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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 II (Methods of procurement and methods of solicitation) of the revised Model Law (chapter II comprises articles 24-29 quinquies) and for chapter III (Open tendering) of the revised Model Law, comprising articles 30-38.

The Secretariat's comments are set out in the accompanying footnotes.

* 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 II. METHODS OF PROCUREMENT AND METHODS OF SOLICITATION AND THEIR CONDITIONS FOR USE

Section I. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 24. Methods of procurement

- (1) The procuring entity may conduct procurement by means of:
- (a) Open tendering;
 - (b) Restricted tendering;
 - (c) Request for quotations;
 - (d) Request for proposals without negotiation;
 - (e) Two-stage tendering;
 - (f) Request for proposals with dialogue;
 - (g) Request for proposals with consecutive negotiations;
 - (h) Competitive negotiation;

~~under the conditions of articles 25-27.~~

~~(2) The procuring entity may have recourse to an electronic (i) Electronic reverse auction under the conditions of article 28.~~

~~(3) The procuring entity may have exceptional recourse to single (j) Single-source procurement under the conditions of article 29.~~

~~(4)~~

~~(2) The procuring entity may engage in a framework agreement procedure in accordance with the provisions of chapter VII where it engages in procurement involving open solicitation.~~

Article 25. General rules applicable to the selection of a procurement method

- (1) Except as otherwise provided ~~by for in articles [26 to 29] of~~ this Law, a procuring entity shall conduct procurement by means of open tendering.
- (2) A procuring entity may use a method of procurement other than open tendering only in accordance with articles [26 to 29], and shall select ~~such the~~ other method of procurement ~~as appropriate into accommodate~~ the circumstances of the ~~particular~~ procurement ~~concerned~~, and shall seek to maximize competition to the extent practicable.

~~[(3)—If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under article [23] a statement of the reasons and circumstances upon which it relied to justify the use of that method.]¹~~

Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)

~~(1)—A procuring entity may engage in procurement by means of restricted tendering, request for quotations and request for proposals without negotiation where it is feasible to provide [a detailed description of the subject matter of the procurement], but where the use of open tendering would not be appropriate for the reasons provided in paragraphs (2) to (4) of this article.~~

~~(2)~~ The procuring entity may² engage in procurement by means of restricted tendering in accordance with article [39] when:

(a) The subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.²

~~provided that the procuring entity selects such a method for the purposes of maximizing [economic efficiency] [economy and efficiency] in the procurement concerned.~~

~~(3)~~ A procuring entity may engage in procurement by means of a request for quotations in accordance with article [40] for the procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations.

~~(4)~~ The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article [41] where the procuring entity ~~will~~³ ~~needs to~~³ consider the ~~[commercial]~~ ~~[financial]~~ ~~[price]~~⁴ aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposal.⁵

1 At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

2 Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 113-115).

3 Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 174).

4 Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 119 and 176).

5 The Working Group may wish to consider whether this procurement method should be treated separately as appropriate only for procurement of advisory or consultancy services (A/CN.9/687, para. 128) and whether there should be a separate method for those services

Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, and [request for proposals with consecutive negotiations, and competitive negotiations])⁶

(1) — A procuring entity may engage in procurement by means of two-stage tendering in accordance with article [42], request for proposals with dialogue in accordance with article [43, ~~1~~] or request for proposals with consecutive negotiations⁷ in accordance with article [44] in the following circumstances:⁸

(a) It is not feasible for the procuring entity to formulate a ~~sufficiently comprehensive~~⁹ ~~detailed~~⁹ description of the subject matter of the procurement in accordance with article [11~~10~~] and it engages in the method concerned ~~in order to~~ after an assessment that the discussion, dialogue or negotiation is needed to¹⁰ obtain the most satisfactory solution to its procurement needs;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) In the case of procurement for reasons of essential national defence or essential national security, where the procuring entity determines that the selected method is the most appropriate method of procurement; or

(d) When open tendering was engaged in but no tenders were ~~submitted~~¹¹ presented or the procurement was cancelled by the procuring entity [pursuant to article [17, ~~19~~] or all tenders were rejected under article [37 (3)],¹¹ and when, in the judgement of the procuring entity, engaging in new open tendering proceedings or a procurement method under chapter IV would be unlikely to result in a procurement contract.-

