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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 articles 13 bis-23 bis of chapter I (General provisions).

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).

## CHAPTER I. GENERAL PROVISIONS (continued)

### Article 13 bis. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or submissions<sup>1</sup>

(1) The manner, place and deadline for presenting applications to pre-qualify shall be set out in the invitation to pre-qualify and the pre-qualification documents. The manner, place and deadline for presenting submissions shall be set out in the solicitation documents.

(2) The deadlines for presenting applications to pre-qualify or submissions shall be expressed as a specific date and time and shall allow sufficient time for suppliers or contractors to prepare and present their applications or submissions, taking into account the reasonable needs of the procuring entity.

(3) If the procuring entity issues a clarification or modification of the pre-qualification or solicitation documents, it shall, prior to the deadline for presenting applications to pre-qualify or submissions, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification into account in their applications or submissions.

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

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

### **Article 14. Clarifications and modifications of solicitation documents**<sup>2</sup>

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting submissions. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely presentation of submissions and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

<sup>1</sup> New article proposed to be added to consolidate in one article repetitive provisions found throughout the Model Law on deadlines and their extension and to make the resulting provisions applicable to all procurement methods. In the 1994 text, the issues related to deadlines and their extension were addressed only in the context of the pre-qualification and tendering proceedings.

<sup>2</sup> The accompanying Guide text will make it clear that any obligation of the procuring entity to debrief individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors are known to the procuring entity (A/CN.9/668, para. 168).

(2) At any time prior to the deadline for presenting submissions, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their submissions.<sup>3</sup>

### Article 15. Submission Tender securities<sup>3</sup>

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a submission tender security:

(a) The requirement shall apply to all ~~such~~ suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the submission tender security and the confirmer, if any, of the submission tender security, as well as the form and terms of the submission tender security, must be acceptable to the procuring entity. In cases of domestic procurement, the solicitation documents may in addition stipulate that the tender security shall be issued by an issuer in this State;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a submission tender security shall not be rejected by the procuring entity on the grounds that the submission tender security was not issued by an issuer in this State if the submission tender security and the issuer otherwise conform to requirements set ~~forthout~~ in the solicitation documents ~~(, unless the~~:

(i) The acceptance by the procuring entity of such a submission tender security would be in violation of a law of this State; or) unless the

(ii) The procuring entity in cases of domestic procurement requires a submission tender security, ~~in cases of domestic procurement,~~ to be issued by an issuer in this State;<sup>4</sup>

(d) Prior to presenting a submission, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a

<sup>3</sup> The accompanying Guide text will refer to the use in some jurisdictions of alternatives to a tender security, such as bid securing declarations that the procuring entity may, in appropriate cases, require all suppliers or contractors to sign in lieu of requiring them to furnish tender securities. Under this type of declarations, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for the contingencies that normally are secured by a tender security. Sanctions however should not include debarment since the latter should not be concerned with commercial failures. These alternatives aim at promoting more competition in procurement, by increasing participation in particular of small and medium enterprises that otherwise might be prevented from participation because of formalities and expenses involved in connection with presentation of a tender security.

<sup>4</sup> Paragraph (c) was amended to make the drafting clearer by splitting its provisions into the chapeau provisions and subparagraphs (i) and (ii). The wording in subparagraph (ii) has been included to reflect a cross-reference in article 23 of the 1994 Model Law. That article has been deleted, and its provisions included within various articles, for ease of reading.

~~submission~~tender security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the ~~submission~~tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required ~~submission~~tender security; any requirement that refers directly or indirectly to conduct by the supplier or contractor presenting the submission ~~shall not may~~ relate only to ~~conduct other than~~;<sup>5</sup>

(i) Withdrawal or modification of the submission after the deadline for presenting submissions, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign the procurement contract if required by the procuring entity to do so;

(iii) Failure to provide a required security for the performance of the contract after the successful submission has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the ~~submission~~tender security, and shall promptly return, or procure the return of, the security document, after whichever of the following that occurs earliest:

(a) The expiry of the ~~submission~~tender security;

(b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) The termination of the procurement proceedings without the entry into force of a procurement contract;

(d) The withdrawal of the submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

## Article 16. Pre-qualification proceedings

(1) The procuring entity may engage in pre-qualification proceedings with a view towards identifying, prior to the solicitation, suppliers and contractors that are qualified. The provisions of article [9] shall apply to pre-qualification proceedings.

