



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 V of the revised Model Law (Procurement methods involving negotiations: Two-stage tendering, Request for proposals with dialogue, Request for proposals with consecutive negotiations, Competitive negotiations and Single-source procurement), comprising articles 42-46.

The Secretariat's comments are set out in the introduction and 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).

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CHAPTER V. PROCUREMENT METHODS INVOLVING NEGOTIATIONS

Section I: TWO-STAGE TENDERING, REQUEST FOR PROPOSALS WITH DIALOGUE AND REQUEST FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS

Section II: COMPETITIVE NEGOTIATIONS AND SINGLE-SOURCE PROCUREMENT

1. Introduction

1. At its sixteenth session, Working Group I requested the Secretariat to review a proposal for draft article 40 (Competitive dialogue) for chapter IV of the draft revised Model Law and to make the changes necessary to align the text with the rest of the draft revised Model Law (A/CN.9/672, para. 13). The proposal, amended accordingly, was before the Commission at its forty-second session (A/CN.9/XLII/CRP.2). The Commission referred the proposal and other outstanding issues in the draft revised Model Law to the Working Group for further consideration (A/64/17, para. 284), and expressed support for intersession informal consultations on the entire text (to be inclusive and have as wide a geographical representation of participants as possible (A/64/17, para. 281)).

2. The text of the proposal has been revised further to those consultations, the results of which are reflected in draft article 43 below (Request for proposals with dialogue). The understanding is that this new method of procurement will replace the method envisaged in article 48 of the 1994 Model Law (Request for proposals). The Working Group may wish to note that the provisions regarding a pre-selection procedure (draft article 43 (3)) are not consistent with the pre-selection procedure provided for in draft article 39 (Restricted tendering), as proposed by an informal drafting party during the forty-second session of the Commission in July 2009.¹ The Working Group may therefore wish to consider whether one consistent procedure should apply to both methods, and if so, which procedure. As noted in connection with draft article 41 (Request for proposals without negotiation), the Working Group may also wish to consider the need for appropriate consistency in regulation of various request for proposals procedures (with and without negotiation/dialogue), in particular as regards procedural safeguards to ensure transparency.

3. In the light of the strong support expressed in the Working Group for retaining two-stage tendering (article 46 of the 1994 Model Law) as a separate procurement method in the revised Model Law (A/CN.9/672, paras. 48 and 66), suggested text for this procurement method is presented in draft article 42.

4. In the light of suggestions that competitive negotiations as envisaged in article 49 of the 1994 Model Law should be retained in the revised Model Law as a

¹ This drafting party comprised Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America.

separate procurement methods (A/CN.9/672, para. 61), suggested text for this procurement method is presented in draft article 45.

5. In the light of noted concerns that simultaneous negotiations, provided for in the 1994 Model Law (article 43), would not be appropriate for some types of services (A/CN.9/672, paras. 67 and 123), and the views that emerged during consultations that a method for advisory or non-quantifiable services would be required, request for proposals with consecutive negotiations as envisaged in article 44 of the 1994 Model Law is proposed to be retained and is set out in draft article 44.

6. At the Working Group's sixteenth session, the view was expressed that request for proposals without negotiations should also be preserved in the revised Model Law as a separate procurement method. The Working Group deferred the consideration of this issue, including whether that procurement method should be included in chapter IV as a method alternative to tendering and not involving negotiations, rather than in chapter V that sets out methods involving negotiations (A/CN.9/672, para. 49). The present draft sets out provisions for request for proposals without negotiations based on article 42 of the 1994 Model Law in chapter IV (draft article 41).

Proposed text for chapter V of the Model Law

Section I

Article 42. Two-stage tendering

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

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

(3) The procuring entity shall, in the first stage, engage in [negotiations/dialogue/discussions]² with [all]³ suppliers or contractors whose tender have not been rejected pursuant to articles [17, 18, 19 or 37], concerning any aspect of their tenders.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite all suppliers or contractors [whose tenders have not been rejected]⁴ to submit final tenders with prices with respect to a single description of the subject matter of the procurement. In formulating that description, the procuring entity may delete or modify any aspect, originally set out in the solicitation documents, of the technical or quality characteristics of the subject matter of the procurement, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law.⁵ Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any submission security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article [37 (4) (b)].

