



General Assembly

Distr.: Limited
22 February 2010

Original: English

**United Nations Commission
on International Trade Law**
Working Group I (Procurement)
Eighteenth session
New York, 12-16 April 2010

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 VI (Electronic reverse auctions) of the revised Model Law, comprising articles 47 to 51.

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 intersession informal consultations on the entire text (A/64/17, para. 281).



CHAPTER VI. ELECTRONIC REVERSE AUCTIONS¹

Article 47. Procedures for soliciting participation in electronic reverse auctions as a stand-alone procurement method

- (1) Where an electronic reverse auction is to be used as a stand-alone procurement method, the procuring entity shall solicit bids by issuing an invitation to participate in the procurement proceedings in accordance with the provisions of article [29 ter].
- (2) The invitation to participate in the procurement proceedings shall include:
 - (a) The name and address of the procuring entity;
 - (b) A description of the subject matter of the procurement, and the desired or required time and location for the provision of such subject matter;
 - (c) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
 - (d) A declaration pursuant to article [8];
 - (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) The information required under article [11 (5)], the mathematical formula that will be used in the evaluation procedure during the auction and an indication of any criteria that cannot be varied during the auction;
 - (g) If suppliers or contractors are permitted to present bids for only a portion of the subject matter of the procurement, a description of the portion or portions for which bids may be presented;
 - (h) The manner in which the bid price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;
 - (i) The currency or currencies in which the bid price is to be formulated and expressed [unless in a domestic procurement the procuring entity decides that an indication of the currency is not necessary];²
 - (j) A statement as to whether the invitation to participate in the procurement proceedings serves as an invitation to register for the auction, or whether an additional invitation to register for the auction will be issued;

¹ The entire chapter has been revised in the light of the changes agreed to be made to the Model Law so far.

² 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.

(k) The minimum number of suppliers or contractors required to register for the auction in order for the auction to be held, which shall be sufficient to ensure effective competition;³

(l) Any maximum number of suppliers or contractors to be invited to register for the auction and the criteria and procedure that will be followed in selecting that maximum number;

(m) The manner and, if already determined, deadline by which the suppliers and contractors shall register for the auction;

(n) An invitation to present initial bids, where the auction is to be preceded by an examination or evaluation of initial bids, in accordance with paragraph (5) of this article, together with the following information:

[(i) Instructions for preparing initial bids, including the language or languages, in conformity with article [13], in which initial bids are to be prepared [unless in a domestic procurement the procuring entity decides that this information is not necessary];⁴

(ii) Information about the criteria and procedure for examination, and where applicable evaluation, of initial bids;

(iii) The manner, place and deadline for presenting initial bids];⁵

(o) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;⁶

(p) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;

(q) Whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage);

(r) Other rules for the conduct of the electronic reverse auction, including the information that will be made available to the bidders in the course of the auction, the language in which it will be provided and the conditions under which the bidders will be able to bid;

(s) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those

³ The accompanying Guide text will address the issues of fairness of treatment, as was suggested in the Working Group.

⁴ 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. 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.

⁵ The Working Group may wish to consider that information in square brackets in subparagraphs (i) to (iii) of this paragraph could be included in the accompanying Guide text rather than in the Model Law as unnecessarily detailed.

⁶ The Working Group may wish to consider that the paragraph could be shortened by referring generally to information regarding technical aspects of the auction. The details of technical aspects may be specified in the accompanying Guide text.

applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(t) 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;

(u) Any commitments to be made by the supplier or contractor outside the procurement contract;

(v) 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 duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(w) Any formalities that will be required once a successful bid has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article [20], and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(x) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of bids and to other aspects of the procurement proceedings.

(3) The invitation to participate in the procurement proceedings shall serve as an invitation to register for the auction and shall so provide, unless:

(a) A maximum number of bidders has been imposed; or

(b) The auction is to be preceded by the examination or evaluation⁷ of initial bids.