(2) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to pre-qualify is

<sup>5</sup> Amended to make the drafting clearer. The phrase "may relate only to" replaced the phrase in the 1994 text "shall not relate to conduct other than".

to be published).<sup>6</sup> Unless decided otherwise by the procuring entity in domestic procurement,<sup>7</sup> the invitation to pre-qualify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

(3) The invitation to pre-qualify shall ~~contain, at a minimum, include~~ the following information:

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

(b) A summary of the principal required terms and conditions of the procurement contract ~~or the framework agreement~~ to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [9-~~2~~];

(d) A declaration to be made in accordance with article [8];

(e) The means, ~~manner and [modalities]~~ of obtaining the pre-qualification documents; ~~and the place where they may be obtained;~~<sup>8</sup>

(f) The price, if any, charged by the procuring entity for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents;<sup>9</sup>

(g) ~~[Unless decided otherwise by the procuring entity in domestic procurement,] the currency and terms~~ ~~If the price is charged, the means~~ of payment for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents; ~~and the currency of payment [unless the procuring entity decides that the indication of the currency is not necessary in domestic procurement]~~<sup>10</sup>;

(h) ~~[Unless decided otherwise by the procuring entity in domestic procurement,] the~~ ~~The~~ language or languages in which the pre-qualification documents ~~are available and in which~~, subsequent to pre-qualification, the

<sup>6</sup> The accompanying Guide text to these and similar provisions throughout the Model Law will note that reference to the official gazette shall be interpreted according to the principle of the functional equivalence between paper- and non-paper means and media of information and thus may encompass any non-paper official gazette used in an enacting State or group of States, such as in the European Union. The Guide will cross-refer in this respect to the relevant discussion that will accompany article 5 on publication of legal texts.

<sup>7</sup> This opening phrase corresponds to the relevant cross-reference in article 23 of the 1994 Model Law that was deleted in the draft revised Model Law.

<sup>8</sup> This provision was revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 72).

<sup>9</sup> The accompanying Guide text to this and similar provision throughout the Model Law will make it clear that development costs (including consultancy fees and advertising costs) are not to be recovered through this provision and that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate) (A/CN.9/687, para. 134).

<sup>10</sup> The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

solicitation documents ~~will be~~ available [unless the procuring entity decides that this information is not necessary in domestic procurement]<sup>11</sup>;

(i) The manner, ~~[modalities]~~ place<sup>12</sup> and deadline for ~~the submission of presenting~~ applications to pre-qualify. ~~The deadline for the submission of applications to prequalify shall be expressed as a specific date, and time and allow sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity, if already known, the manner, place and deadline for presenting submissions, in conformity with article [13 bis] of this Law.~~

(4) The procuring entity shall provide a set of pre-qualification documents to each supplier or contractor that requests them in accordance with the invitation to pre-qualify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the pre-qualification documents shall reflect only the cost of providing them to suppliers or contractors.<sup>13</sup>

(5) The pre-qualification documents shall include, ~~at a minimum~~ the following information:

(a) Instructions for preparing and ~~submitting~~ presenting pre-qualification applications;

(b) Any documentary evidence or other information that must be ~~submitted~~ presented by suppliers or contractors to demonstrate their qualifications;

(c) 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 pre-qualification proceedings, without the intervention of an intermediary;

(d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the pre-qualification proceedings and the place<sup>14</sup> where these laws and regulations may be found;

(e) ~~If already known, the manner, [modalities] and deadline for presenting submissions~~;

~~(f) 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 applications to pre-qualify and to the pre-qualification proceedings.~~

(6) The procuring entity shall respond to any request by a supplier or contractor for clarification of the pre-qualification documents that is received by the procuring entity within a reasonable time prior to the deadline for ~~the presentation~~

11 Id. The Working Group may in addition wish to consider that indication of the language or languages may be important even in the domestic procurement in some multilingual countries.

12 This provision was revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 72).

13 See supra, footnote 9.

14 Reference to the place was added by the Secretariat in this and similar provision throughout the Model Law further to the suggestions made by experts. The accompanying Guide text will explain that the place refers not to the physical location but rather to an official publication, portal, etc. where authoritative texts of laws and regulations of the enacting State are made available to the public and systematically maintained.