6 The Working Group agreed to address at a later stage whether all the methods envisaged in the article should be retained, and whether some should be reserved for particular types of procurement, such as advisory or consultancy services, when considering the procedures for each procurement method, and in conjunction with the appropriate conditions for use of each method, but confirmed its understanding that in principle all procurement methods were available for all types of procurement (A/CN.9/687, para. 128). It was suggested that the accompanying Guide text would explain that the conditions for use in this article could not entirely address the considerations raised by the selection of the procurement method, and indeed that it might not be appropriate for them to do so. The selection may in practice not be amenable to challenge, and the main issue should be to enable structured decision-making on the part of the procuring entity and to manage the risks that such decisions may entail. The Guide will provide detailed commentary addressing the issues in selecting between the methods listed in articles 26 and 26 and among the methods listed in article 26, from the perspective both of legislators and of procuring entities. In addition, the guidance will address the elements of that choice that could not be addressed in a legislative text and will draw on real-life examples (A/CN.9/687, paras. 121-127).

7 The Working Group may wish to consider whether this procurement method should be treated separately as appropriate only for procurement of advisory or consultancy services (A/CN.9/687, para. 128) and whether there should be a separate method for those services

8 The accompanying Guide text will alert the enacting State that, in the light of the risks involved in the procurement methods involving negotiations, the enacting State may require that recourse to them should be subject to approval by a higher-level authority. In such case, the enacting State may wish to amend paragraph (1) of this article by inserting the following opening phrase "Subject to approval by ... (the enacting State designates an organ to issue the approval)" (A/CN.9/687, para. 193).

9 Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 122).

10 Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 193).

11 Corresponding to cross-references in article 19 (1) (d) of the 1994 Model Law to articles 12, 15 and 34 (3) of that text.

Article 27 bis. Conditions for use of competitive negotiations

A procuring entity may engage in competitive negotiations, in accordance with the provisions of article [45] of this Law, in the following circumstances:

(a) There is an urgent need for the subject matter of the procurement, and engaging in open tendering proceedings or any other methods of procurement because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open tendering or any other method of procurement because of the time involved in using those methods; and

(c) In the case of procurement for reasons of essential national defence or essential national security, where the procuring entity determines that the use of any other method of procurement is not appropriate.¹²

Article 28. Conditions for use of an electronic reverse auction

A procuring entity may engage in procurement by means of an electronic reverse auction, or may use an electronic reverse auction in other methods of as a phase preceding the award of the procurement contract in [other procurement methods, as appropriate, in order to determine the successful submission,] [restricted tendering, two-stage tendering, ...] or a framework agreement procedure with second stage competition,¹³ in accordance with the provisions of chapter VI of this Law, under the following conditions:

(a) Where it is feasible for the procuring entity to formulate a detailed and precise description of the subject matter of the procurement;

(b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; and

¹² The accompanying Guide will explain that the provisions in subparagraphs (a) to (c) are without prejudice to the general principle contained in article 25 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to competitive negotiation, such as restricted tendering or request for quotations, is appropriate, the procuring entity must select such an alternative procurement method that would ensure most competition in the circumstances of the given procurement without jeopardizing other not less important considerations, such as urgency of delivery of the subject matter of the procurement.

¹³ The previous wording that read "in other methods of procurement, as appropriate, in order to determine the successful submission" has been changed to refer to a phase preceding the award of the procurement contract. The previous wording implied that the auction can be used for the award of a framework agreement rather than a procurement contract under the framework agreement with second stage competition. The Secretariat does not think that it would be appropriate to hold an auction for the award of any framework agreement. The suggestion is also made, instead of including an ambiguous statement "in other methods of procurement, as appropriate", to specify in which procurement methods or procedures under the Model Law the auction can be used as a phase. The Working Group may wish to consider these provisions after it finalized the consideration of articles setting out procedures for each procurement method. The Secretariat is of the view that conditions for use, procedures and requirements of most procurement methods are not compatible with those of the auction.

(c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

Article 29. Conditions for use of single-source procurement¹⁴

A procuring entity may engage in single-source procurement in accordance with the provisions of article [46] of this Law in the following exceptional circumstances:

(a) The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;

(b) ~~There~~Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, and engaging in open tendering or any other method of procurement would be impractical because of the time involved in using those methods ~~would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;~~¹⁵

(c) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(d) In the case of procurement for reasons of essential national defence or essential national security ~~or essential national defence purposes,~~¹⁶ where the procuring entity determines that the use of any other method of procurement is not appropriate; or¹⁷

(e) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, where procurement from a particular supplier or contractor is necessary in order to implement a socio-economic policy of this State set out in the procurement regulations, provided that procurement from no other supplier or contractor is capable of promoting that policy.

