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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 III (Open tendering) of the revised Model Law, comprising articles 30-38.

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

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## CHAPTER III. OPEN TENDERING

### SECTION I. SOLICITATION OF TENDERS

#### Article 30. Procedures for soliciting tenders<sup>1</sup>

(1) Subject to article 16,<sup>2</sup> a procuring entity shall solicit tenders through open solicitation.

#### Article 31. Contents of invitation to tender<sup>3</sup>

The invitation to tender shall contain, at a minimum, the following information:

- (a) The name and address of the procuring entity;
- (b) The nature and quantity, and place of delivery of goods to be supplied, the nature and location of construction to be effected, or the nature and location of services to be provided, or the appropriate combination thereof;
- (c) The desired or required time for the supply of goods or for the completion of construction, or the timetable for the provision of services, or appropriate combination thereof;
- (d) The criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article [9 (2)];
- (e) A declaration pursuant to article [8], as the case may be;
- (f) The means, manner and [modalities] of obtaining the solicitation documents;<sup>4</sup>
- (g) The price, if any, charged by the procuring entity for the solicitation documents;
- (h) [Unless decided otherwise by the procuring entity in domestic procurement,]<sup>5</sup> the currency and means of payment for the solicitation documents;
- (i) [Unless decided otherwise by the procuring entity in domestic procurement,]<sup>6</sup> the language or languages in which the solicitation documents are available;

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<sup>1</sup> The draft article, which is based on article 24 of the 1994 Model Law, was amended further to the introduction of the definition of “open solicitation” in article 2.

<sup>2</sup> This reference to article 16 has been inserted to make it clear that the procuring entity may engage in prequalification. A similar reference in other procurement methods, where appropriate. The Working Group may wish to consider whether an express reference to prequalification would provide greater ease of reading.

<sup>3</sup> The Working Group, at its fifteenth session, approved the draft article, which is based on article 25 (1) of the 1994 Model Law, with amendments to subparagraph (j) (A/CN.9/668, paras. 161-162).

<sup>4</sup> This subparagraph was revised to ensure that it is technologically neutral.

<sup>5</sup> 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.

- (j) The manner, [modalities] and deadline for presenting tenders.<sup>7</sup>

### **Article 32. Provision of solicitation documents<sup>8</sup>**

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors.

### **Article 33. Contents of solicitation documents<sup>9</sup>**

The solicitation documents shall include, at a minimum, the following information:

- (a) Instructions for preparing tenders;
- (b) The criteria and procedures, in conformity with the provisions of article [9], relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article [37 (6)];
- (c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (d) The description of the subject matter of the procurement, in conformity with article [10]; the quantity of goods to be ordered<sup>10</sup> and/or services to be performed; the location where construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;
- (e) Information about the criteria and procedure for examination of tenders;
- (f) 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;
- (g) If alternatives to the characteristics of the subject matter of the procurement, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;

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<sup>6</sup> Id.

<sup>7</sup> This subparagraph was revised to ensure that it is technologically neutral.

<sup>8</sup> The Working Group, at its fifteenth session, approved the draft article, which is based on article 26 of the 1994 Model Law, with a consequential change (A/CN.9/668, paras. 163-164).

<sup>9</sup> The Working Group, at its fifteenth session, approved the draft article, which is based on article 27 of the 1994 Model Law (A/CN.9/668, para. 166).

<sup>10</sup> Amendment proposed by an 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.

(h) If suppliers or contractors are permitted to submit tenders for only a portion of the subject matter of the procurement, a description of the portion or portions for which tenders may be submitted;

(i) The manner in which the tender 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;

(j) [Unless decided otherwise by the procuring entity in domestic procurement,]<sup>11</sup> the currency or currencies in which the tender price is to be formulated and expressed;

(k) [Unless decided otherwise by the procuring entity in domestic procurement,]<sup>12</sup> the language or languages, in conformity with article [13], in which tenders are to be prepared;

(l) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors presenting tenders in accordance with article 15, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and material bonds;

(m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security, a statement to that effect;

(n) The manner, [modalities] and deadline for presenting tenders, in conformity with article [34];<sup>13</sup>

(o) The means by which, pursuant to article [14], suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) The period of time during which tenders shall be in effect, in conformity with article [35];

(q) The manner, [modalities], date and time for the opening of tenders, in conformity with article [36];<sup>14</sup>

(r) Information about the criteria and procedure for evaluation of tenders;

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<sup>11</sup> 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.

<sup>12</sup> Id.

<sup>13</sup> The Working Group may wish to add a requirement for a reasonable period to allow suppliers to prepare their tenders, as it has provided in the context of framework agreements. Suggested text is provided in proposed revised article 34 (1), but the Working Group may also wish to make appropriate reference in this article.