~~of presenting~~ applications to pre-qualify. The ~~response by the~~ procuring entity shall ~~be given respond~~ within a reasonable time so as to enable the supplier or contractor to make a timely presentation of its application to pre-qualify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity has provided the pre-qualification documents.

(7) The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set ~~forth out~~ in the invitation to pre-qualify and in the pre-qualification documents.

(8) Only suppliers or contractors that have been pre-qualified are entitled to participate further in the procurement proceedings.

(9) The procuring entity shall promptly notify each supplier or contractor presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any member of the general public, upon request, the names of all suppliers or contractors that have been pre-qualified, ~~[unless the procuring entity decides to withhold this information in order to protect classified information in procurement involving classified information].~~<sup>15</sup>

(10) The procuring entity shall ~~upon request~~ promptly communicate to ~~suppliers or contractors that have~~ each supplier or contractor that has not been pre-qualified the reasons therefore.<sup>16</sup>

### **~~{~~Article 17. Cancellation of the procurement~~}~~<sup>17</sup>**

(1) The procuring entity may cancel the procurement at any time ~~[prior to the acceptance of the successful submission-].~~<sup>18</sup> The procuring entity shall not open any tenders or proposals after taking a decision to cancel the procurement.

(2) The decision of the procuring entity to cancel the procurement and reasons for the decision shall be ~~[~~recorded in the record of the procurement proceedings and ~~upon request]~~<sup>19</sup> promptly communicated to any supplier or contractor that

<sup>15</sup> The paragraph was redrafted pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 73, 91 and 102). The accompanying Guide text will cross-refer to the article on confidentiality that contains exceptions to the public disclosure.

<sup>16</sup> The words "upon request" were deleted in this provision, pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 76).

<sup>17</sup> The article was revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 78-80). The accompanying Guide text will explain that the purpose of the article is to draw the right balance between the discretion of the procuring entity to cancel the procurement at any stage of the procurement process covered by the Model Law [prior to the acceptance of the successful submission] and the need to accord appropriate protection to the market against irresponsible acts by the procuring entities, such as the abuse of discretion to cancel procurements to investigate market conditions (A/CN.9/687, para. 81). It will also state that, although the article does not address issues of damages and other remedies, it has implications for the review provisions in chapter VIII of the Model Law.

<sup>18</sup> The Working Group may wish to consider the appropriateness of the phrase put in square brackets in the light of the provisions of article 20 (8) that envisage possibility of cancelling the procurement after the acceptance of the successful submission if the supplier or contractor whose submission has been accepted fails to sign any written procurement contract required, or fails to provide any required security for the performance of the contract.

<sup>19</sup> At the Working Group's seventeenth session, the suggestion was made that this type of provisions should be moved from articles

presented a submission. The procuring entity shall in addition promptly publish a notice of the cancellation of the procurement in the same manner, ~~publication and mediaplace~~ in which ~~the~~ solicitation ~~for~~ notice of the procurement ~~concerned~~ was published, and return any tenders or proposals that remain unopened at the time of the decision to the suppliers or contractors that presented them.

(3) ~~The~~ Unless the cancellation of the procurement was a consequence of irresponsible or dilatory conduct on the part of the procuring entity, the procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have presented submissions, ~~[, provided that the circumstances giving rise to the cancellation [were not foreseeable by] [did not arise as a consequence of dilatory or irresponsible conduct on the part of] the procuring entity].~~<sup>20</sup>

### Article 18. Rejection of abnormally low submissions

(1) The procuring entity may reject a submission if the procuring entity has determined that the ~~submitted~~ price in combination with the other constituent elements of ~~a~~ the submission is abnormally low in relation to the subject matter of the procurement ~~abnormally low~~ and raises concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

(a) The procuring entity has requested in writing from the supplier or contractor ~~concerned~~ details of the ~~constituent elements of a~~ submission that give rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;

(b) The procuring entity has taken account of any information provided by the supplier or contractor following this request, and the information included in the submission, but continues, on the basis of all such information, to hold ~~those~~ concerns; and

(c) The procuring entity has recorded the concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a submission in accordance with this article and reasons for the decision shall be [recorded in the record of the procurement proceedings and] promptly communicated to the supplier or contractor concerned.

where they were found and that they should be instead consolidated in the article on documentary records of procurement proceedings. It was also suggested that the Guide to the articles from where these provisions would be moved might cross-refer to the relevant requirement found in the article on documentary records of procurement proceedings (A/CN.9/687, para. 91). The Working Group did not make a decision on this suggestion and may therefore consider it in the context of these and other similar provisions put in square brackets.

