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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 VI (Electronic reverse auctions) of the revised Model Law, comprising articles 47 to 52.

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 VI. ELECTRONIC REVERSE AUCTIONS**

### **Article 47. Procedures for soliciting participation in procurement involving the use of electronic reverse auctions<sup>1</sup>**

(1) Subject to article 16,<sup>2</sup> where an electronic reverse auction is to be used as a stand-alone procurement method, the procuring entity shall solicit bids through open solicitation.

(2) Where an electronic reverse auction is to be used in other methods of procurement, as appropriate, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings that an electronic reverse auction will be held.

### **Article 48. Contents of the notice of the electronic reverse auction<sup>3</sup>**

(1) The notice of the electronic reverse auction shall include, at a minimum, the following information:

(a) In addition to the information required under article 11 (4), the mathematical formula to be used in the evaluation procedure and an indication of any criteria that cannot be varied during the auction;

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

(c) The manner and, if already determined, deadline by which the suppliers and contractors shall register to participate in the auction;

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

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

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

(2) The notice of an electronic reverse auction to be used as a stand-alone procurement method shall in addition include:

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<sup>1</sup> The article was revised further to the introduction of the definition “open solicitation”.

<sup>2</sup> Phrase inserted in lieu of specific reference to prequalification information in article 48, to ensure consistency with other procurement methods.

<sup>3</sup> This article was restructured to clearly differentiate information that should be included in any notice of ERA (whether stand-alone or connected to another procurement method) from information that is specific in the context of the notice of a stand-alone ERA.

(a) Information referred to in article [31 (a), (d) and (e), and article 33 (d), (f), (h) to (j) and (t) to (y)];

(b) A number of suppliers or contractors to be invited to the auction where the procuring entity decides to impose a minimum and/or maximum number, provided that in doing so the procuring entity has satisfied itself that it would ensure that effective competition and fairness are maintained. Where the maximum is imposed, the notice of an electronic reverse auction shall also include the criteria and procedure that will be followed in selecting the maximum number of suppliers or contractors;<sup>4</sup>

(c) An invitation to present initial submissions together with information referred to in articles [31 (f) to (j) and 33 (a), (k) to (s) and (z)] where the procurement contract is awarded on the basis of the lowest evaluated bid,<sup>5</sup> or where the procuring entity decides that the electronic reverse auction shall be preceded by examination of initial submissions.

### **Article 49. Invitation to participate in the electronic reverse auction<sup>6</sup>**

(1) Except as provided for in paragraphs (2) to (4) of this article, the notice of the electronic reverse auction shall serve as an invitation to participate in the auction and shall be complete in all respects, including as regards information specified in paragraph (5) of this article.

(2) Where a limitation on the number of suppliers or contractors to be invited to the auction has been imposed in accordance with article [48 (2) (b),] the procuring entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor selected corresponding to the number,<sup>7</sup> and in accordance with the criteria and procedure, specified in the notice of the electronic reverse auction.

(3) Where prequalification took place in accordance with article [16,] the procuring entity shall send the invitation to participate in the auction individually and simultaneously to each pre-qualified supplier or contractor.

(4) Where the auction has been preceded by examination or full evaluation of initial submissions, the procuring entity shall:

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<sup>4</sup> The Working Group may wish to ensure consistency between this provision and the provisions on pre-selection in proposed article 39.

<sup>5</sup> The Guide will explain that in such case, the electronic reverse auction shall always be preceded by a full examination and evaluation of initial submissions in accordance with the criteria to be used by the procuring entity in determining the successful bid and the relative weight of such criteria, as specified in accordance with article [11] and as set out in the notice of the electronic reverse auction.

<sup>6</sup> The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222). Some changes were required to be made in the light of revisions made in other provisions of the draft Model Law.

<sup>7</sup> The Guide will explain that, if there are fewer participants than the maximum permitted number, all qualified must be invited to participate.