² The Working Group may wish to decide how to refer to the interaction between the parties. The 1994 Model Law referred to negotiations in this context, but the interaction does not involve negotiations in the classical sense.

³ The 1994 text read “any”. The Working Group may wish to consider making this replacement in the light of potential abuse that may occur in the second stage of the two-stage tendering proceedings if negotiations in the first stage were held only with one or a few suppliers or contractors that would effectively determine the content of the revised solicitation documents and ultimately successful supplier.

⁴ The wording put in square brackets should not give impression that rejection of tenders is possible subsequent to negotiations referred to in paragraph (3) of the article. The Working Group may wish to consider making this point clearer in the text or in the Guide to this provision.

⁵ Concern was expressed by some experts about the extent of permissible modifications under this provision. The suggestion was made to set a limit by for example requiring that no material change in the procurement should occur as a result of such modifications.

Article 43. Request for proposals with dialogue⁶

(1) Subject to article 16, the procuring entity shall solicit proposals through open solicitation unless it decides that direct solicitation is necessary for the reasons set out in article 41 (1) (a) to (c)⁷ of this Law.

(2) Prior to the [publication of the notice soliciting participation in the procurement, or where prequalification or pre-selection is involved, prior to the publication of the invitation to pre-qualify or to pre-selection as appropriate] [issue of the request for proposals], the procuring entity may establish any minimum requirements⁸ with respect to quality, technical, financial⁹ and commercial aspects of proposals, including the technical and other parameters to which the proposal must conform, that will be applied during the procedure.¹⁰

(3) The procuring entity 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 procedure to request a limited number of suppliers or contractors to submit proposals;

⁶ This procurement method is available for all types of procurement, including the procurement of non-quantifiable advisory services. However, the Working Group's attention is drawn to the discussion in A/CN.9/WG.I/WP.71 regarding the particular features of such procurement. The Working Group is invited to consider whether a dedicated procurement method for it would be required in the revised Model Law. Alternatively, the Guide to Enactment might explain that in such type of procurement, regulations could provide additional steps or provisions. For example, proposals need not contain financial elements or prices where the cost is not an evaluation criterion or not a significant evaluation criterion, proposals could be submitted in two envelopes with technical and financial aspects in different envelopes, and an additional step could include a public opening of the envelopes in one or two sittings. As regards evaluation criteria in such type of procurement, the Guide could explain that for non-quantifiable advisory services, relevant issues may include (i) cost, (ii) the service-provider's experience for the specific assignment, (iii) the quality of the understanding of the assignment under consideration and of the methodology proposed, (iv) the qualifications of the key staff proposed, (v) transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the description of the assignment, and (vi) when applicable, the extent of participation by nationals among key staff in the performance of the services.

⁷ The Working Group may wish to consider whether all grounds listed in draft article 41 (1) (a) to (c) would be applicable in the context of this procurement method or reference should be made only to the grounds listed in (a) and (c), not (b). This should be considered also in conjunction with article 44 (1) where a cross-reference to article 43 (1) is made.

⁸ This term is used, as it is with reference to the description of the subject matter of the procurement (article 10 of this draft), to avoid confusion with the notion of (financial) thresholds for low-value procurements.

⁹ The Guide to Enactment would note that the procuring entity may choose to invite initial proposals with or without a price.

¹⁰ These minimum requirements are intended to allow the procuring entity to set the benchmark for responsiveness. The Working Group may wish to consider the appropriate point in the proceedings at which these minimum requirements should be set, weighing advantages of flexibility and discretion and the manner in which they can assist in identifying the best solutions, against the risk of abuse.

(ii) The number of suppliers or contractors to be so requested, provided that sufficient suppliers or contractors are pre-qualified;

(iii) The manner in which the selection of that number will be carried out, in accordance with paragraph (3)(b) below.