<sup>20</sup> The accompanying Guide text will explain that the opening phrase also covers unforeseeable events and that liability will arise in exceptional circumstances. It will also explain that the procuring entity may face liability for cancelling the procurement under other branches of law and that, although suppliers or contractors present their submissions at their own risk, and bear the related expenses, cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened.

**Article 19. ~~Rejection~~Exclusion of a ~~submissions~~supplier or contractor from the procurement proceedings on the grounds of inducements from ~~supplier~~the supplier or contractors, an unfair competitive advantage or conflicts of interest<sup>21</sup>**

(1) A procuring entity shall ~~reject~~exclude a ~~submissions~~supplier or contractor from the procurement proceedings if:

(a) The supplier or contractor ~~that presented it~~ offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, ~~so as an inducement with respect to~~ influence<sup>22</sup> an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings;

(b) The supplier or contractor has an unfair competitive advantage ~~in violation of the applicable standards;~~

~~—(c) The supplier or contractor has a conflict of interest in violation of the applicable standards.~~<sup>23</sup>

(2) The ~~rejection of the submission~~exclusion of a supplier or contractor from the procurement proceedings under this article and the reasons therefore shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

**Article 20. Acceptance of the successful submission and entry into force of the procurement contract**

(1) ~~Unless rejected in accordance with the provisions of this Law, the~~ The procuring entity shall accept the successful submission unless the procurement is cancelled in accordance with article [17] or the supplier or contractor presenting the successful submission is disqualified in accordance with article [9] of this Law.

21 The accompanying Guide text will explain that the provisions of the article are subject to other branches of law of an enacting State where the issues of anti-corruption are regulated and are also without prejudice to any other sanctions, such as debarment, that may be applied to the supplier or contractor. The Guide in this context will cross-refer to article 3 of the Model Law. While emphasizing the need to cross-refer to other branches of law in order to avoid unnecessary confusion, inconsistencies and wrong perceptions about anti-corruption policies of an enacting State, the Guide will caution that such cross-referencing should not inadvertently convey the erroneous meaning that a criminal conviction would be a pre-requisite for exclusion of the supplier or contractor under this article (A/CN.9/687, para. 85). The Guide will also address: (i) applicable standards (e.g. consultants involved in drafting the solicitation documents should be prohibited from participating in the procurement proceedings where those documents are used); (ii) difficulties with establishing the fact of corruption as opposed to a bribe as the former might consist of a chain of actions over time rather than a single action; (iii) that combining provisions on conflicts of interest (which refers to a situation) and corruption (which is a wrongdoing) may lead to confusion, and should be avoided; and (iv) how the situation of a subsidiary would be treated (A/CN.9/687, para. 90).

22 Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 87).

23 The accompanying Guide text will explain the reference to standards and stress that those standards evolve over time. The Guide will also address issues of unjustified rejection and the need for the establishment of a process including a dialogue between the procuring entity and an affected supplier or contractor to discuss potential conflicts of interest, drawing on the provisions of article 18 regulating procedures for investigating abnormally low submissions.

(2) The procuring entity shall promptly notify ~~all suppliers~~each supplier or contractor~~s~~ whose ~~submissions were~~ [submission was examined] of its ~~intended~~anticipated decision to accept the successful submission. The notice shall ~~be sent individually and simultaneously to each such supplier or contractor and shall~~ contain, at a minimum, the following information:

(a) The name and address of the supplier or contractor presenting the successful submission;

(b) The contract price or, where ~~necessary, the successful submission was ascertained on the basis of price and other criteria, the contract price and~~ a summary of other characteristics and relative advantages of the successful submission; ~~provided that the procuring entity shall not disclose any information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition or would compromise essential national security or essential national defence;~~<sup>24</sup> and

(c) The duration of the standstill period, ~~as set out in the solicitation documents,~~ [which shall be at least (...] (a specific number of days is to be determined by an enacting State~~)),] [reasonable in the circumstances of the given procurement],<sup>25</sup> and shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors whose submissions were examined.~~

