurement conducted in accordance with [request for proposals procurement, add appropriate cross-references], experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement;

(3) All non-price evaluation criteria shall, to the extent practicable, be objective, quantifiable and expressed in monetary terms.⁶⁶

(4) In addition to the criteria set out in paragraph (2), the evaluation criteria may include:

(a) Any criteria that the procurement regulations or other provisions of law of this State authorize or require to be taken into account [subject to approval by ... (the enacting State designates an organ to issue the approval)];

(b) If authorized or required by the procurement regulations or other provisions of law of this State [or by ... (the enacting State designates an organ)]⁶⁷ [and subject to approval by ... (the enacting State designates an organ to issue the

⁶⁴ The entire article was revised in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 24-26 and 53-62).

⁶⁵ The Guide would explain that this paragraph allows the procuring entity to include characteristics such as the environmental character of the production line. More generic socio-economic policy considerations are addressed in articles 8, 9 and 10 and para. (4) of this article.

⁶⁶ The accompanying Guide text will explain that expressing all non-price evaluation criteria in monetary terms in competitive dialogue would not be practicable.

⁶⁷ The issue of the text put in square brackets has been raised in the context of the similar provisions found in the definition of "socio-economic policies" in article 2. The Working Group may wish to consider whether this text should be deleted with the result that the issue of granting margins of preference would have to be regulated in law or regulations and not merely dealt with on an ad hoc basis by a State agency. However, the approval requirement might be useful to avoid low-value price-only procurement being subject to socio-economic factors at the desire of the procuring entity.

approval)], a margin of preference for the benefit of submissions for construction by domestic contractors, for the benefit of submissions for domestically produced goods or for the benefit of domestic suppliers of services.⁶⁸ The margin of preference shall be calculated in accordance with the procurement regulations.⁶⁹

(5) The procuring entity shall set out in the solicitation documents:⁷⁰

(a) Whether the successful submission will be ascertained on the basis of price or of price and other criteria;⁷¹

(b) All evaluation criteria established pursuant to this article, including the price subject to any margin of preference, expressed to the extent practicable in monetary terms;

(c) Where any criteria other than price are to be used in the evaluation procedure, the relative weights of price subject to any applicable margin of preference and of the evaluation criteria other than price, except where the procurement is conducted under article [43], in which case the procuring entity shall list all evaluation criteria in descending order of importance;⁷²

(d) The manner of application of the criteria in the evaluation procedure.

⁶⁸ The Working Group may wish to consider whether the provisions should be expanded to apply in the context of other socio-economic policies of the enacting State by permitting granting a margin of preference for example to small and medium enterprises or suppliers coming from disadvantaged groups or areas. The Working Group may also wish to consider whether the provisions should be based on a broader notion of “domestic content”.

⁶⁹ The Working Group may wish to consider whether margins of preference are applicable to both price and non-price evaluation criteria listed in paragraph 2 (a) to (c) above (the 1994 text restricted application of the margin of preference to price) and are relevant in all procurement methods (some experts in particular questioned how margins of preference could operate in competitive dialogue). The accompanying Guide text will cross-refer to the article regulating the documentary record of procurement proceeding that require putting on the record the relevant information on the use of a margin of preference in the given procurement.

⁷⁰ The accompanying Guide text will cross-refer to the corresponding provisions in the articles regulating the contents of solicitation documents in the context of each procurement method.

⁷¹ The accompanying Guide text would explain that the solicitation documents must make it clear whether the selection will be on the basis of the lowest priced submission, the most advantageous submission, the proposal that best meets the needs of the procuring entity, etc, as appropriate.

⁷² This formulation is intended to reflect the general transparency approach that suppliers should be able to see how their submissions will be evaluated. The Secretariat’s understanding is that the basket of non-price criteria will include some quantifiable and objective criteria (such as maintenance costs) and some subjective elements (the relative value that the procuring entity places on speedy delivery or green production lines, for example), amalgamated into an overall quality ranking. It is to that ranking that the price including any margin of preference is applied to identify the successful submission. Thus for procurement not involving negotiations, the procuring entity has to disclose both how the non-price basket factors will weigh, and how the basket will weigh against price. However, the provisions do not discuss the level of detail of the evaluation criteria, which accords some flexibility to the procuring entity. The accompanying Guide text will explain this approach, and will cross-refer to the provisions of article 43 that require listing the evaluation criteria in descending order of importance in competitive dialogue proceedings where it is often not possible to establish the relative weight of evaluation criteria at the outset of the procurement.

(6) In evaluating submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents, and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents. No criterion or procedure shall be used that has not been set out in accordance with this provision.⁷³

Article 12. Rules concerning estimation of the value of procurement⁷⁴

(1) A procuring entity shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among suppliers or contractors or otherwise avoid obligations under this Law.⁷⁵

(2) In estimating the value of procurement, the procuring entity shall include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers or contractors, taking into account all forms of remuneration.⁷⁶

Article 13. Rules concerning the language of documents

(1) The pre-qualification documents, if any, and the solicitation documents shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade unless decided otherwise by the procuring entity in a domestic procurement).

(2) Applications to pre-qualify, if any, and submissions may be formulated and presented in the language of the pre-qualification documents, if any, and solicitation documents, respectively, or in any other language permitted by those documents.

⁷³ A/64/17, paras. 152-156.

⁷⁴ The accompanying Guide text will explain that the provisions of the article are in particular relevant in the context of low-value procurement thresholds envisaged by the Model Law for recourse to domestic procurement under article 8, restricted tendering or request for quotations proceedings (A/CN.9/687, paras. 63 and 66).

⁷⁵ The provisions were revised pursuant to the consideration at the Working Group's seventeenth session (A/CN.9/687, para. 64).

⁷⁶ The accompanying Guide text will explain that in the procurement that provides for the possibility of option clauses, the estimated value under the article will refer to the estimated maximum total value of the procurement, inclusive of optional purchases, as this is regulated in the respective provisions of the WTO GPA (article II.2 and 3 of the 1994 version and article II.6 of the 2006 version) (A/CN.9/687, para. 65).