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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 PROCUREMENT

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 application¹

This Law applies to all procurement by procuring entities.

Article 2. Definitions²

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 or where the procuring entity decides that in view of the low value of the subject matter of the procurement (the relevant

¹ The Guide to this article 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).

² Further to the suggestion at the Commission’s forty-second session (A/64/17, para. 52), the definitions were set out in an alphabetical order. The article will be supplemented in the revised Guide to Enactment by a more comprehensive glossary of terms used in the Model Law.

threshold is to be established in the procurement regulations), that only domestic suppliers or contractors are likely to be interested in presenting submissions;]³

(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];⁴

[(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 who 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.⁵]

(e) [“Material change” means a change to the 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, and that would change the status of suppliers or contractors with regard to their qualification. For avoidance of doubt, material change includes a change in the description of the subject matter of the

³ Pursuant to the request at the Commission’s forty-second session (A/64/17, para. 74), the Secretariat proposes adding this new definition in the light of frequent references to this term in the Model Law. It is based on articles 17 and 23 of the 1994 Model Law.

⁴ Added pursuant to the suggestion at the Commission’s forty-second session (A/64/17, paras. 72-73).

⁵ The Working Group is to consider whether all these definitions should be retained in article 2 or should be moved to chapter VII (framework agreements procedures) (A/64/17, paras. 64-66). The Guide to this article will explain that the framework agreement itself would have to set out how items such as delivery times and any other variable items would be determined.

procurement, in the criteria and procedures for examining, evaluating and comparing submissions and ascertaining the successful submission and in the relative weight of the evaluation criteria;]⁶

(f) “Procurement” means the acquisition by any means of goods, construction or services (“subject matter of the procurement”);⁷

(g) “Procurement contract” means a contract [or contracts]⁸ between the procuring entity and a supplier or contractor resulting from the procurement proceedings;

(h) [“Procurement involving classified⁹ information” means procurement in which the procuring entity may be authorized by the procurement regulations 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;]¹⁰

(i) [“Procurement regulations” means regulations to be enacted in accordance with article 4 of this Law;]¹¹

⁶ A/64/17, paras. 67-71. Based on the draft article that was included in the chapter regulating framework agreements procedures of the previous draft.

⁷ The Guide to this definition 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).

⁸ At the Commission’s forty-second session, when considering the article on the record of procurement proceedings, it was proposed that some provisions of that article should be revised to provide for the possibility that more than one procurement contract might result from the procurement proceedings (A/64/17, para. 267 (a)). To avoid the cumbersome use throughout the Model Law of the phrase “procurement contract or contracts”, this shorter formulation is suggested.

⁹ The Guide to this provision would 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”.

¹⁰ Pursuant to the request at the Commission’s forty-second session (A/64/17, para. 74), the Secretariat proposes adding this new definition in the light of frequent references to this term in the Model Law. Based on the wording proposed at the Commission’s forty-second session (A/64/17, paras. 118 and 137). The definition is supplemented by the requirement in article 23 (on the record of procurement 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.

¹¹ Pursuant to the request at the Commission’s forty-second session (A/64/17, para. 74), the Secretariat proposes adding this new definition in the light of frequent references to this term in the Model Law.

(j) “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”);

(k) [“Socio-economic factors”¹² means environmental, social, economic and other considerations authorized by the procurement regulations to be taken into account by the procuring entity in ascertaining the qualifications of suppliers or contractors, in assessing the responsiveness of submissions, or in evaluating and comparing submissions, or any combination thereof, for the purpose of implementing the socio-economic policies of this State. [... (the enacting State may expand this subparagraph by providing an illustrative list of such considerations)];¹³

(l) “Solicitation” means request to suppliers or contractors to present submissions:

(i) “Open solicitation” means solicitation from an unrestricted number of suppliers or contractors that involves publication of the solicitation in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published) and, [unless decided otherwise by the

¹² This new definition is proposed to be added by the Secretariat in the light of frequent reference to the term in the Model Law and further to the results of the Secretariat’s consultations with experts.