~~[(3) Paragraph (2) of this article shall not apply to awards where of procurement contracts:~~

~~(a) Under framework agreements not involving the second stage competition;~~<sup>26</sup>

~~(b) Where the contract price is less than [...][...];~~<sup>27</sup> or ~~where~~

~~(c) Where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period;~~<sup>28</sup> The decision of the procuring entity that such urgent considerations exist and the

<sup>24</sup> The accompanying Guide text will cross-refer to the discussion in the Guide on debriefing of unsuccessful suppliers or contractors. The Guide text on debriefing will explain reasons for addressing the issues of debriefing only in the Guide but not in the Model Law, in particular that debriefing procedures vary significantly not only from jurisdiction to jurisdiction but also from procurement to procurement, and that provisions on debriefing are not easily enforceable (A/CN.9/687, para. 93).

<sup>25</sup> The wording in the second set of square brackets reflects the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 92). The Secretariat suggests considering alternatives in the light of potential challenges that the standstill period as set out in the solicitation documents by the procuring entity is of unreasonable duration. If the first alternative is retained the Guide may explain considerations that should be taken into account in establishing the minimum duration of the standstill period in the Law, including the impact that the duration of the standstill period would have on overall objectives of the revised Model Law as regards transparency, accountability, efficiency and equitable treatment of suppliers or contractors and the impact of a lengthy standstill period on the costs that would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate

<sup>26</sup> A/CN.9/687, para. 96.

<sup>27</sup> The accompanying Guide text will draw the attention of an enacting State to the thresholds found in other provisions of the Model Law referring to low-value procurement, such as those justifying recourse to domestic procurement or to request for quotations proceedings. The threshold in this provision may be aligned with them.

<sup>28</sup> In the light of the similar provisions found in chapter VIII in the context of the suspension of the procurement proceedings (article 65), the Working Group may consider whether the Guide should elaborate on whether the same or different considerations might be involved to justify an exemption under this provision and under article 65.

reasons for the decision [shall be recorded in the record of the procurement proceedings and] shall be conclusive with respect to all levels of review under chapter VIII of this Law except for judicial review.<sup>129</sup>

(4) Upon expiry of the standstill period, or ~~in the absence of an applicable standstill period where there is none~~, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission, unless ~~the review body or a competent court~~ or ... (the enacting State designates the relevant organ) orders otherwise.

(5) Unless a written procurement contract and/or approval by a higher authority is/are required, a procurement contract in accordance with the terms and conditions of the successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in force.

(6) Where the solicitation documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:

(a) The procuring entity ~~(the requesting ministry)~~ and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity ~~(the requesting ministry)~~. Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity ~~(the requesting ministry)~~ nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(7) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of submissions specified in the solicitation documents or the period of effectiveness of the ~~submission~~tender security required under article [15] of this Law.

~~(8)~~ If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract required, or fails to provide any required security for the performance of the contract, the procuring entity may cancel the procurement ~~under article 17 (1)~~ or may decide to award the procurement contract to the next submission still in force which the procuring entity ascertains to be successful in accordance with the criteria and procedures set out in this Law and in the solicitation documents. In the ~~latter case~~ of the award of the procurement

contract to the next successful submission, the provisions of this article shall apply mutatis mutandis to such submission.

(9) The notices under this article are dispatched when they are promptly and properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by any reliable means specified in accordance with article [7] of this Law.

(10) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given promptly to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

~~{(11) The provisions of this article shall apply to the selection of the party or parties to the closed framework agreements in accordance with articles [...] of this Law [as well as to the award of procurement contracts under [open and] closed framework agreements in accordance with articles [...] of this Law].}~~

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## **Article 21. Public notice of awards of procurement contract and framework agreement**

(1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the ~~name of the supplier or contractor to whom the procurement contract was awarded or, in the case of the framework agreement, name(s) of the supplier(s) or contractor(s)~~ withto whom the procurement contract or the framework agreement was ~~concluded~~awarded.

