



General Assembly

Distr.: Limited
29 October 2009

Original: English

**United Nations Commission
on International Trade Law**
Working Group I (Procurement)
Seventeenth session
Vienna, 7-11 December 2009

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 IV (Procurement methods not involving negotiations: Restricted tendering, Request for quotations and Request for proposals without negotiation) of the revised Model Law, comprising articles 39-41.

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).

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Chapter IV. Procurement methods not involving negotiations (restricted tendering, request for quotations and request for proposals without negotiation)

Article 39. Restricted tendering¹

(1) (a) When the procuring entity engages in restricted tendering on the grounds that the subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors, it shall solicit tenders from all suppliers and contractors from whom the subject matter of the procurement is available;

(b) When the procuring entity engages in restricted tendering on the grounds that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement, it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner, and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(2) [Where a procuring entity intends to use restricted tendering under paragraph 1 (b) of this article,] the procuring entity [shall] [may] engage in pre-selection proceedings. Article 16 of this Law shall apply to the pre-selection proceedings except:

(a) The invitation to pre-selection and the pre-selection documents shall state, in addition to the information listed in article 16 (3) and (5):

(i) That the procuring entity intends upon completion of the pre-selection proceedings to solicit tenders only from a limited number of pre-qualified suppliers or contractors that best meet the prequalification criteria;

(ii) The maximum number of pre-qualified suppliers or contractors from whom the tenders will be solicited, which shall be at least [five]; and

(iii) The manner in which the selection of that number will be carried out, in accordance with paragraph (2) (b) below;

(b) The procuring entity shall rate the suppliers or contractors that meet the prequalification criteria on the basis of the criteria applied to assess their qualifications and select suppliers or contractors that will be invited to present tenders upon completion of the pre-selection proceedings. In selecting those suppliers, the procuring entity shall apply only the manner of rating that is set forth in the invitation to pre-selection and the pre-selection documents. [The procuring entity shall select suppliers or contractors from whom to solicit tenders in a

¹ Document A/CN.9/WG.I/WP.69/Add.3 sets out all options for this article considered by the Working Group so far. This document sets out only one option, which is presented based on the Secretariat's consultations with experts and the draft submitted to the Secretariat by 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, and in the light of the provisions on conditions for use of restricted tendering set out in article 26 of chapter II of this draft.

non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition];²

(c) The procuring entity shall promptly notify each supplier or contractor whether or not it has been selected and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been selected, [unless the procuring entity decides to withhold this information in order to protect classified information in procurement involving classified information.]³ The procuring entity shall upon request communicate to suppliers or contractors that have not been selected the reasons therefor.

(3) The procuring entity shall cause a notice of the restricted tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall contain at a minimum the information listed in article 31 of this Law.

(4) The procuring entity shall not be required to employ the procedure set out in paragraph (3) of this article in procurement involving classified information in order to protect classified information. The procuring entity shall include in the record of the procurement required under article [23] of this Law, a statement of the reasons and circumstances on which it relied to justify its decision not to issue a notice of the restricted tendering.⁴

(5) The procuring entity shall invite all selected suppliers or contractors to submit their tenders. Where the solicitation documents are not made publicly available from the date of publication of the invitation to pre-selection, the procuring entity shall ensure that those documents are made available at the same time to all the selected suppliers or contractors.

(6) The provisions of chapter III of this Law shall apply to the subsequent stages of restricted tendering.

Article 40. Request for quotations⁵

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than

² The Working Group may wish to consider whether the last sentence is superfluous in the light of procedural safeguards already contained in the preceding provisions of paragraph (2) of this article and the relevant general principles found elsewhere in the Model Law. The provision is also repetitive with paragraph (1) (b) of this article.

³ The closing wording was added pursuant to the instructions at the Commission's forty-second session to the Secretariat to prepare drafting suggestions for consideration by the Working Group that would accommodate sensitive type of procurement, by envisaging in particular special measures for protection of classified information in this type of procurement (A/64/17, paras. 264-265).

⁴ Paragraph (4) was added pursuant to the instructions at the Commission's forty-second session to the Secretariat to prepare drafting suggestions for consideration by the Working Group that would accommodate sensitive type of procurement, by envisaging in particular special measures for protection of classified information in this type of procurement (A/64/17, paras. 264-265).

