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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 chapter V of the revised Model Law (Procurement methods involving negotiations (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)), comprising articles 42-46.

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

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



## **CHAPTER V. PROCUREMENT METHODS INVOLVING NEGOTIATIONS (TWO-STAGE TENDERING, REQUEST FOR PROPOSALS WITH DIALOGUE, REQUEST FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS, COMPETITIVE NEGOTIATIONS AND SINGLE-SOURCE PROCUREMENT)**

### **Article 42. Two-stage tendering<sup>1</sup>**

(1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings, except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers or contractors to present, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

(3) The procuring entity may, in the first stage, engage in discussions<sup>2</sup> with suppliers or contractors whose tender have not been rejected pursuant to provisions of this Law<sup>3</sup> concerning any aspect of their tenders. When the procuring entity engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors.<sup>4</sup>

(4) (a) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite all suppliers or contractors whose tenders have not been rejected<sup>5</sup> to present final tenders with prices with respect to a single description of the subject matter of the procurement.

(b) In formulating that description, the procuring entity may delete or modify any aspect of the technical or quality characteristics of the subject matter of the procurement as set out in the solicitation documents and add any new characteristic that conforms to the requirements of this Law.<sup>6</sup>

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<sup>1</sup> The accompanying Guide text will note that variants of the two-stage tendering are used in practice, and may set out some of such variants. The Guide will further explain that the article of the Model Law focus on the essential characteristics of this method that intend to accommodate all these variants (A/CN.9/687, para. 182). The Guide will further explain the relevant risks, in particular high risk of collusion, posed by this procurement method (A/CN.9/687, para. 186).

<sup>2</sup> A/CN.9/687, para. 184.

<sup>3</sup> The accompanying Guide text will cross-refer to the relevant provisions, highlighting that this procedure involves an assessment of responsiveness.

<sup>4</sup> A/CN.9/687, para. 183.

<sup>5</sup> The accompanying Guide text will explain that the wording used in these provisions should not give impression that rejection of tenders is possible subsequent to discussions referred to in paragraph (3) of the article.

<sup>6</sup> The accompanying Guide text will explain that the aim of the changes is to enhance precision in the description of the subject matter of the procurement (A/CN.9/687, para. 186).

(c) The procuring entity may delete or modify any criterion for examining or evaluating tenders set out in the solicitation documents and may add any new criterion that conforms to the requirements of this Law, to the extent only that the deletion or modification is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement.<sup>7</sup>

(d) Any deletion, modification or addition made pursuant to subparagraphs (b) or (c) above shall be communicated to suppliers or contractors in the invitation to present final tenders.

(e) A supplier or contractor not wishing to present a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide.<sup>8</sup>

(f) The final tenders shall be evaluated [and compared] in order to ascertain the successful tender as defined in article [37 (4) (b)].

### **Article 43. Request for proposals with dialogue<sup>9, 10</sup>**

(1) Except in the cases of direct solicitation under article [29 quinquies] or pre-selection, the procuring entity shall issue an invitation to participate in the procurement proceedings in accordance with article [29 ter].

(2) The invitation shall include:

(a) The name and address of the procuring entity;

<sup>7</sup> A/CN.9/687, paras. 188-190. The accompanying Guide text will explain that changes to technical or quality characteristics may necessarily require changes to the examination and/or evaluation criteria, as otherwise the examination and/or evaluation criteria at the second stage would not reflect the applicable technical and quality criteria.

<sup>8</sup> The accompanying Guide text will explain the application of the article on tender securities in the context of two-stage proceedings, in particular at which stage of the proceedings tender securities may be required.

<sup>9</sup> The article was revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 192-208) and the newly proposed section II of chapter II.

<sup>10</sup> This procurement method is available for all types of procurement, including the procurement of non-quantifiable advisory services. However, the Working Group's attention is drawn to the discussion in A/CN.9/WG.I/WP.71 regarding the particular features of such procurement. The Working Group is invited to consider whether a dedicated procurement method for it would be required in the revised Model Law. Alternatively, the Guide to Enactment might explain that in such type of procurement, regulations could provide additional steps or provisions. For example, proposals need not contain financial elements or prices where the cost is not an evaluation criterion or not a significant evaluation criterion, proposals could be presented in two envelopes with technical and financial aspects in different envelopes, and an additional step could include a public opening of the envelopes in one or two sittings. As regards evaluation criteria in such type of procurement, the Guide could explain that for non-quantifiable advisory services, relevant issues may include (i) cost, (ii) the service-provider's experience for the specific assignment, (iii) the quality of the understanding of the assignment under consideration and of the methodology proposed, (iv) the qualifications of the key staff proposed, (v) transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the description of the assignment, and (vi) when applicable, the extent of participation by nationals among key staff in the performance of the services.