(2) Paragraph (1) is not applicable to:

~~— (a) Awards awards where the contract price value of procurement is less than [...] ~~{(the enacting State includes a minimum amount [or] the amount set out in the procurement regulations);}~~.<sup>30</sup> The procuring entity shall publish a cumulative notice of such awards from time to time but at least once a year.~~

~~— (b) In order to protect classified information in procurement involving classified information, when so decided by the procuring entity.~~

(3) ~~The procuring entity shall publish [quarterly] [periodic] notices of all procurement contracts referred to in paragraph (2) (a) of this article.~~

~~(4) The procurement regulations [may][shall]<sup>31</sup> provide for the manner of publication of the notices required by paragraphs (1) and (3) of this article.~~

<sup>30</sup> The accompanying Guide text may suggest that the enacting State may alternatively decide to refer to the procurement regulations where such amount will be set out.

<sup>31</sup> The Working Group may wish to consider that the provisions should require, not simply suggest as the 1994 text does, that the procurement regulations should set out the manner of publication. The accompanying Guide text may suggest minimum standards for publication of this type of information.

## **{Article 22. Confidentiality**

(1) In its communications with suppliers or contractors or the general public, the procuring entity shall not disclose any information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition<sup>32</sup> or would compromise essential national security or essential national defence, unless disclosure of that information is ordered by the competent court or ... (the enacting State designates the relevant organ) and in such case, subject to the conditions of such an order.

(4)—2) [Other than when providing or publishing information pursuant to] [Without prejudice to] articles [20 (2), 21, 23 and 36] of this Law, the procuring entity shall treat applications to pre-qualify and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors {for to any other person not authorized to have access to this type of information}.<sup>33</sup>

(2)3) Any discussions, [communications,] negotiations and dialogues between the procuring entity and a supplier or contractors pursuant to articles [insert cross-references to articles—the relevant provisions in chapter V] of this Law shall be confidential. Unless required by law or ordered by {the review body or a competent court} or ... (the enacting State designates the relevant organ)<sup>34</sup> or permitted in the solicitation documents, no party to any discussions, communications, negotiations or dialogues shall disclose to any other person any technical, price or other information relating to these discussions, [communications,] negotiations or dialogues without the consent of the other party.<sup>35</sup>

(34) In procurement involving classified information, the procuring entity may impose/decide or may be required to:

- (a) Withhold classified information from public disclosure;
- (b) Impose on suppliers or contractors requirements aimed at protecting the classified information; and may demand
- (c) Demand that suppliers or contractors ensure compliance with such requirements aimed at protecting classified information by their sub-contractors.<sup>36}</sup>

## **{Article 23. Documentary record of procurement proceedings<sup>37</sup>**

<sup>32</sup> The accompanying Guide text will explain that the phrase “to impede fair competition” should be interpreted as encompassing the risks of hampering competition not only in the procurement proceedings in question but also in subsequent procurements (A/CN.9/668, para. 131).

<sup>33</sup> A/64/17, paras. 248, 249. Reference to any other person not authorized to have access to this type of information is proposed to be added further to the results of the Secretariat’s consultations with experts. This addition is in line with similar provisions found in article 34 (8) of the 1994 Model Law (article 37 (8) of the present draft). The Guide would explain the ambit of this reference as referring to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized to have access to information in question under applicable provisions of law of the enacting State.

<sup>34</sup> A/CN.9/687, para. 103.

<sup>35</sup> A/64/17, paras. 250-252.

<sup>36</sup> A/64/17, paras. 248, 253-266.

<sup>37</sup> The entire article was considerably redrafted further to the suggestions made at the Commission’s forty-second session (A/64/17, paras. 267-280) and the Secretariat’s consultations with experts. The title of the article was changed in the light of the new paragraph (5).

(1) The procuring entity shall maintain a record of the procurement proceedings ~~containing, at a minimum, that includes~~<sup>38</sup> the following information:

(a) A brief description of the subject matter of the procurement;

(b) The names and addresses of suppliers or contractors that presented submissions, and the name(s) and address(es) of the supplier(s) or contractor(s) with whom the procurement contract is entered into and the contract price (in the case of ~~the~~ framework agreement procedure, in addition the name(s) and address(es) of the supplier(s) or contractor(s) with whom the framework agreement is concluded);<sup>39</sup>

(c) A statement of the reasons and circumstances relied upon by the procuring entity for the decision as regards means of communication and any requirement of form;

