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

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

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

### Article 39. Restricted tendering<sup>1</sup>

(1) The procuring entity shall solicit tenders in accordance with the provisions of articles [29 quater] and paragraph (2) of this article.

(2) (a) When the procuring entity engages in restricted tendering on the grounds that the subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors,<sup>2</sup> it shall solicit tenders from all suppliers and contractors from whom the subject matter of the procurement is available; ~~—~~

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

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

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

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

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

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

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

<sup>1</sup> The article was revised pursuant to the deliberations at the Working Group's seventeenth session and in the light of the newly proposed section II of chapter II (A/CN.9/687, paras. 159-169). In particular, provisions on a pre-selection procedure have been deleted.

<sup>2</sup> The accompanying Guide text will provide examples of the exceptional cases in which these grounds will apply (A/CN.9/687, paras. 159-160).

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

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

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

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

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

~~(6) The provisions of chapter III of this Law shall apply to the subsequent stages of restricted tendering proceedings, except to the extent that those provisions are derogated from in this article.~~

### **Article 40. Request for quotations<sup>3</sup>**

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the subject matters of the procurement themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

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

(3) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity as set out in the request for quotations.<sup>4</sup>

<sup>4</sup> A/CN.9/687, para. 170.

## Article 41. Request for proposals without negotiation

~~(1) Except in the cases of direct solicitation under article [29 quinquies], the procuring entity shall issue an invitation to participate in the procurement proceedings in accordance with article [29 ter].(1) Subject to article 16, the procuring entity shall solicit proposals through open solicitation unless it decides that direct solicitation is necessary because:~~

~~(2) The invitation shall include:~~

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

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

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

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

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

~~\_\_\_\_\_ (a) A description of the subject matter of the procurement, including the quality, technical, quality and other characteristics~~parameters~~ to which the proposal must conform and the desired or required time and location ~~for where~~ the provision of such subject matter; ~~of the procurement is to be provided;~~~~

~~\_\_\_\_\_ (c) 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 parties;~~

~~\_\_\_\_\_ (d) A declaration pursuant to article [8];~~

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

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

~~\_\_\_\_\_ (ge) The means of obtaining the request for proposal~~terms~~ and the place where they may be obtained;~~

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

~~(i) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals, [unless in a domestic conditions of the procurement the procuring entity decides that an indication of the currency is not necessary]<sup>5</sup>contract;~~

~~(j) The language or languages in which the requests for proposals are available [unless in domestic procurement the procuring entity decides that this information is not necessary]<sup>6</sup>;~~

~~(k) The manner, place and deadline for presenting proposals.~~

~~(3) The procuring entity shall issue the request for proposals:~~

~~(a) Where the invitation to participate in the procurement proceedings has been issued, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;~~

~~(b) In the case of direct solicitation, to the~~ ~~(d) Instructions~~ ~~to suppliers or contractors~~ selected by the procuring entity.<sup>7</sup>

~~(4) The request for proposals shall include, in addition to the information referred to in paragraphs (2)(a) to (f) and (k) of this article, the following information:~~

~~(a) Instructions for preparing and presenting proposals, including instructions to suppliers or contractors to present~~~~submit~~ simultaneously to the procuring entity proposals in two envelopes: one envelope containing the quality and technical and quality characteristics~~aspects~~ of the proposal and the other envelope containing the ~~[commercial][financial][price]~~ aspects of the proposal;<sup>7</sup>

~~(b) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used,<sup>8</sup> [unless in a domestic procurement the procuring entity decides that this information is not necessary];<sup>9</sup>~~

~~(c) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;<sup>10</sup>~~

<sup>5</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.

<sup>6</sup> 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.

<sup>7</sup> It is the Secretariat's understanding that provisions on pre-selection of article 43 would not be applicable to this procurement method.

<sup>8</sup> Based on article 38 (j) and (n) of the 1994 Model Law.

<sup>9</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.

<sup>10</sup> Based on article 38 (k) of the 1994 Model Law.

(d) The means by which suppliers or contractors may seek clarifications of the request for proposals;<sup>11</sup>

(e) 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 place<sup>12</sup> where these laws and regulations may be found;<sup>13</sup>

(f) 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;<sup>14</sup>

(g) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of a standstill period and, if none will apply, a statement to that effect and reasons therefor;<sup>15</sup>

(h) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;<sup>16</sup>

(i) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of proposals and to the procurement proceedings.<sup>17</sup>

~~(5(3))~~ Before opening the envelopes containing the ~~commercial~~~~financial~~~~price~~ aspects of the proposals, the procuring entity shall examine and evaluate the quality and technical and quality characteristics aspects of proposals in accordance with the criteria and procedures specified in the request for proposals.

~~(64)~~ The results of the examination and evaluation of the ~~quality and technical and quality characteristics~~ aspects of the proposals shall be immediately recorded in the record of the procurement proceedings.

~~(75)~~ The proposals whose ~~quality and technical and quality characteristics~~ aspects fail to meet the relevant minimum requirements shall be considered to be non-responsive and shall be rejected on that ground. The notice of rejection ~~and reasons~~

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

12 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.

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

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

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

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

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

for rejection],<sup>18</sup> together with an unopened envelope containing the ~~{commercial}{financial aspects}{price}~~ aspect of the proposal, shall be promptly ~~dispatched~~~~communicated individually and simultaneously~~ to each respective supplier or contractor whose proposal was rejected.

(86) The proposals whose ~~quality and~~ technical ~~and quality characteristics meet or exceed aspects met or exceeded~~ the relevant minimum requirements shall be considered to be responsive. The procuring entity shall promptly ~~communicate to each supplier or contractor presenting such a proposal and simultaneously communicate to the suppliers or contractors submitting such proposals~~ the score of the ~~quality and~~ technical ~~and quality characteristics of its aspects of their~~ respective proposals ~~as recorded in the record of procurement proceedings pursuant to paragraph (4) of this article~~. The procuring entity shall invite ~~all such these~~ suppliers or contractors to the opening of the envelopes containing the ~~{commercial}{financial}{price}~~ aspects of their proposals.

(97) The score of the ~~quality and~~ technical ~~and quality characteristics~~ aspects of each responsive proposal and the corresponding ~~{commercial}{financial}{price}~~ aspect of ~~that~~the proposal shall be read out in the presence of the suppliers or contractors invited in accordance with paragraph (86) of this article to the opening of the envelopes containing the ~~{commercial}{financial}{price}~~ aspects of the proposals.

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

- ~~— (a) The proposal with the lowest price; or~~
- ~~— (b) The proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price.<sup>19</sup>~~

<sup>18</sup> A/CN.9/687, para. 178.

<sup>19</sup> A/CN.9/687, paras. 179-181. The article is designed for the award of the contract on the basis of the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price. The accompanying Guide text will explain that the procuring entity can award on the basis of the lowest price alone if it sets out sufficiently high the relevant threshold for the minimum quality and technical characteristics of the proposals. In such case, the procuring entity, before opening the envelopes containing the financial aspects of the proposals, would examine the technical and quality characteristics of proposals and reject non-responsive ones. No evaluation of quality and technical characteristics of responsive proposals would take place and thus no scores or ratings would be assigned since scores or ratings would not be relevant where the award is made to the responsive proposal with the lowest price.