(a) Promptly notify each supplier or contractor concerned whether or not its initial submission is responsive. [Where a supplier or contractor's initial submission is not responsive, and is accordingly rejected in accordance with article [37 (3)], the procuring entity shall, upon request, promptly communicate to the supplier or contractor concerned the grounds upon which its initial submission was considered to be non-responsive;]<sup>8</sup>

(b) Send an invitation to participate in the auction individually and simultaneously to each supplier or contractor whose initial submission was responsive. The invitation shall be accompanied by the outcome of the examination and evaluation of the initial submission of the supplier or contractor concerned.<sup>9</sup>

(5) Unless already provided in the notice of the electronic reverse auction, the invitation to participate in the auction shall set out:

(a) The deadline by which the invited suppliers and contractors shall register to participate in the auction;

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

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

(d) Information concerning individual connection to the electronic equipment being used; and

(e) All other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction.

(6) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction in accordance with this article is sufficient to guarantee effective competition.

### **Article 50. Registration to participate in the electronic reverse auction and timing of holding of the auction<sup>10</sup>**

(1) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.

(2) If the number of suppliers or contractors registered to participate in the auction is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity may cancel the electronic reverse auction. The fact of the cancellation of the auction shall be promptly communicated individually to each registered supplier or contractor.

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<sup>8</sup> 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 sentence in the text or encourage such a step in the Guide. Consistency is required because the auction procedure may take place as a phase in other procurement methods, which do not contain debriefing obligations. See, also, the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

<sup>9</sup> The Guide will address the extent of the information on the outcome of the full evaluation that should be provided.

<sup>10</sup> The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222).

(3) The auction shall not take place before expiry of adequate time after the notice of the electronic reverse auction has been issued or, where invitations to participate in the auction are sent, from the date of sending the invitations to all suppliers or contractors concerned. This time shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.<sup>11</sup>

### **Article 51. Requirements during the auction<sup>12</sup>**

(1) The electronic reverse auction shall be based on:

(a) Price, where the procurement contract is to be awarded to the lowest priced bid; or

(b) Prices and other criteria to be used by the procuring entity in determining the successful bid, specified in accordance with article [11] and as set out in the notice of the electronic reverse auction, where the procurement contract is to be awarded to the lowest evaluated bid.

(2) During an electronic reverse auction:

(a) All bidders shall have an equal and continuous opportunity to present their bids;

(b) There shall be automatic evaluation of all bids in accordance with the criteria and other relevant information included in the notice of the electronic reverse auction;

(c) Each bidder must instantaneously and on a continuous basis during the auction receive sufficient information allowing it to determine the standing of its bid vis-à-vis other bids;<sup>13</sup>

(d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.

(3) The procuring entity shall not disclose the identity of any bidder during the auction.

(4) The auction shall be closed in accordance with the criteria specified in the notice of the electronic reverse auction.

(5) The procuring entity shall suspend or terminate the electronic reverse auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the

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<sup>11</sup> The words “taking into account the reasonable needs of the procuring entity” were added to ensure consistency with other similar provisions of the Model Law (see, e.g., articles 16 (3) (i) and 34 (1) of this draft).

<sup>12</sup> The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222). Some changes were made in the light of revisions subsequently made in other provisions of the draft Model Law.

<sup>13</sup> The Working Group, at its fifteenth session, approved the subparagraph without change but agreed that the Guide would highlight the risks of collusion that might arise where information about other bids is provided, and would provide examples of existing good practice to mitigate these risks.

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

### **Article 52. Requirements after the auction<sup>14</sup>**

(1) The bid ascertained at the closure of the auction to be the lowest priced bid or the best<sup>15</sup> evaluated bid, as applicable, shall be the successful bid.

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

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

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

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<sup>14</sup> The Working Group, at its fifteenth session, approved the article subject to the consideration at a later stage of the use of the term “the best evaluated bid” in place of the term “the lowest evaluated bid” (A/CN.9/668, para. 222). See the footnote immediately below.

<sup>15</sup> At the Working Group’s fifteenth session, it was suggested that the term “the lowest evaluated bid” should be replaced with the term “the best evaluated bid”, since in practice it was the highest or the best, not the lowest, evaluated bid that was accepted. The Working Group deferred the consideration of the issue to a later stage (A/CN.9/668, paras. 220 and 222). The informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, supported the use of the term “best” rather than the term “lowest,” with the Guide to Enactment carefully explaining the meaning of the term “best” in the special circumstances of reverse auctions.