(b) The pre-selected suppliers shall comprise either the stated number of suppliers or contractors that best meet the prequalification criteria, or those suppliers or contractors that meet or exceed minimum requirements as regards the prequalification criteria set by the procuring entity.¹¹ All suppliers or contractors that are not pre-selected will be disqualified from further participation in the procedure.¹²

(c) The procuring entity shall promptly notify each supplier or contractor whether or not it has been pre-selected and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been pre-selected[, unless the procuring entity decides to withhold this information in order to protect classified information in procurement involving classified information].¹³ The procuring entity shall upon request communicate to suppliers or contractors that have not been pre-selected the reasons therefore.

(4) The notice soliciting participation in the procurement must set out, at a minimum, the following information:

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

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

(c) The intended stages of the procedure;

(d) Any minimum requirements that may be established by the procuring entity pursuant to paragraph (2) of this article, and, if applicable, a statement that

¹¹ The implication of this provision is that the procuring entity could raise the pre-qualification requirements during the procedure. The Working Group may wish to consider whether this flexibility would be subject to abuse, and so that any minimum requirements should be set at the outset (as is the case with responsiveness requirements in paragraph (2) of this article). If so, the situation would be addressed in the pre-selection documents and would not require specific mention here. If the Working Group considers that the procuring entity should be able to raise the requirements during the procedure, it may wish to build in transparency safeguards, for example by providing in the notice that the minimum requirements may be raised if more than a stated maximum number of suppliers are pre-qualified.

¹² The two ways of conducting pre-selection were suggested by experts during consultations with the Secretariat. As noted in the introductory note to this chapter, the provisions in this paragraph deviate from those in draft paragraph (2)(b) of draft article 39 on restricted tendering. The Working Group may wish to consider whether deviations are justifiable.

¹³ 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).

proposals that fail to achieve these minimum requirements shall be regarded as non-responsive and rejected from the procedure;¹⁴

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

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

(g) The means, manner and [modalities] of obtaining the request for proposals;

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

(i) [Unless decided otherwise by the procuring entity in domestic procurement,]¹⁵ the currency and terms of payment for the request for proposals;

(j) [Unless decided otherwise by the procuring entity in domestic procurement,]¹⁶ the language or languages in which the request for proposals are available, in which proposals are to be prepared and in which the dialogue will be held;

(k) The manner, [modalities] and deadline for presenting proposals. The deadline for presenting proposals shall be expressed as a specific date and time and shall allow sufficient time for suppliers or contractors to prepare and submit their proposals, taking into account the reasonable needs of the procuring entity.

(5) The request for proposals shall be issued to all suppliers or contractors that respond to the solicitation and pay the price, if any, charged for the request unless prequalification or pre-selection procedures were involved. In the latter case, the request for proposals shall be issued to all pre-qualified or pre-selected suppliers or contractors.

(6) The request for proposals shall include, in addition to the information referred to in paragraphs (4)(a) to (f) and (k) of this article, at a minimum, the following information:¹⁷

(a) The criteria and procedure for evaluating the proposals in accordance with article 11;¹⁸

¹⁴ This is a new provision that reflects the needs expressed during consultations for the manner in which any limitation of proposals will be made, and is based on Model Provision 15 of the UNCITRAL PFIPs instruments.

¹⁵ 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.

¹⁶ Id.

¹⁷ Provisions of subparagraphs (a) and (e) to (o) are based on the respective provisions of article 38 of the 1994 Model Law. The content of other provisions of article 38 of the 1994 Model Law, except for subparagraphs (d) and (h), is reflected in the relevant provisions of paragraph (4) of this article. The content of subparagraphs (d) and (h) of article 38 of the 1994 Model Law was not reflected in the current draft as not applicable in the light of the revisions agreed so far to be made in the revised Model Law.

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

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

(d) Instructions for preparing and presenting proposals;

(e) 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;¹⁹

(f) If suppliers or contractors are permitted to submit proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be submitted;²⁰

(g) [Unless decided otherwise by the procuring entity in domestic procurement,]²¹ the currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating and comparing proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;²²

(h) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;²³

(i) If alternatives to the characteristics of the subject matter of the procurement, contractual terms and conditions or other requirements set out in the request for proposals are permitted, a statement to that effect and a description of the manner in which alternative proposals are to be evaluated and compared;²⁴

(j) The means by which suppliers or contractors may seek clarifications of the request for proposals;²⁵

¹⁸ Based on article 38 (m) of the 1994 Model Law. The Guide to Enactment would address the question of sub-criteria and the guidance that would be needed to ensure that a true picture of the evaluation criteria is given. Different procurements might require different levels of flexibility in this regard.