<sup>14</sup> This subparagraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

(s) [Unless decided otherwise by the procuring entity in domestic procurement,]<sup>15</sup> the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article [37 (5)] and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(t) 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];<sup>16</sup>

(u) 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;

(v) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to [the socio-economic factors];<sup>17</sup>

(w) Notice of the right provided under article [61] of this Law to seek review [due to non-compliance with the provisions of this Law]<sup>18</sup> [together with information about duration of a standstill period and, if none will apply, a statement to that effect and reasons therefor];<sup>19</sup>

(x) Any formalities that will be required once a successful tender 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;

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

## SECTION II. PRESENTATION OF TENDERS

### Article 34. Presentation of tenders<sup>20</sup>

(1) Without prejudice to paragraphs (2) to (5) of this article, the procuring entity shall fix in the invitation to tender in accordance with article 31 (j) and in the

<sup>15</sup> 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.

<sup>16</sup> Amendment proposed by the informal drafting party, July 2009.

<sup>17</sup> Amendment proposed by the informal drafting party, July 2009.

<sup>18</sup> Amended to reflect changes in article 61.

<sup>19</sup> Added pursuant to A/64/17, paras. 235 and 237.

<sup>20</sup> The Working Group, at its fifteenth session, approved the draft article, which is based on article 30 of the 1994 Model Law, with the revisions to paragraph (1) (A/CN.9/668, para. 171).

solicitation documents in accordance with article 33 (n) the manner, [modalities] and deadline for presenting tenders. The deadline for presenting tenders shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and present their tenders, taking into account the reasonable needs of the procuring entity.<sup>21</sup>

(2) If, pursuant to article [14], the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for presenting tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for presenting tenders, extend the deadline if it is not possible for one or more suppliers or contractors to present their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5)<sup>22</sup> (a) A tender shall be presented in writing, and signed, and:

(i) If in paper form, in a sealed envelope; or

(ii) If in any other form, according to requirements specified by the procuring entity, which ensure at least a similar degree of authenticity, security, integrity and confidentiality;

(b) The procuring entity shall provide to the supplier or contractor a receipt showing the date and time when its tender was received;<sup>23</sup>

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law.

(6) A tender received by the procuring entity after the deadline for presenting tenders shall not be opened and shall be returned unopened to the supplier or contractor that presented it.

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<sup>21</sup> The provisions of the paragraph were revised to make them technologically neutral and consistent throughout the Model Law.

<sup>22</sup> The text of paragraph (5) of this article is as preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 28).

<sup>23</sup> The Working Group, at its fifteenth session, accepted the suggestion that the Guide in the context of this subparagraph should discuss the nature of the receipt to be provided, and should state that the certification of receipt provided by the procuring entity would be conclusive (A/CN.9/668, para. 173).

### **Article 35. Period of effectiveness of tenders; modification and withdrawal of tenders<sup>24</sup>**

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. [A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the [original]<sup>25</sup> period of effectiveness];

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for presenting tenders.

## **SECTION III. EVALUATION AND COMPARISON OF TENDERS**

### **Article 36. Opening of tenders<sup>26</sup>**

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for presenting tenders, or at the deadline specified in any extension of the deadline, in accordance with the manner, [modalities] and procedures specified in the solicitation documents.<sup>27</sup>

<sup>24</sup> The Working Group, at its fifteenth session, deferred the consideration of the draft article, which is based on article 31 of the 1994 Model Law, in the light of divergent views expressed regarding the suggestion to delete the second sentence of paragraph (2) (a) (A/CN.9/668, paras. 175-176). For the discussion of the drafting history of the provisions, see A/CN.9/WG.I/WP.68/Add.1, section G.

<sup>25</sup> Amendment proposed by the informal drafting party, July 2009.

<sup>26</sup> The Working Group, at its fifteenth session, approved the draft article, which is based on article 33 of the 1994 Model Law and the text of paragraph (2) preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 38), without change (A/CN.9/668, para. 177). It was agreed that the Guide should highlight that the modalities for the opening of tenders established by the procuring entity (time, place where applicable, and other factors) should allow for the presence of suppliers or contractors (A/CN.9/668, para. 178). The informal drafting party, July 2009, suggested that the Guide should also elaborate on “deemed” present or “virtual” presence of suppliers or contractors at the opening of tenders.

<sup>27</sup> This paragraph has been revised to make it technologically neutral and consistent with similar

(2) All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders.

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have presented tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article [23].<sup>28</sup>

### **Article 37. Examination, evaluation and comparison of tenders<sup>29</sup>**

(1) (a) The procuring entity may ask a supplier or contractor individually for clarifications of its tender in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted;

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall [require purely arithmetical errors that are discovered during the examination of tenders to be corrected by the supplier or contractor that presented the tender].<sup>30</sup>

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity [shall]<sup>31</sup> regard a tender as responsive [only]<sup>32</sup> if it conforms to [all requirements set forth in the solicitation documents in accordance with article 11 of this Law] [the

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provisions of the Model Law.