(4) (a) The procuring entity may impose a maximum number of suppliers or contractors to be invited to register for the auction for technical reasons or capacity limitations.

(b) [The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article [23] of this Law.]⁸

(c) Where the number of suppliers or contractors responding to the invitation to participate in the procurement proceedings exceeded the maximum number, the procuring entity shall issue the invitation to register for the auction in accordance with article [49] of this Law to all suppliers or contractors up to the maximum selected in accordance with the criteria and procedure specified in the invitation to participate in the procurement proceedings.

⁷ It is the Secretariat's understanding that "evaluation" necessarily encompasses "examination".

⁸ At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

(5) (a) The auction is always to be preceded by an examination [and] [or]⁹ evaluation¹⁰ of initial bids where the procurement contract is to be awarded to the [lowest evaluated bid] [best evaluated bid] [most advantageous bid].¹¹

(b) Where the procurement contract is to be awarded to the lowest priced bid, the auction may be preceded by the examination or evaluation of initial bids if so decided by the procuring entity in the light of the circumstances of the given procurement.

(c) Where the auction has been preceded by the examination or evaluation of initial bids, the procuring entity shall promptly after the completion of the examination or evaluation of initial bids:

(i) Dispatch the notice of rejection and reasons for rejection¹² to each supplier or contractor whose initial bid was rejected;

(ii) Issue an invitation to register for the auction in accordance with article [49] of this Law to each supplier or contractor whose initial bid is responsive. Where an evaluation of initial bids has taken place, each invitation to register for the auction shall be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed.¹³

(6) The procuring entity shall ensure that the number of suppliers or contractors invited to register for the auction in accordance with paragraphs (4) and (5) of this article is sufficient to ensure effective competition.

⁹ The Working Group may wish to consider that in some simple auctions where the award is to the most advantageous bid no evaluation may need to take place. The ascertainment of responsiveness of initial bids without assigning any ratings/scores or ranking would be sufficient.

¹⁰ If the Working Group decides to provide for a choice between examination and evaluation, the accompanying Guide text would have to explain that that choice is not discretionary but will be dictated by the circumstances of the given procurement.

¹¹ At the Working Group's fifteenth session, it was suggested that the term "the lowest evaluated bid" should be replaced with the term "the best evaluated bid", since in practice it was the highest or the best, not the lowest, evaluated bid that was accepted. The Working Group deferred the consideration of the issue to a later stage (A/CN.9/668, paras. 220 and 222). The informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, supported the use of the term "best" rather than the term "lowest", with the Guide to Enactment carefully explaining the meaning of the term "best" in the special circumstances of reverse auctions. The Working Group may wish to recall in this regard that at its seventeenth session it agreed in the context of tendering to replace the "lowest evaluated tender" with the "most advantageous tender". It may therefore wish to use the term the "most advantageous bid" in the context of electronic reverse auctions.

¹² A/CN.9/687, para. 178.

¹³ The Guide will address the extent of the information on the outcome of the full evaluation that should be provided.

Article 48. Specific requirements for solicitation of participation in procurement proceedings involving an electronic reverse auction as a phase preceding the award of the procurement contract

(1) Where an electronic reverse auction is to be used as a phase preceding the award of the procurement contract in [other procurement methods, as appropriate][restricted tendering, two-stage tendering, ...] or a framework agreement procedure with second stage competition, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings that an electronic reverse auction will be held and shall provide at a minimum the following information about the auction:

(a) The mathematical formula that will be used in the evaluation procedure during the auction and an indication of any criteria that cannot be varied during the auction;

(b) How the electronic reverse auction can be accessed, and the electronic equipment being used and technical specifications for connection.

(2) Before the auction is held, the procuring entity shall issue an invitation to register for the auction to all suppliers or contractors remaining in the proceedings in accordance with article [49] of this Law.