¹⁹ Based on article 38 (p) of the 1994 Model Law.

²⁰ Based on article 38 (i) of the 1994 Model Law.

²¹ 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.

²² Based on article 38 (j) and (n) of the 1994 Model Law.

²³ Based on article 38 (k) of the 1994 Model Law.

²⁴ Based on article 38 (o) of the 1994 Model Law.

²⁵ Based on article 38 (q) of the 1994 Model Law.

(k) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;²⁶

(l) Notice of the right provided under article [61] of this Law to seek review [due to non-compliance with the provisions of this Law] [together with information about duration of a standstill period and, if none will apply, a statement to that effect and reasons therefore];²⁷

(m) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;²⁸

(n) 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];²⁹

(o) [Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of proposals and to the procurement proceedings.]³⁰ [The desired format and any instructions, including any relevant timetables applicable in respect of the procurement process.]

(7) Where the procuring entity established any minimum requirements pursuant to paragraph (2) of this article, the procuring entity shall examine all proposals received against such requirements, and shall reject each proposal that fails to meet these minimum requirements on the grounds that it is non-responsive. The notice of rejection [and reasons for rejection]³¹ shall be promptly communicated individually and simultaneously to each respective supplier or contractor whose proposal was rejected.

(8) The procuring entity shall invite all suppliers and contractors whose proposals it received and, where applicable, were not rejected as non-responsive pursuant to paragraph (7) of this article, to participate in dialogue on their proposals. The procuring entity shall ensure that the number of suppliers invited to participate in the dialogue is sufficient to guarantee effective competition, and shall be at least three, if possible.

²⁶ Based on article 38 (r) of the 1994 Model Law.

²⁷ Based on article 38 (t) of the 1994 Model Law and reflecting the proposed amendment to the corresponding provisions in the article applicable to the open tendering (article 33 (w) of the current draft).

²⁸ Based on article 38 (u) of the 1994 Model Law.

²⁹ Based on article 38 (s) of the 1994 Model Law, and reflecting the proposed amendment to the corresponding provisions in the article applicable to the open tendering (article 33 (t) of the current draft).

³⁰ Based on article 38 (v) of the 1994 Model Law.

³¹ 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 finalize 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.

(9) The dialogue shall be [conducted by the same representatives of the procuring entity, and shall be]³² concurrent.

(10) During the course of the [dialogue/discussions], the procuring entity shall not modify the subject matter of the procurement, nor shall there be any other modification to the description that changes the subject matter of the procurement, nor any modification to [any qualification, or evaluation criterion,] any element of the procurement that is not subject to [dialogue/discussions] as notified in the request for proposals, or to any other terms and conditions of the procurement.³³

(11) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that are communicated by the procuring entity to a supplier or contractor shall be communicated at the same time on an equal basis to all other participating suppliers or contractors, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article 22 of this Law.³⁴

(12) Following the dialogue, the procuring entity shall issue a finalized request for proposals to each participating supplier or contractor, inviting it to submit its best and final offer with respect to all aspects of its proposal. The request shall be in writing, and shall specify the manner, [modalities] and deadline by which offers must be submitted.

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

³² No consensus was reached at the Working Group's sixteenth session as regards advisability of including the text in square brackets in the Model Law as opposed to the Guide (A/CN.9/672, para. 110).

³³ There was no consensus among the experts during consultations held by the Secretariat on the scope of modifications and the issue of consistency with two-stage tendering that is very flexible at this stage. See, for comparison, the greater flexibility as regards modifications at this stage in draft article 39 (4) above and the relevant accompanying footnote. The Working Group may consider whether the degree of flexibility should be conformed, or whether one method should have more flexibility than the other. Two-stage tendering is generally a less flexible method than request for proposals with dialogue (because the latter procedure is intended to facilitate the identification of the best solution for the procuring entity through a high degree of flexibility). Also, in two-stage tendering, the dialogue leads to the issue of a single set of specifications and greater flexibility might be at less risk of abuse as a result. The degree of flexibility that would be needed for specialized procurement such as of advisory services should also be considered, linked to the issue of whether a distinct method would be required for such procurement (see footnote 6 above, and A/CN.9/WG.I/WP.71). The Working Group may also wish to consider this provision in the light of the draft definition of the term "material change" in article 2.