(b) A description of the subject matter of the procurement to the extent known, and the desired or required time and location for the provision of such subject matter;

(c) The intended stages of the procedure;

(d) The minimum requirements established by the procuring entity<sup>11</sup> and a statement that proposals that fail to achieve these minimum requirements shall be regarded as non-responsive and rejected from the procedure;

(e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article [9];

(f) A declaration pursuant to article [8];

(g) The means of obtaining the request for proposals and the place where they may be obtained;

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

(i) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals, [unless in a domestic procurement the procuring entity decides that an indication of the currency is not necessary];<sup>12</sup>

(j) The language or languages in which the requests for proposals are available [unless in domestic procurement the procuring entity decides that this information is not necessary];<sup>13</sup>

(k) The manner, place and deadline for presenting proposals.

(3) For the purpose of limiting the number of suppliers or contractors from whom to request proposals, the procuring entity may engage in pre-selection proceedings. The provisions of article [16] of this Law shall apply mutatis mutandis to the pre-selection proceedings except to the extent that those provisions are derogated from in this paragraph:

(a) The procuring entity shall specify in the pre-selection documents that it will request proposals only from a limited number of pre-selected suppliers or contractors that best meet the qualification criteria specified in the pre-selection documents;

(b) The pre-selection documents shall set out the maximum number of pre-selected suppliers or contractors from whom the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing

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<sup>11</sup> The Working Group may wish to include a cross-reference to article [10] so that the objectivity provisions of that article would apply to the description of the subject matter and minimum requirements.

<sup>12</sup> The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

<sup>13</sup> Id. The Working Group may in addition wish to consider that indication of the language or languages may be important even in the domestic procurement in some multilingual countries.

such a number the procuring entity shall bear in mind the need to ensure the effective competition;

(c) The procuring entity shall rate the suppliers or contractors that meet the qualifications criteria specified in the pre-selection documents according to the manner of rating that is set out in the invitation to pre-selection and the pre-selection documents.

(d) The procuring entity shall pre-select suppliers or contractors that acquired the best rating up to the maximum number indicated in the pre-selection documents but at least three if possible;

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

(4) The procuring entity shall issue the request for proposals:

(a) Where the invitation to participate in the procurement proceedings has been issued, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;

(b) Where pre-selection proceedings have been engaged in, to each pre-selected supplier or contractor in accordance with the procedures and requirements specified in the pre-selection documents;

(c) In the case of direct solicitation, to the suppliers or contractors selected by the procuring entity.

(5) The request for proposals shall include, in addition to the information referred to in paragraphs (2)(a) to (e) and (k) of this article, the following information:

(a) Instructions for preparing and presenting proposals;

(b) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;<sup>14</sup>

(c) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;<sup>15</sup>

(d) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be

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<sup>14</sup> Based on article 38 (r) of the 1994 Model Law.

<sup>15</sup> Based on article 38 (i) of the 1994 Model Law.

used,<sup>16</sup> [unless in a domestic procurement the procuring entity decides that this information is not necessary];<sup>17</sup>

(e) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;<sup>18</sup>

(f) The means by which suppliers or contractors may seek clarifications of the request for proposals;<sup>19</sup>

(g) Any elements of the description of the subject matter of the procurement or term or condition of the procurement that will not be the subject of dialogue during the procedure;

(h) Where the procuring entity intends to fix the number of suppliers or contractors that it will invite to participate in the dialogue, the minimum number of suppliers or contractors, which shall be not lower than three, if possible, and, where appropriate, the maximum number;

(i) The criteria and procedure for evaluating the proposals in accordance with article [11];<sup>20</sup>

(j) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place<sup>21</sup> where these laws and regulations may be found;<sup>22</sup>

(k) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;<sup>23</sup>

(l) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about

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<sup>16</sup> Based on article 38 (j) and (n) of the 1994 Model Law.

<sup>17</sup> The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

<sup>18</sup> Based on article 38 (k) of the 1994 Model Law.

<sup>19</sup> Based on article 38 (q) of the 1994 Model Law.

<sup>20</sup> Based on article 38 (m) of the 1994 Model Law. The Guide to Enactment would address the question of sub-criteria and provide the guidance that would be needed to ensure that a true picture of the evaluation criteria is given. Different procurements might require different levels of flexibility in this regard.

<sup>21</sup> Reference to the place was added by the Secretariat further to the suggestions of experts. The accompanying Guide text will explain that the place refers not to the physical location but rather an official publication, portal, etc. where authoritative texts of laws and regulations of the enacting State are made available to the public and systematically maintained.

<sup>22</sup> Based on article 38 (s) of the 1994 Model Law, and reflecting the proposed amendment to the corresponding provisions in the article applicable to the open tendering (article 33 (t) of the current draft).

<sup>23</sup> Based on article 38 (p) of the 1994 Model Law.

duration of a standstill period and, if none will apply, a statement to that effect and reasons therefor;<sup>24</sup>

(m) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;<sup>25</sup>

(n) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of proposals and to the procurement proceedings,<sup>26</sup> [including any relevant timetables applicable in respect of the procurement process.]

(6) The procuring entity shall examine all proposals received against the established minimum requirements and shall reject each proposal that fails to meet these minimum requirements on the grounds that it is non-responsive. The notice of rejection and reasons for rejection shall be promptly communicated to each supplier or contractor whose proposal was rejected.