⁵ The Working Group, at its fifteenth session, approved the draft article, which is based on article 50 of the 1994 Model Law, as revised at that session (A/CN.9/668, paras. 202-208).

the charges for the subject matters of the procurement themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(3) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity.⁶

Article 41. Request for proposals without negotiation⁷

(1) Subject to article 16, the procuring entity shall solicit proposals through open solicitation unless it decides that direct solicitation is necessary because:

(a) The subject matter of the procurement is available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter of the procurement, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) Direct solicitation is the only means to protect classified information in procurement involving classified information, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.⁸

(2) The request for proposals shall include, at a minimum:

(a) A description of the subject matter of the procurement, including the quality, technical and other parameters to which the proposal must conform and the location where the subject matter of the procurement is to be provided;

⁶ The Working Group may wish to consider whether a notice of the request for quotations proceedings should be required to be published and whether this article should therefore contain provisions similar to the ones in article 39 (3) and (4) above. The same issue is valid in all cases where direct solicitation takes place.

⁷ The Working Group, at its fifteenth session, after a debate on whether the provisions should be retained in the revised Model Law, decided to retain the draft article, which was based on article 42 of the 1994 Model Law, but deferred its consideration to a later stage (A/CN.9/668, para. 201). The article proposed in this document has been redrafted to make the intended scope and purpose of the article clearer, in the light of the deliberations at the Working Group's fifteenth session (A/CN.9/668, paras. 193-201) and Secretariat's consultations with experts. The Working Group may wish to consider to what extent all provisions on request for proposals in chapters IV and V should conform, in particular as regards transparency requirements and level of detail in regulating the procedure.

⁸ Based on provisions of article 37 (3) of the 1994 Model Law and A/64/17, para. 265. The Working Group may wish to consider that as a general rule the procuring entity shall be required to publish a notice of procurement (similar to the one required under draft article 39 (3) above) even in the case of direct solicitation unless it decides otherwise in procurement involving classified information in order to protect classified information (draft article 39 (4) above).

(b) The criteria and procedures for opening, examining, evaluating and comparing the proposals in accordance with articles 10 and 11, including any minimum requirements that the procuring entity will establish with respect to quality, technical and commercial aspects of proposals, [and any maximum price,]⁹ and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;

(c) The terms and conditions of the procurement contract;

(d) Instructions to suppliers or contractors to submit simultaneously to the procuring entity proposals in two envelopes: one envelope containing quality and technical aspects of the proposal and the other envelope containing the [commercial][financial][price]¹⁰ aspects of the proposal.

(3) Before opening the envelopes containing the [commercial][financial][price] aspects of the proposals, the procuring entity shall evaluate the quality and technical aspects of proposals in accordance with the criteria and procedures specified in the request for proposals.

(4) The results of the evaluation of the quality and technical aspects of proposals shall be immediately recorded in the record of procurement proceedings.

(5) The proposals whose quality and technical aspects fail to meet the relevant minimum requirements shall be considered to be non-responsive and shall be rejected on that ground. The notice of rejection [and reasons for rejection],¹¹ together with an unopened envelope containing the [commercial][financial][price] aspect of the proposal, shall be promptly communicated individually and simultaneously to each respective supplier or contractor whose proposal was rejected.

(6) The proposals whose quality and technical aspects met or exceeded the relevant minimum requirements shall be considered to be responsive. The procuring entity shall promptly and simultaneously communicate to the suppliers or contractors submitting such proposals the score of the quality and technical aspects of their respective proposals as recorded in the record of procurement proceedings pursuant to paragraph (4) of this article. The procuring entity shall invite these suppliers or contractors to the opening of the envelopes containing the [commercial][financial][price] aspects of their proposals.

(7) The score of the quality and technical aspects of each responsive proposal and the corresponding [commercial][financial][price] aspect of the proposal shall be read out in the presence of the suppliers or contractors invited in accordance with

⁹ The Working Group may wish to consider whether this reference should be included to accommodate procurement with a fixed budget. See, further, the discussions pertaining to procurement of advisory services in A/CN.9/WG.I/WP.71.

¹⁰ The Working Group may wish to consider which of the suggested terms is the most appropriate in this context. The 1994 Model Law refers in this context only to "price".

¹¹ The provision in square brackets is linked to the issue of debriefing. The Working Group may recall that it has not yet finally decided the manner in which debriefings should be addressed in the text or the Guide, and may wish therefore to finalise that decision before addressing whether to retain this provision in the text or encourage such a step in the Guide. See, also, the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

paragraph (6) of this article to the opening of the envelopes containing the [commercial][financial][price] aspects of the proposals.

(8) The procuring entity shall compare the [commercial][financial][price] aspects of the proposals [that do not exceed any maximum price]¹² and on that basis identify the successful proposal in accordance with the criteria and the procedure set out in the request for proposals. The successful proposal shall be:

- (a) The proposal with the lowest price; or
- (b) The proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price.

¹² See footnote 9 above.