Article 49. Registration for the auction and timing of holding of the auction

(1) The invitation to register for the auction shall include, in addition to any other information required to be included under provisions of this Law:¹⁴

(a) The manner and deadline by which the invited suppliers and contractors shall register for the auction;

(b) The date and time of the opening of the auction and criteria governing the closing of the auction;

(c) The requirements for registration and identification of bidders at the opening of the auction;

(d) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;

(e) Whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage); and

(f) Other rules for the conduct of the electronic reverse auction, including the information that will be made available to the bidders in the course of the auction and the conditions under which the bidders will be able to bid.

¹⁴ The accompanying Guide text will cross-refer to the provisions of article 47 (5) that requires including in the invitation to register for the auction the outcome of evaluation of initial bids where applicable.

- (2) The fact of the registration for the auction shall be promptly confirmed individually to each registered supplier or contractor.
- (3) If the number of suppliers or contractors registered for the auction is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity may cancel the electronic reverse auction. The cancellation of the auction shall be communicated promptly to each registered supplier or contractor.
- (4) The period of time between the issuance of the invitation to register for the auction and the auction shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.

Article 50. Requirements during the auction

- (1) The electronic reverse auction shall be based on:
 - (a) Price, where the procurement contract is to be awarded to the lowest priced bid; or
 - (b) Prices and other criteria specified to bidders under articles [11] and [47 to 49] of this Law, as applicable, where the procurement contract is to be awarded to the [lowest evaluated bid] [best evaluated bid] [most advantageous bid].
- (2) During an electronic reverse auction:
 - (a) All bidders shall have an equal and continuous opportunity to present their bids;
 - (b) There shall be automatic evaluation of all bids in accordance with the criteria and other relevant information specified to bidders under articles [47 to 49] of this Law, as applicable;
 - (c) Each bidder must receive, instantaneously and on a continuous basis during the auction, sufficient information allowing it to determine the standing of its bid vis-à-vis other bids;¹⁵
 - (d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.
- (3) The procuring entity shall not disclose the identity of any bidder during the auction.
- (4) The auction shall be closed in accordance with the criteria specified to bidders under articles [47 to 49] of this Law, as applicable.
- (5) The procuring entity shall suspend or terminate the electronic reverse auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the

¹⁵ The accompanying Guide text will highlight the risks of collusion that might arise where information about other bids is provided, and will provide examples of existing good practices to mitigate these risks.

electronic reverse auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.

Article 51. Requirements after the auction

(1) The bid that at the closure of the auction was the lowest priced bid or the [lowest evaluated bid] [best evaluated bid] [most advantageous bid], as applicable, shall be the successful bid.

(2) Whether or not it has engaged in pre-qualification proceedings pursuant to article [16], the procuring entity may require the bidder presenting the bid that has been found at the closure of the auction to be the successful bid to demonstrate its qualifications in accordance with criteria and procedures conforming to the provisions of article [9]. If the bidder fails to do so, the procuring entity shall disqualify that supplier or contractor and, without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)], [shall][may] select the bid that at the closure of the auction was the next lowest priced or next [lowest evaluated bid] [best evaluated bid] [most advantageous bid], provided that the bidder that presented that bid can demonstrate its qualifications if required to do so.

(3) Where it has not examined initial bids prior to the auction, the procuring entity shall assess after the auction the responsiveness of the bid that at the closure of the auction has been found to be the successful bid. The procuring entity shall reject the bid if that bid is found to be unresponsive and, without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)], [shall][may] select the bid that at the closure of the auction was the next lowest priced or next [lowest evaluated bid] [best evaluated bid] [most advantageous bid], provided that that bid is found to be responsive.

(4) Where the bid that at the closure of the auction has been found to be the successful bid appears to the procuring entity to be abnormally low and gives rise to concerns of the procuring entity as to the ability of the bidder that presented it to perform the procurement contract, the procuring entity may engage in procedures described in article [18]. If the procuring entity rejects the bid as abnormally low under article [18], it [shall][may] select the bid that at the closure of the auction was the next lowest priced or next [lowest evaluated bid] [best evaluated bid] [most advantageous bid]. This provision is without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)].