¹⁴ The Working Group may wish to consider whether this method should also be available for the procurement of subject matters of a very low value established by the procurement regulations.

¹⁵ Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 129 and 131). The accompanying Guide text will explain that this provision is without prejudice to the general principle contained in article 25 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to single-source procurement, such as competitive negotiation, restricted tendering or request for quotations, is appropriate, the procuring entity must select such an alternative procurement method that would ensure most competition in the circumstances of the given procurement without jeopardizing however other not less important considerations, such as urgency of delivery of subject matter of the procurement.

¹⁶ A/64/17, para. 119.

¹⁷ A/CN.9/687, para. 131.

Article 29 bis. Conditions for use of a framework agreement procedure¹⁸

(1) A procuring entity may engage in a framework agreement procedure in accordance with chapter VII where it determines that:

_____ (a) The need for the subject matter of the procurement is expected to arise on a [repeated or indefinite]¹⁹ basis during a given period of time; or

_____ (b) By virtue of the nature of the subject matter of the procurement, the need for it may arise on an urgent basis during a given period of time; or

_____ [(c) Other grounds and circumstances that justify recourse to a framework agreement procedure.]²⁰

[(2) The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify the recourse to a framework agreement procedure and the type of framework agreement selected.]²¹

SECTION II. METHODS OF SOLICITATION AND THEIR CONDITIONS FOR USE

Article 29 ter. Solicitation in open tendering, two-stage tendering and electronic reverse auctions as a stand-alone procurement method

(1) In open tendering, two-stage tendering and electronic reverse auctions as a stand-alone procurement method, a procuring entity shall solicit submissions by publishing the solicitation in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published).

(2) Unless decided otherwise by the procuring entity in the case of a domestic procurement, the solicitation shall also be published in a language customarily used

¹⁸ The article has been moved from chapter VII.

¹⁹ One of the issues deferred by the Working Group was a proposal presented at the fifteenth session to reconsider the inclusion and extent of conditions for use of framework agreements (A/CN.9/668, paras. 227-229). The alternatives in square brackets were provided by participants at the session to the Secretariat, for further consideration by the Working Group, with the comment that the term "indefinite" indicates unknown timing and/or unknown quantities. 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, recommended that the Guide to Enactment should explain that a procuring entity should offer estimates of future quantities in the solicitation documents, in part to guide prospective vendors as to the government's likely requirements. The Guide to Enactment should also explain why the Model Law refers to indefinite quantities, e.g., because it is possible that an item may be ordered only once.

²⁰ At the Working Group's fifteenth session, it was alternatively suggested that an additional open-ended subparagraph (c) could be included, which would allow the procuring entity to have recourse to framework agreement procedures subject to the justification of its decision in the record of the procurement proceedings (A/CN.9/668, para. 228). The informal drafting party, July 2009, recommended that the Guide to Enactment should give examples of what these circumstances might be.

²¹ At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

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.²²

(3) The provisions of this article shall not apply in the case of pre-qualification in accordance with article [16] or in the case of pre-selection in accordance with article [43].

Article 29 quater. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement

(1) In restricted tendering, request for quotations and competitive negotiations, a procuring entity shall solicit submissions directly from a sufficient number of suppliers or contractors to ensure effective competition. In single-source procurement under the circumstances set out in article [29], the procuring entity may solicit a proposal or price quotation from a single supplier or contractor.

(2) In restricted tendering, competitive negotiations and single-source procurement,²³ the procuring entity shall publish a notice of the procurement in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published). The notice shall contain at a minimum 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) A declaration pursuant to article [8]; and

(d) The method of procurement to be used.

(3) The provisions of paragraph (2) shall not apply to procurement involving classified information, where the procuring entity withholds publication in order to protect classified information, or in the case of urgency as referred to in articles [27 bis and 29 (b)]. [The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify an exemption from the requirement of publication of the notice of the procurement under paragraph (2) of this article.]²⁴

22 The Guide will explain that international advertisement is on the increase to promote regional trade and cross-border protests.

23 The Working Group, at its seventeenth session, decided that the requirement of publishing the notice of procurement should not apply to request for quotations proceedings (A/CN.9/687, para. 171). The accompanying Guide text would need to set out reasons for this exemption (A/CN.9/687, para. 171).