(d) In the ~~case of domestic~~ procurement proceedings in which the procuring entity, in accordance with article [8], limits participation of suppliers or contractors, a statement of the reasons and circumstances relied upon by the procuring entity for ~~recourse to the domestic procurement imposing the limitation;~~

(e) If the procuring entity uses a method of procurement other than open tendering, ~~the~~ statement of the reasons and circumstances relied upon by the procuring entity for the use of such other method;

[(f) In the case of the use of a chapter V procurement method, the statement of the reasons and circumstances relied upon by the procuring entity for the use of the specific procurement method under that chapter;]<sup>40</sup>

(g) In the case of ~~recourse to procurement including~~ an electronic reverse auction, ~~the~~ statement of the reasons and circumstances relied upon by the procuring entity for the use of the auction, ~~as well as~~ information about the date and time of the opening and closing of the auction, and the reasons and circumstances on which the procuring entity relied to justify ~~the any~~ rejection of ~~the~~ bids submitted/presented during the auction;<sup>41</sup>

(h) If the procurement ~~was~~ cancelled<sup>42</sup> [pursuant to article [17] of this Law],<sup>43</sup> a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision to cancel the procurement;

(i) [If, in procurement proceedings involving methods of procurement other than open tendering, those proceedings]<sup>44</sup> [If the procurement proceedings] did not result in a procurement contract, a statement to that effect and of the reasons therefore;

38 A/CN.9/687, para. 104.

39 A/64/17, para. 267 (a).

40 Reproduces article 11 (1) (j) of the 1994 Model Law. To be considered together with chapter V. A/64/17, para. 267 (e).

41 A/64/17, para. 267 (d).

42 A/64/17, para. 267 (c).

43 The cross-reference is to be reconsidered in the light of the footnote to article 17 (1) and article 20 (8) of the present draft.

44 The Working Group may wish to consider whether the 1994 exemption of the open tendering from this requirement should be retained. Under draft article 27 (d), which is based on article 19 (1) (d) of the 1994 Model Law, the failure of open tendering justifies recourse to procurement methods involving negotiations. It should therefore be important to put on the record the reasons of the failure to conclude the procurement contract as a result of the open tendering. In the light of these considerations, the Secretariat therefore proposes the alternative text in the second set of square brackets.

~~— [(j) If request for expression of interest was issued in accordance with articles [cross-references to articles regulating request for proposals proceedings], a summary of each expression of interest received by the procuring entity and the procuring entity's decision as regards each of them;]~~

~~— [(j) If the procurement proceedings resulted in the award of a procurement contract to the next successful submission in accordance with article [20 (8)], a statement to that effect and of the reasons therefor;~~

(k) A summary of any requests for clarification of the pre-qualification documents, if any, or solicitation documents, the responses thereto, as well as a summary of any modification of those documents;

(l) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented applications to pre-qualify, if any, or submissions;

(m) The price, or the basis for determining the price, and a summary of the other principal terms and conditions of each submission and of the procurement contract, where these are known to the procuring entity (in the case of the framework agreement procedure, in addition a summary of the principal terms and conditions of the framework agreement);

(n) A summary of the evaluation [and comparison] of submissions, including the application of any margin of preference pursuant to article [11 (24) (b)];

(o) If any socio-economic factors were considered in the procurement proceedings, information about such factors and the manner in which they were applied;<sup>45</sup>

~~— [(p) The information required in articles [18 and 19] if a submission was rejected pursuant to those provisions; (p) If the submission is rejected pursuant to article [18] or the supplier or contractor is excluded from the procurement proceedings pursuant to article [19], a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;~~

(q) If no standstill period was applied, a statement of the reasons and circumstances relied upon by the procuring entity for non-application of a standstill period in accordance with article [20 (3)];

~~[(r) In the case of review in conjunction with the procurement proceedings under chapter VIII of this Law, a summary of the claim/complaint, review proceedings and decision taken at each level of the review ~~when more than one level of review was involved;~~];~~

~~[(s) In procurement involving classified information, a statement of the reasons and circumstances relied upon by the procuring entity for measures and requirements taken for the protection of the classified information, including any exemptions from the provisions of this Law calling for public disclosure;]~~

(t) [~~other~~Other information required to be included in the record in accordance with the provisions of this Law is to be added (e.g. recourse to direct

<sup>45</sup> Added pursuant to A/64/17, paras. 165 and 267 (b).

solicitation where there is an option between open and direct solicitation (article 11 (1) (k) of the 1994 Model Law)).<sup>46</sup>

(2) ~~Subject to article [36 (3)], the~~ The portion of the record referred to in subparagraphs [(a) to (f)]<sup>47</sup> of paragraph (1) of this article shall, on request, be made available to any person after [the successful submission has been accepted] entry into force of the procurement contract or after procurement proceedings have been terminated without resulting in a procurement contract (in the case of ~~the~~ framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement).