¹³ The 1994 Model Law (article 34 (4) (c) (iii)) refers in this context to the “balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills.” At the Commission’s forty-second session, the suggestion was made to update the list to refer to “specific industrial sector development, development of small and medium-sized enterprises, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, environmental improvements, improvement in the rights of women, the young and the elderly, people who belong to indigenous and traditional groups, as well as economic factors, such as balance of payment position and foreign exchange reserves” (A/64/17, para. 164). The alternative approach of providing an illustrative list only in the Guide was also considered (A/64/17, para. 161). The definition attempts to accommodate all the suggestions made. The Guide to this definition would describe the costs to procurement that the use of such factors can bring, and that they are commonly considered to be appropriate only for the purposes of assisting development, such as capacity-building.

procuring entity in domestic procurement,],¹⁴ in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation;¹⁵

(ii) “Direct solicitation” means the [exceptional]¹⁶ solicitation from a restricted number of suppliers or contractors under conditions specified in this Law;

(m) “Solicitation documents” means all documents for solicitation of submissions;

(n) “Standstill period” means the period before the entry into force of the procurement contract, to be specified in the solicitation documents, during which the suppliers or contractors whose submissions were examined may seek review of the intended decision of the procuring entity to accept the successful submission;¹⁷

(o) “Submission(s)”¹⁸ means tender(s), proposal(s), offer(s), quotation(s) and bid(s) referred to collectively or generically;

(p) “Submission security”¹⁹ 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

¹⁴ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

¹⁵ The Guide will explain that international advertisement is on the increase to promote regional trade and cross-border protests.

¹⁶ 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.

¹⁷ Pursuant to the request at the Commission’s forty-second session (A/64/17, para. 74), the Secretariat proposes adding this new definition in the light of frequent references to this term in the Model Law. Based on the previously agreed wording in draft article 19 (2) (c) in document A/CN.9/WG.I/WP.69/Add.2.

¹⁸ A/64/17, paras. 58-60. The term “submission” instead of the suggested term “tender or other submission” was retained because the use of the latter distorts the meaning of a number of provisions throughout the Model Law and makes reading difficult. The Guide to Enactment would explain that enacting States may wish to select another shorthand term to reflect common use of terminology in their procurement systems.

¹⁹ Although there were suggestions made at the Commission’s forty-second to replace the term with “tender security” or “tender or other [submission] security” (A/64/17, paras. 55-56), the term “submission security” was retained for consistency and ease of reading. The Guide to this definition will explain that the definition does not intend to imply that multiple submission securities can be required by the procuring entity in any single procurement proceedings that involve presentation of revised bids, proposals or offers (A/64/17, para. 57).

exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract;

(q) “Successful submission” means ...;²⁰

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

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]²¹

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 regulations

(1) 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.

(2) The procurement regulations shall include a code of conduct for officers or employees of procuring entities, addressing, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements.²²

(3) The procurement regulations shall also set out any environmental, social, economic and other considerations that the procuring entity may take into account in ascertaining the qualifications of suppliers or contractors, in assessing the responsiveness of submissions, or in evaluating and comparing submissions, or any

²⁰ To be completed upon finalization of chapters III to VII.

²¹ The Guide to this article will explain that the texts in square brackets in this article are relevant 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).

²² The Working Group may reconsider placing the provisions of paragraph (2) in this article since in many jurisdictions these issues are regulated at the level of statutory law, not regulations.

combination thereof, for the purpose of implementing the socio-economic policies of this State.²³

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.

[Article 6. Information on possible forthcoming procurement

(1) Procuring entities may publish information regarding planned procurement activities for forthcoming months or years.²⁴

(2) Procuring entities may also publish an advance notice of a possible future procurement.²⁵

(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.^{26]}

Article 7. Communications in procurement

(1) Any document, notification, decision and 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.

²³ Proposed to be added in the light of the new definition “socio-economic factors” in article 2.

²⁴ The Guide to this paragraph would emphasize the need for proper procurement planning.

²⁵ The Guide to this paragraph would 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.

²⁶ A/64/17, paras. 80-87. The Guide 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 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.

(2) Direct solicitation²⁷ and communication of information between suppliers or contractors and the procuring entity referred to in articles [15 (1) (d),²⁸ 16 (6) and (9),²⁹ 35 (2) (a),³⁰ 37 (1)³¹ and 44 (...)³²]³³ 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.³⁴

(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 procurements 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;³⁵]

(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;³⁶

(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 shall use means of communication that are in common use by suppliers or contractors in the context of the particular procurement. In addition, the procuring entity shall hold any meeting with suppliers or contractors using means that ensure that suppliers or contractors can fully and contemporaneously participate in the meeting.³⁷

(5) The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned.³⁸

²⁷ Corresponds to references in article 9 of the 1994 Model Law to articles 37 (3) and 47 (1) of that text.