24 At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law

Article 29 quinquies. Solicitation in request for proposals proceedings

(1) Article [29 ter] shall apply mutatis mutandis to solicitation of proposals in request for proposals without negotiation, request for proposals with dialogue²⁵ and request for proposals with consecutive negotiations proceedings, except where the direct solicitation is required in those procurement proceedings because:

(a) The subject matter to be procured is available only from a limited number of suppliers or contractors, provided that the procuring entity solicits proposals from all those suppliers or contractors; or

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

(c) The procurement involves classified information, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.²⁶

(2) [The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify recourse to the direct solicitation.]²⁷

(3) The provisions of article [29 quater (2)] shall apply to the direct solicitation in request for proposals proceedings under this article, except where the procurement involves classified information, and the procuring entity withholds publication of the notice of the procurement in order to protect classified information. [The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify an exemption from the requirement of publication of the notice of the procurement.]²⁸

CHAPTER III. OPEN TENDERING

SECTION I. SOLICITATION OF TENDERS

Article 30. Procedures for soliciting tenders

should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

25 The Secretariat's understanding is that although the original intention of the Working Group was to envisage in this procurement method open solicitation in all cases, that intention was superseded by the subsequent consideration in the Working Group of the conditions justifying recourse to the direct solicitation, such as in the procurement involving classified information.

26 Based on provisions of article 37 (3) of the 1994 Model Law and A/64/17, para. 265.

27 At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

28 Id.

~~(1) Subject to article 16, a~~ The procuring entity shall solicit tenders ~~through open solicitation.~~ by issuing an invitation to tender in accordance with the provisions of article [29 ter].

Article 31. Contents of invitation to tender

The invitation to tender shall ~~contain, at a minimum,~~ include²⁹ the following information:

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

(b) ~~The~~ A summary of the principal required terms and conditions of the procurement contract 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 ~~of services where they are~~ to be provided, ~~or the appropriate combination thereof;~~

~~(c) The~~ 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, ~~or appropriate combination thereof;~~

~~(d)~~ The criteria and procedures to be used for ~~evaluating~~ ascertaining the qualifications of suppliers or contractors, and any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, in conformity with article [9-(2)];

~~(e)~~ A declaration pursuant to article [8], ~~as the case may be;~~

~~(f)~~ The means, ~~manner and [modalities]~~ of obtaining the solicitation documents; and the place where they may be obtained;³⁰

~~(g)~~ The price, if any, charged by the procuring entity for the solicitation documents;

~~(h) [Unless decided otherwise by the procuring entity in domestic procurement,] the~~ currency and means of payment for the solicitation documents;

~~(i) [Unless decided otherwise by the procuring entity in domestic procurement,] the~~ (g) If a price is charged for the solicitation documents, the means and currency of payment [unless in a domestic procurement the procuring entity decides that the indication of the currency is not necessary]³¹;

~~(h)~~ The language or languages in which the solicitation documents are available [unless in a domestic procurement the procuring entity decides that this information is not necessary]³²;

~~(j)~~ The manner, ~~[modalities]~~ place and deadline for presenting tenders.

²⁹ A/CN.9/687, para. 133.

³⁰ A/CN.9/687, para. 72.

³¹ 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.

³² 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.

Article 32. Provision of solicitation documents

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

Article 33. Contents of solicitation documents

The solicitation documents shall include, ~~at a minimum,~~³³ the following information:

- (a) Instructions for preparing tenders;
- (b) The criteria and procedures, in conformity with the provisions of article [9], ~~relative to that will be applied in the evaluation~~ascertainment of the qualifications of suppliers or contractors and ~~relative to their any~~ further demonstration of qualifications pursuant to article [37 (6)];₋
- (c) The requirements as to documentary evidence or other information that must be ~~submitted~~presented by suppliers or contractors to demonstrate their qualifications;
- (d) The description of the subject matter of the procurement, in conformity with article [10]; the quantity of ~~the goods to be ordered and/or,~~³⁴ services to be performed; the location where ~~the goods are to be delivered,~~ construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;³⁵
- (e) ~~Information about the criteria and procedure for examination of tenders;~~
- ~~(f)~~ The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties³⁶;
- ~~(g)~~ If alternatives to the characteristics of the subject matter of the procurement, contractual terms and conditions or other requirements set ~~forth~~out in

³³ A/CN.9/687, para. 133.

³⁴ The accompanying Guide text will explain that in some cases this may refer to an estimated quantity, with cross-references to the relevant provisions in the chapter on framework agreements.

³⁵ A/CN.9/687, para. 136.