³⁴ The Working Group may recall that article 22 addresses consent to disclosure of the confidential information among suppliers.

Article 44. Request for proposals with consecutive negotiations³⁵

(1) The provisions of article 43 (1) and (3) to (6) of this Law shall apply to procurement conducted by means of request for proposals with consecutive negotiations except to the extent those provisions are derogated from in this article.

(2) Prior to the [publication of the notice soliciting participation in the procurement, or where prequalification or pre-selection is involved, prior to the publication of the invitation to pre-qualify or to pre-selection as appropriate] [the issue of the request for proposals,] the procuring entity shall establish minimum requirements with respect to quality, technical and commercial aspects of proposals, [and any maximum price].³⁶

(3) The procuring entity shall examine the proposals against the applicable minimum requirements and shall reject each proposal that fails to meet these minimum requirements on the grounds that it is non-responsive. The notice of rejection [and reasons therefore] shall be promptly communicated individually and simultaneously to each respective supplier or contractor whose proposal was rejected.

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

(a) Invite for negotiations [on the price of its proposal]³⁷ the supplier or contractor that has attained the best rating in accordance with those criteria and procedure; and

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

(5) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (4)(a) of this article will not result in a procurement contract, the procuring entity shall inform that supplier or contractor that it is terminating the negotiations.

(6) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall

³⁵ Based on article 44 of the 1994 Model Law, and the method set out in draft article 43 above. The Working Group may wish to consider when the use of consecutive negotiations is appropriate by reference to the draft conditions for use in chapter II. It may also wish to consider whether the method should be linked to draft article 41 (Request for proposals without negotiations) as in the 1994 Model Law, instead of draft article 43 above as in the current draft.

³⁶ 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.

³⁷ The 1994 Model Law permits holding consecutive negotiations only on price (article 44 (b)). Experts consulted by the Secretariat questioned advisability of imposing such a restriction. The Working Group may wish therefore consider whether in this procurement method negotiations should also be permitted on non-price criteria.

invite the other suppliers or contractors for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

(7) During the course of the negotiations, the procuring entity shall not modify the subject matter of the procurement, nor shall there be any other modification to the description that changes the subject matter of the procurement, nor any modification to [any qualification, or evaluation criterion,] any element of the procurement that is not subject to negotiation, as notified in the request for proposals, or to any other terms and conditions of the procurement.³⁸

Section II

Article 45. Competitive negotiations³⁹

(1) In competitive negotiations, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

[(2) The procuring entity shall cause a notice of the competitive negotiations to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) [In procurement involving classified information in order to protect classified information]⁴⁰ or in the case of urgency referred to in article 27 (2), the procuring entity shall not be required to employ the procedure set out in paragraph (2) of this article. 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 competitive negotiations.]⁴¹

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

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

³⁸ As regards the issue of flexibility, see footnote 33 above.

³⁹ Based on article 49 of the 1994 Model Law, with the addition of a notice requirement suggested to be included further to the results of the Secretariat's consultations with experts. The Working Group may wish to consider when the use of competitive negotiations is appropriate by reference to the draft conditions for use in chapter II.

⁴⁰ The opening 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).

⁴¹ Paragraphs (2) and (3) are suggested to be added further to the results of the Secretariat's consultations with experts.

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

Article 46. Single-source procurement

(1) In the circumstances set out in article [29], the procuring entity may solicit a proposal or price quotation from a single supplier or contractor.

[(2) The procuring entity shall cause a notice of the single-source procurement to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) [In procurement involving classified information in order to protect classified information]⁴² or in the case of urgency referred to in article 29 (b), the procuring entity shall not be required to employ the procedure set out in paragraph (2) of this article. 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 competitive negotiations.]⁴³

⁴² The opening 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).

⁴³ Paragraphs (2) and (3) are suggested to be added further to the results of the Secretariat's consultations with experts.