²⁸ Id., as regards reference to article 32 (1) (d) of the 1994 text.

²⁹ Id., as regards reference to article 7 (4) and (6) of the 1994 text.

³⁰ Id., as regards reference to article 31 (2) (a) of the 1994 text.

³¹ Id., as regards reference to article 34 (1) of the 1994 text.

³² 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.

³³ 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).

³⁴ A/64/17, paras. 121, 122.

³⁵ A/64/17, paras.123-137.

³⁶ A/64/17, paras. 138, 139.

³⁷ A/64/17, paras. 140, 141.

³⁸ A/64/17, paras. 142, 143.

Article 8. Participation by suppliers or contractors

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on grounds specified in the procurement regulations[, including in order to implement one or more of the socio-economic policies of this State,]³⁹ or according to other provisions of law.

[(2) Except when required to do so in order to implement one or more of the socio-economic policies of this State set out in the procurement regulations, the procuring entity shall establish no other requirement aimed at limiting participation of suppliers or contractors in procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof.]⁴⁰

(3) 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.

(4) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare that suppliers or contractors may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered.

(5) If the procuring entity decides to limit participation of suppliers or contractors in procurement proceedings pursuant to this article, it shall so declare in the solicitation documents.

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) Suppliers or contractors must meet such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

- (i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, ethical standards, and [references],⁴¹ and the personnel, to perform the procurement contract;

³⁹ Proposed to be added further to consultations with experts, to allow the procuring entity to limit participation in procurement proceedings on the basis of nationality on socio-economic grounds.

⁴⁰ A reference to the restriction by reference to socio-economic factors is suggested to be added in the light of consultations with experts, to allow for example for set-aside programmes for minorities, small and medium enterprises or indigenous groups.

⁴¹ At the Commission's forty-second session, it was agreed when discussing evaluation criteria to replace the term "reputation" with the term "references" (the latter being more objective) (A/64/17, para. 160 (c)). The same change is therefore made here.

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- (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;
- (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.
- (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 such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (2).
- (4) Any requirement established pursuant to this article shall be set forth in the prequalification 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.
- (5) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents.
- (6) Subject to article 8, 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.
- (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 in procurement proceedings. 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 has been prequalified in accordance with article 16 of this Law to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement⁴²

(1) The procuring entity shall set out in the prequalification 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. Where minimum requirements are set by the procuring entity for identifying responsive submissions, the procuring entity shall also set out in the prequalification documents, if any, and in the solicitation documents, those minimum requirements and the manner in which they are to be applied.⁴³

(2) Subject to article 8, 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 prequalification 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 concerning testing and test methods, 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 characteristics 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

⁴² The Working Group may wish to consider whether draft revised article 10 should more explicitly refer to the assessment of responsiveness, rather than to the description of the subject matter of the procurement (so doing would also align article 10 with the proposed provisions on evaluation in draft revised article 11).

⁴³ A/64/17, paras. 144-148.

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 prequalification 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 contract to be entered into as a result of the procurement proceedings, and in formulating other relevant aspects of the prequalification documents, if any, and solicitation documents.

[Article 11. Rules concerning evaluation criteria and procedures⁴⁴

(1) (a) Save as regards socio-economic factors provided for in paragraph (2) below, the evaluation criteria shall relate to the subject matter of the procurement.

(b) The evaluation criteria shall include [only]:⁴⁵

(i) The price, subject to any margin of preference applied pursuant to paragraph (2) (b) of this article;

(ii) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the functional characteristics of goods or construction, the terms of payment and of guarantees in respect of the subject matter of the procurement, subject to any margin of preference applied pursuant to paragraph (2) (b) of this article;⁴⁶

(iii) Where relevant in the procurement conducted in accordance with [request for proposals procurement, add appropriate cross-references], experience, references,⁴⁷ 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, subject to any margin of preference applied pursuant to paragraph (2) (b) of this article;⁴⁸

(iv) [Performances in environmental protection].⁴⁹

⁴⁴ A/64/17, paras. 149-174.

⁴⁵ A/64/17, para. 160 (a).

⁴⁶ The Working Group may wish to consider whether reference to margins of preference should be retained here.

⁴⁷ A/64/17, para. 160 (c).

⁴⁸ A/64/17, paras. 159-160. The Working Group may wish to consider whether reference to margins of preference should be retained here.