³⁶ The accompanying Guide text will explain the meaning of the term "contract form" in this provision as distinct from contract form requirements found in subparagraph (x) of this article.

the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated [and compared];

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

(~~h~~) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

~~— (j) [Unless decided otherwise by the procuring entity in domestic procurement,] the~~ (i) The currency or currencies in which the tender price is to be formulated and expressed ~~[unless in a domestic procurement the procuring entity decides that the indication of the currency is not necessary]~~³⁷;

(~~k~~) ~~[Unless decided otherwise by the procuring entity in domestic procurement,] the~~ (j) The language or languages, in conformity with article [13], in which tenders are to be prepared ~~[unless in a domestic procurement the procuring entity decides that this information is not necessary]~~³⁸;

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

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

(~~m~~) The manner, ~~[modalities]~~place and deadline for presenting tenders, in conformity with article [34;13 bis].³⁹

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

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

(~~p~~) The manner, ~~[modalities]~~place, date and time for the opening of tenders, in conformity with article [36;].⁴⁰

(q) Information about the criteria and procedure for the examination of tenders as against the description of the subject matter of the procurement;

37 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.

38 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.

39 A/CN.9/687, para. 139.

40 A/CN.9/687, para. 139.

(r) Information about the criteria and procedure for evaluation of tenders in accordance with article [11];

(s) ~~[Unless decided otherwise by the procuring entity in domestic procurement,] the~~ The currency that will be used for the purpose of evaluating [and comparing] tenders pursuant to article [37 (5)] and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used, [unless in a domestic procurement the procuring entity decides that this information is not necessary]⁴¹;

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings~~],~~ including those applicable to procurement involving classified information~~],~~ and the place⁴² where these laws and regulations may be found;

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) Any commitments to be made by the supplier or contractor outside ~~of the~~ procurement contract, ~~such as commitments relating to [the socio economic factors]~~⁴³;

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

(x) Any formalities that will be required once a successful tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article [20], and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(y) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of tenders and to other aspects of the procurement proceedings.⁴⁴

SECTION II. PRESENTATION OF TENDERS

41 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.

42 Reference to the place was added by the Secretariat further to the suggestions of experts. The accompanying Guide text will explain that the place refers not to the physical location but rather 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.

43 A/CN.9/687, para. 139.

44 In the context of the discussion at the Working Group's seventeenth session of correction of arithmetical errors (draft article 37 (1)), a query was raised as to whether it might be useful to require the solicitation documents to specify the manner in which arithmetical errors would be corrected (A/CN.9/687, para. 151). The Working Group may wish therefore consider whether the article should be amended to provide for such a requirement.

Article 34. Presentation of tenders

~~(1) Without prejudice to paragraphs (2) to (5) of this article, the procuring entity shall fix in the invitation to tender in accordance with article 31 (j) and in the solicitation documents in accordance with article 33 (n) the manner, [modalities] and deadline for presenting tenders. The deadline for presenting tenders shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and present their tenders, taking into account the reasonable needs of the procuring entity. [The old paras. 1 to 4 were deleted in the light of the newly proposed article 13 bis]~~

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

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

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

~~(5) (1) Tenders shall be presented in the manner, at the place and by the deadline specified in the solicitation documents.~~

(2) (a) A tender shall be presented in writing, and signed, and:

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

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

(b) The procuring entity shall provide to the supplier or contractor a receipt showing the date and time when its tender was received;⁴⁵

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

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

⁴⁵ The accompanying Guide text will discuss the nature of the receipt to be provided, and will state that the certification of receipt provided by the procuring entity would be conclusive (A/CN.9/668, para. 173).

Article 35. Period of effectiveness of tenders; modification and withdrawal of tenders

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

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. ~~¶A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the [original] period of effectiveness;~~⁴⁶

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

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

SECTION III. EVALUATION [AND COMPARISON] OF TENDERS

Article 36. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for presenting tenders, ~~or~~⁴⁷ They shall be opened at the deadline specified in any extension of the deadline, place and in accordance with the manner, ~~[modalities]~~⁴⁸ and procedures specified in the solicitation documents.⁴⁸

(2) All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders.⁴⁹

⁴⁶ The accompanying Guide text will explain that in such case the effectiveness of the tender of the supplier or contractor will terminate upon the expiry of the original period of effectiveness specified in the solicitation documents (A/CN.9/687, para. 143).