<sup>28</sup> The Working Group may recall that the provisions of article 23 (1) (b) require the equivalent details of all those that submitted tenders to be recorded, and may wish to include a note in the Guide to explain that any late tenders would be returned unopened, but their (late) submission would be noted in the record.

<sup>29</sup> The Working Group, at its fifteenth session, deferred the consideration of this article, which is based on article 34 of the 1994 Model Law, in the light of the divergent views expressed regarding the drafting suggestions thereto (A/CN.9/668, paras. 180-181). As was requested by the Working Group, the drafting suggestions were placed in square brackets in the present draft for further consideration by the Working Group. The Secretariat was also requested to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (ibid). The results of the research are reflected in document A/CN.9/WG.I/WP.68, sections II.A and B.

<sup>30</sup> Amendments proposed by the informal drafting party, July 2009.

<sup>31</sup> The Working Group may wish to consider replacing the word “may” appearing in the 1994 text with the word “shall”, to ensure that responsiveness is ascertained objectively. The Working Group may consider that the use of the word “may” in this context might allow unintended and undesirable subjectivity, and provides a description of what a responsive tender might be, rather than a definition of a responsive tender. The informal drafting party, July 2009, proposed retaining the word “shall”.

<sup>32</sup> The Working Group may consider that the word “only” is unnecessary if the word “shall” is used in this provision, as to which, see the footnote above. The informal drafting party, July 2009, proposed retaining the word “only”.

relevant requirements set forth in the solicitation documents] [the description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement [set out in the solicitation documents in accordance with article 11 of this Law]];<sup>33</sup>

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.<sup>34</sup>

(3) The procuring entity shall reject a tender:

(a) If the supplier or contractor that presented the tender is not qualified;

(b) If the supplier or contractor that presented the tender does not [correct an arithmetical error pursuant to paragraph (1) (b) of this article];<sup>35</sup>

(c) If the tender is not responsive;

(d) In the circumstances referred to in articles [18 and 19].

(4) (a) The procuring entity shall evaluate and compare the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

(b) The successful tender shall be:

(i) [Where price is the only award criterion],<sup>36</sup> the tender with the lowest tender price, subject to any margin of preference applied pursuant to article [11]; or

<sup>33</sup> The Working Group, at its fifteenth session, deferred the consideration of these alternative texts in square brackets and requested the Secretariat to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (a) and 181). The results of the research are reflected in document A/CN.9/WG.I/WP.68, section II.A. The informal drafting party, July 2009, proposed retaining the first alternative text.

<sup>34</sup> The Working Group may wish to consider whether the assessment of responsiveness is a step that should be regulated in some or all other procurement methods. At the fifteenth session, a suggestion was made to include in paragraph 3 (c) of this article a cross-reference to revised draft article 10 (A/CN.9/668, para. 179 (b)). The current scope of revised draft article 10 does not allow for an appropriate cross-reference, as it refers to the description of the subject matter of the procurement and the terms and conditions of the procurement contract rather than the assessment of responsiveness.

<sup>35</sup> Changes to this provision have been made further to the changes proposed by the informal drafting party, July 2009, in paragraph 1 (b) of this article.

<sup>36</sup> The Working Group, at its fifteenth session, deferred the consideration of the suggestion to add this phrase in the beginning of this subparagraph and requested the Secretariat to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions

(ii) [Where there are price and other award criteria],<sup>37</sup> if the procuring entity has so stipulated in the solicitation documents, the [lowest evaluated tender].<sup>38</sup> ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with article [11].

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, according to the rate specified in the solicitation documents pursuant to article [33 (s)], for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article [16], the procuring entity may require the supplier or contractor presenting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article [9]. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders still in force, subject to the right of the procuring entity, in accordance with article [17 (1)], to cancel the procurement.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in articles [20 and 23].

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were considered (A/CN.9/668, paras. 180 (d) and 181). The results of the research are reflected in document A/CN.9/WG.I/WP.68, section II.B.2. The informal drafting party, July 2009, proposed retaining this additional phrase.

<sup>37</sup> Ibid.

<sup>38</sup> No consensus has so far been reached as regards retaining in the revised Model Law of this term and, if it is not retained, which alternative term should replace it (A/64/17, paras. 169-174). The alternative terms considered so far are the “best evaluated tender” or “most advantageous/economical tender”. The Secretariat, further to the Working Group’s request at its fifteenth session (A/CN.9/668, paras. 180 (c), 181 and 220), researched the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and reported its findings in document A/CN.9/WG.I/WP.68, section II.B.1. The informal drafting party, July 2009, proposed retaining reference to the “lowest evaluated tender”. Some experts consulted by the Secretariat also supported retaining this term in the context of all types of tendering proceedings (open, restricted and two-stage tendering).

**Article 38. Prohibition of negotiations with suppliers  
or contractors<sup>39</sup>**

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender presented by the supplier or contractor.

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<sup>39</sup> The Working Group, at its fifteenth session, approved the draft article, which is based on article 35 of the 1994 Model Law, without change (A/CN.9/668, para. 182).