(3) ~~Subject~~ Except when disclosed pursuant to article [36 (3)], the portion of the record referred to in subparagraphs [(g) to (p)]; of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that presented submissions, or applied for pre-qualification, after [the successful submission has been accepted] entry into force of the procurement contract or procurement proceedings have been terminated without resulting in a procurement contract (in the case of the framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement). Disclosure of the portion of the record referred to in subparagraphs [(k) to (n)]; may be ordered at an earlier stage only by ~~[the review body or a competent court]. or ... (the enacting State designates the relevant organ).~~<sup>48</sup>

(4) Except when ordered to do so by ~~[a competent court] [a competent authority] [a competent court or administrative organ referred to in article 63 of this Law] [a competent court and/ or competent authority or administrative agency].~~ ... (the enacting State designates the relevant organ).<sup>49</sup> and subject to the conditions of such an order, the procuring entity shall not disclose:

[(a) Information from the record of the procurement proceedings<sup>50</sup> if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition or would compromise essential national security or essential national defence;] ]<sup>51</sup>

(b) Information relating to the examination, evaluation [and comparison] of submissions, and submission prices, other than the summary referred to in paragraph [(1) (n)] of this article.

46 The Working Group may wish to include further specific provision, such as the decision and reasons for limiting participation in electronic reverse auctions and open framework agreements on the ground of technological constraints. In addition, some other information not listed in the 1994 Model Law may be added. See, in this regard, the issues raised in A/CN.9/WG.I/WP.68/Add.1, section H. The Working Group may also wish to consider including a "catch-all" provision in the end of the list in paragraph (1) that would ensure that all significant decisions in the course of the procurement proceedings and reasons therefor would have to be put on the record, even if no specific record requirement with respect to them exists in the Model Law

47 The scope of information from the record that can be disclosed to public is proposed to be expanded further to the results of the Secretariat's consultations with experts. The cross-reference to article 36 (3) was deleted in this paragraph as not applicable to general public.

48 A/CN.9/687, para. 103.

49 A/CN.9/687, para. 103.

50 A/64/17, para. 275.

51 The Working Group may wish to consider that this provision is unnecessary in the light of the proposed article 22 (1).

(5) The procurement entity shall record, file and preserve all documents relating to the procurement proceedings ~~as specified by the according to~~ procurement regulations ~~and according to or other~~ provisions of ~~other applicable~~ law.<sup>52</sup>

### **Article 23 bis. Code of conduct**

A code of conduct for officers or employees of procuring entities, enacted pursuant to laws of this State and addressing, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements, shall be promptly made accessible to the public and systematically maintained.<sup>53</sup>

<sup>52</sup> The accompanying Guide text will explain that the provisions intend to reflect a requirement in the United Nations Convention against Corruption that States parties must “take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents” (article 9 (3)). The Guide will also explain the need for preservation of documents, and cross refer to any applicable rules on documentary records and archiving. If the enacting State considers that applicable internal rules and guidance should also be stored with the documents for a particular procurement, it could include those items in the regulations.

<sup>53</sup> New provisions suggested to be added by the Secretariat. They are based on the provisions that were initially suggested to be made a part of the article on procurement regulations. At the Working Group’s seventeenth session, concern was expressed however that the location of the provisions on a code of conduct in that article may give the wrong impression that issues pertaining to a code of conduct of procurement officers are always to be regulated in procurement regulations. It was noted that in some jurisdictions those issues were regulated at the level of statutory law. The Working Group entrusted the Secretariat with redrafting the provisions so that different approaches to regulating these issues in various jurisdictions could be appropriately accommodated (A/CN.9/687, paras. 31-32). The accompanying Guide text will cross\_refer to article 5 (1) of this Law that addresses publicity of legal texts.