⁴⁷ The words “or at the deadline specified in any extension of the deadline” were deleted in the light of the definition of solicitation documents as incorporating any amendments thereto: any extension of the deadline originally set out in the solicitation documents will be considered the amendments to the originally issued solicitation documents.

⁴⁸ The accompanying Guide text will explain risks of departing from the requirements of the Model Law that tenders must be opened at the time specified in the solicitation documents as the deadline for presenting tenders, and practical considerations that should be taken into account in implementing that requirement (A/CN.9/687, para. 150).

⁴⁹ The accompanying Guide text will highlight that the place, manner and procedures for the opening of tenders established by the

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have presented tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article [23]-].⁵⁰

Article 37. Examination, evaluation [and comparison] of tenders

(1) (a) The procuring entity may ask a supplier or contractor ~~individually~~ for clarifications of its tender in order to assist in the examination, evaluation [and comparison] of tenders-;

~~(b) The procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that presented the tender.~~⁵¹

~~(c) No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.~~⁵²

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

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity [shall] regard a tender as responsive [only] if it conforms to [all requirements set forth in the solicitation documents in accordance with article 11 of this Law] [the relevant requirements set forth in the solicitation documents] [the description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement [set out in the solicitation documents in accordance with article 11[10] of this Law]];

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

procuring entity should allow for the presence of suppliers or contractors (A/CN.9/668, para. 178). The Guide will also elaborate on “deemed” present or “virtual” presence of suppliers or contractors at the opening of tenders.

50 The accompanying Guide text will explain that any late tenders would be returned unopened, and their (late) submission would be noted in the record.

51 The accompanying Guide text will explain the rules and principles applicable to the correction by the procuring entity of arithmetical errors.

52 The paragraph was redrafted to make the requirement of subparagraph (c) applicable to both subparagraphs (a) and (b). In the 1994 text, this requirement was found only in subparagraph (a), raising questions on the extent of the permissible corrections of arithmetical errors under subparagraph (b). The Secretariat’s understanding is that under both subparagraphs (a) and (b), no change can be made in a matter of substance of the tender.

- (3) The procuring entity shall reject a tender:
- (a) If the supplier or contractor that presented the tender is not qualified;
 - (b) If the supplier or contractor that presented the tender does not ~~correctly~~ accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article~~;~~;
 - (c) If the tender is not responsive;
 - (d) In the circumstances referred to in articles [18 and 19].
- (4) (a) The procuring entity shall evaluate [and compare] the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;
- (b) The successful tender shall be:
- (i) ~~{Where price is the only award criterion},~~ the tender with the lowest tender price, ~~subject to any margin of preference applied pursuant to article [11];~~⁵³ or
 - (ii) ~~{Where there are price and other award criteria},~~ if the procuring entity has so stipulated in the solicitation documents, the [lowest evaluated most advantageous] tender~~;~~⁵⁴ ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with article [11].
- (5) When tender prices are expressed in two or more currencies, for the purpose of evaluating and comparing tenders the tender prices of all tenders shall be converted to the same currency, specified in the solicitation documents according to the rate specified in ~~the solicitation~~ those documents, pursuant to article [33 (s)], ~~for the purpose of evaluating and comparing tenders.~~⁵⁵
- (6) Whether or not it has engaged in pre-qualification proceedings pursuant to article [16], the procuring entity may require the supplier or contractor presenting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate ~~again~~ its qualifications again, in accordance with the criteria and procedures conforming to the provisions of article [9]. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.
- (7) If the supplier or contractor ~~submitting~~ presenting the successful tender is requested to demonstrate ~~again~~ its qualifications again in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders still in force, subject to the right of the procuring

53 A/CN.9/687, para. 153.

54 A/CN.9/687, paras. 153 and 155. The Guide will elaborate on evolution of procurement practices since 1994 that justified the replacement of the term the "lowest evaluated tender" used in this context in the 1994 Model Law.

55 A/CN.9/687, para. 157.

entity; to cancel the procurement in accordance with article [17 (1)], ~~to cancel the procurement.~~

(8) Information relating to the examination, clarification, evaluation [and comparison] of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation [or comparison] of tenders or in the decision on which tender should be accepted, except as provided in articles [20, 22 and 23],⁵⁶

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⁵⁶ The Working Group may wish to consider this provision in conjunction with the newly proposed article 22 and article 23 (4) (b), in particular whether all these connected provisions should be consolidated in article 22.

**Article 38. Prohibition of negotiations with suppliers
or contractors**

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

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