(7) The procuring entity shall invite each supplier or contractor that presented a responsive proposal, to participate in dialogue. The procuring entity shall ensure that the number of suppliers invited to participate in the dialogue is sufficient to ensure effective competition, and shall be at least three, if possible.

(8) The dialogue shall be conducted by the same representatives of the procuring entity on a concurrent basis.

(9) [During the course of the dialogue,<sup>27</sup> 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].<sup>28</sup>

(10) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that are communicated by the procuring entity to a supplier or contractor shall be communicated at the same time on an equal basis to all other participating suppliers or contractors, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article [22] of this Law.<sup>29</sup>

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<sup>24</sup> Based on article 38 (t) of the 1994 Model Law, and reflecting the proposed amendment to the corresponding provisions in the article applicable to the open tendering (article 33 (w) of the current draft).

<sup>25</sup> Based on article 38 (u) of the 1994 Model Law.

<sup>26</sup> Based on article 38 (v) of the 1994 Model Law.

<sup>27</sup> A/CN.9/687, para. 198.

<sup>28</sup> *Ibid.*, para. 207. No consensus was reached as regards this wording proposed at the Working Group's seventeenth session. The Working Group may wish to consider whether the amended wording of this paragraph corresponds to the definition of the "material change" in article 2 and if so, whether the paragraph could be substantially shortened by including the prohibition of material change in the course of the dialogue.

<sup>29</sup> The accompanying Guide text will cross-refer to article 22 that addresses consent to disclosure of the confidential information among suppliers.

(11) Following the dialogue, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing, and shall specify the manner, place and deadline for presenting best and final offers.

(12) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

#### **Article 44. Request for proposals with consecutive negotiations<sup>30</sup>**

(1) The provisions of article [43 (1)-(6) and (9)]<sup>31</sup> of this Law shall apply mutatis mutandis to procurement conducted by means of request for proposals with consecutive negotiations except to the extent those provisions are derogated from in this article.

(2) The procuring entity shall rate each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals, and shall:

(a) Invite for negotiations [on the price of its proposal]<sup>32</sup> the supplier or contractor that has attained the best rating in accordance with those criteria and procedure; and

(b) Inform other suppliers or contractors that presented responsive proposals that they may be considered for negotiation if the negotiations with the suppliers or contractors with better ratings do not result in a procurement contract.

(3) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (2)(a) of this article will not result in a procurement contract, the procuring entity shall inform that supplier or contractor that it is terminating the negotiations.

(4) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors still participating in the procurement proceedings for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

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<sup>30</sup> Based on article 44 of the 1994 Model Law, and the method set out in draft article 43 above. The Working Group is still to consider whether this procurement method should be limited to advisory services (see the relevant footnote to article 27 of this draft). If the decision is to retain this procurement method for all types of procurement, the accompanying Guide text may explain that the procedural and substantive differences between the methods in articles 43 and 44 should guide a procuring entity in the selection of one method over the other. The accompanying Guide text may elaborate on those differences (A/CN.9/687, para. 197).

<sup>31</sup> The Working Group may wish to consider whether provisions on pre-selection procedures of article 43 should be applicable to this procurement method.

<sup>32</sup> The 1994 Model Law permits holding consecutive negotiations only on price (article 44 (b)). Experts consulted by the Secretariat questioned advisability of imposing such a restriction. The Working Group may wish therefore consider whether in this procurement method negotiations should also be permitted on non-price criteria.

[(5) The procuring entity cannot reopen negotiations with the supplier or contractor with whom it had already terminated negotiations.]<sup>33</sup>

### **Article 45. Competitive negotiations**<sup>34</sup>

(1) In competitive negotiations, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition. The provisions of article 29 quater shall apply to the procedures preceding the negotiations.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor before or during the negotiations shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present, by a specified date, a best and final offer with respect to all aspects of their proposals.

(4) The successful offer shall be the offer that best meets the needs of the procuring entity.

### **Article 46. Single-source procurement**

The procuring entity may solicit a proposal or price quotation from a single supplier or contractor in accordance with article 29 quater.

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<sup>33</sup> No such explicit prohibition appears in the 1994 text. The 1994 Guide text to the relevant provisions of the Model Law discussed advantages and disadvantages of such an explicit prohibition in this procurement method. The provisions in square brackets were put by the Secretariat in the light of the deliberations at the Working Group's seventeenth session. The concerns about this procurement method expressed at that session of the Working Group were based on the understanding that the Model Law indeed prohibited reopening negotiations with the supplier or contractor with whom the procuring entity had already terminated negotiations. In response, the positive impact of such a prohibition on the negotiating discipline of both sides of the negotiations was emphasized (A/CN.9/687, paras. 209-210).

<sup>34</sup> Based on article 49 of the 1994 Model Law, with the addition of a notice requirement suggested to be included further to the results of the Secretariat's consultations with experts (see the newly proposed section II of chapter II of this draft). The Working Group may wish to consider when the use of competitive negotiations is appropriate by reference to the draft conditions for use in article 27 bis of chapter II.