⁴⁹ As suggested at the Commission’s forty-second session (A/64/17, para. 160 (e)). The Working Group may wish to consider whether reference to performances in environmental protection should be retained here or it is sufficient to address environmental considerations as part of socio-economic factors under paragraph (2) (a) of this article (the definition of “socio-economic

(2) If authorized by the procurement regulations (and subject to approval by ... (the enacting State designates an organ to issue the approval),) the evaluation criteria may in addition include:

(a) Socio-economic factors;⁵⁰

(b) 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. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings;⁵¹

(c) [National defence and security considerations].⁵²

(3) Subject to the provisions of [article 43], all evaluation criteria shall be given a relative weight in the evaluation procedure. Any non-price evaluation criteria shall, to the extent practicable, be objective, quantifiable and expressed in monetary terms.⁵³

(4) The procuring entity shall set out in the solicitation documents:⁵⁴

(a) The basis upon which the successful submission will be ascertained;⁵⁵

(b) All [evaluation] criteria established pursuant to this article, including any margin of preference; and

(c) Where any criteria other than price are to be used in the evaluation procedure, the relative weight to be accorded to each [evaluation] criterion (including the price), or their order of importance where the procurement is

factors” in article 2 makes reference to environmental considerations; removing reference to environmental considerations from the definition of “socio-economic factors” in article 2 would have implications on consideration of environmental considerations under articles 8 (in conjunction with e.g., set-aside projects/qualifications) and 10 (in conjunction with the assessment of responsiveness of submissions). If reference stays in this paragraph, the Working Group may wish to consider whether environmental considerations would always relate to the subject matter of the procurement (see paragraph (1) of the article) or they should be excluded from the ambit of paragraph (1) as socio-economic factors are. If the issue of environmental considerations are to be addressed only in paragraph (2) (i.e., as part of socio-economic factors), environmental considerations could be considered in the evaluation of submissions only if the requirements in the chapeau of paragraph (2) are met (i.e., they have to be authorized by procurement regulations and applied subject to approval by a designated organ).

⁵⁰ The factors themselves are now set out in the definitions section, because they may be applied to qualification and responsiveness as well as evaluation of submissions.

⁵¹ The Working Group may wish to consider whether margins of preference are applicable to both price and non-price evaluation criteria and to all procurement methods. See relevant queries to provisions of paragraphs 1 (b) (ii) and (iii) of this article.

⁵² The Working Group may wish to consider whether this provision remains appropriate. An alternative would be to allow such considerations to be applied by an addition of a reference to essential national defence or national security in paragraph (1).

⁵³ A/64/17, paras. 157, 158.

⁵⁴ The paragraph is based on the provisions of article 27 (e) repeated in article 38 (m), of the 1994 text. The Working Group may consider that article 27 (Contents of solicitation documents) could alternatively contain this provision.

⁵⁵ The Guide to this article would explain that the solicitation documents must make it clear whether the selection will be on the basis of the lowest priced submission, the lowest evaluated submission, the proposal that best meets the needs of the procuring entity, etc, as appropriate.

conducted under article 43, and the procedures for application of the criteria in the evaluation procedure.

(5) [Subject to articles 14, 42 and 43 of this Law],⁵⁶ in evaluating and comparing 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.^{57]}

[Article 12. Rules concerning estimation of the value of procurement

(1) A procuring entity shall neither divide its procurement into separate contracts nor use a particular valuation method for estimating the value of procurement with the intention of limiting competition among suppliers or contractors.

(2) In estimating the value of procurement, it shall include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration.]⁵⁸

Article 13. Rules concerning the language of documents

(1) The prequalification documents, if any, and 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 domestic procurement,]⁵⁹).

(2) Applications to prequalify, if any, and submissions may be formulated and presented in any language in which the prequalification documents, if any, and solicitation documents have been issued or in any other language that the procuring entity specifies in the prequalification documents, if any, and solicitation documents, respectively.

⁵⁶ The article to which cross-references are made allow for modification of aspects originally set forth in the solicitation documents.

⁵⁷ A/64/17, paras. 152-156.

⁵⁸ New provisions are proposed to be added in the light of the suggestions made by experts. They are based on the equivalent provisions of the WTO GPA (article II.2 and 3 of the 1994 version and article II.6 of the 2006 version). The provisions are relevant in the context of low-value procurement thresholds envisaged by the Model Law for recourse to domestic procurement, restricted tendering or request for quotations proceedings.

⁵⁹ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.