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## **Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services— drafting materials for the use of electronic reverse auctions in public procurement**

**Note by the Secretariat**

### Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction .....	1-3	3
II. General remarks .....	4-8	3
III. Draft provisions to enable the use of electronic reverse auctions under the Model Law and to establish conditions for their use .....	9-17	4
A. General remarks .....	9-10	4
B. Proposed new text for the Model Law: new article 19 bis. ....		5
C. Commentary and further issues for consideration by the Working Group and eventual inclusion in the Guide to Enactment regarding article 19 bis .....	11-16	5
D. Proposed text for the Guide to Enactment regarding article 19 bis. ....	17	7
IV. Draft provisions addressing the conduct of electronic reverse auctions under the Model Law—proposed new article 47 bis and ter .....	18-35	8
A. Pre-auction period. ....	19-25	8
1. General remarks .....	19-20	8
2. Proposed new text for the Model Law: new article 47 bis .....		8



3.	Commentary and further issues for consideration by the Working Group and possible inclusion in the Guide to Enactment . . . . .	21-25	10
4.	Proposed additional text for the Guide to Enactment regarding new article 47 bis . . . . .		11
B.	The holding of the auction . . . . .	26-35	12
1.	General remarks . . . . .	26-27	12
2.	Proposed new text for the Model Law: article 47 ter. . . . .		13
3.	Commentary and further issues for consideration by the Working Group and eventual inclusion in the Guide to Enactment . . . . .	28-35	14
4.	Proposed additional text for the Guide to Enactment regarding new article 47 ter . . . . .		16

## I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”)<sup>1</sup> is set out in paragraphs 5 to 33 of document A/CN.9/WG.I/WP.37, submitted to the Working Group for its consideration at the current session.
2. At its seventh session (New York, 4-8 April 2005), the Working Group addressed the following topics: electronic publication and communication of procurement-related information, other aspects arising from the use of electronic means of communication in the procurement process (such as controls over their use), electronic reverse auctions, and abnormally low tenders (see, further, document A/CN.9/575). The Working Group requested the Secretariat to prepare drafting materials for consideration on these topics at its eighth session (as regards the Working Group’s conclusions regarding electronic reverse auctions in particular, see A/CN.9/575, paras. 60-67).
3. This note will present for the Working Group’s consideration the drafting materials requested for provisions to govern the use of electronic reverse auctions. It draws on, and should be read in conjunction with, the related Note by the Secretariat presented to the Working Group on the topic at its seventh session (A/CN.9/WG.I/WP.35 and Add.1).

## II. General remarks

4. At its seventh session, the Working Group noted that electronic reverse auctions were increasingly used as a method of procurement in those countries where e-commerce had become a norm. The prevailing view of the Working Group at that session was that, taking account of their increasing use and the twin aims of harmonization and promotion of best practice, provisions governing the use of electronic reverse auctions should be included in the text of the Model Law (A/CN.9/575, para. 60). The Working Group also decided at its seventh session to consider the more detailed aspects of electronic reverse auctions, such as conditions for their use and their modalities, at its eighth session (A/CN.9/575, paras. 9 and 67).
5. The Working Group therefore requested the Secretariat to draft general enabling provisions for the Model Law to provide for the use of electronic reverse auctions, and to set out the key principles for their use. The Working Group requested that the related draft text of the Guide to Enactment should address the use of electronic reverse auctions in detail, in particular their advantages and disadvantages, and how to address any risks that they pose.
6. The Working Group has also given the Secretariat the following additional guidance when drafting these materials for its consideration:
  - (a) The enabling provisions should be based on the use of electronic reverse auctions as a procurement method rather than a phase in other procurement methods;

(b) The enabling provisions should address the general conditions for use of electronic reverse auctions, and should not exclude any category of procurement (goods, construction or services) per se;

(c) It should be made clear that the main condition as regards the suitability of electronic reverse auctions as a procurement method is whether or not the specifications can be drafted with precision and the criteria to be subject to auction easily and objectively quantified; and

(d) The materials should take account of the approach on the same subject taken by the parties currently revising the plurilateral Government Procurement Agreement of the World Trade Organization (GPA) as regards the use of electronic reverse auctions (A/CN.9/575, paras. 62, 66 and 67).<sup>2</sup>

7. The Secretariat has presented the drafting materials so that the provisions are consistent with those applied by the Model Law to other methods of procurement. Consequently, as tendering is the general procurement method for goods and construction, the provisions enable an electronic reverse auction procedure that follows the pattern of the standard tendering method, adapted to provide for an electronic reverse auction. The conduct of the auction itself would under the draft text below be governed by the principles and objectives of the rules governing tendering. The Secretariat has also identified the articles of the current text of the Model Law that would require consequential amendment so as to enable the use of electronic reverse auctions, and those consequential amendments are set out in chapter V of the addendum to this Note (A/CN.9/WG.I/WP.40/Add.1).

8. As electronic reverse auctions may also be appropriate in the circumstances in which the Model Law allows use of restricted tendering under article 20 (in cases in which the time and costs of a tendering procedure would be disproportionate, or in cases of a limited number of suppliers because of highly complex or specialized goods), the materials also include an option to provide for an equivalent to a restricted tendering procedure (see, further, para. 24 below).

### **III. Draft provisions to enable the use of electronic reverse auctions under the Model Law and to establish conditions for their use**

#### **A. General remarks**

9. Proposed article 19 bis for the Model Law offers options for the Working Group to consider as to the conditions for use of electronic reverse auctions, and operates as the general enabling provision requested. As to its location, the Working Group may consider that the draft article should be presented as part of chapter II ("Methods of procurement and their conditions for use") and, as a form of tendering, after the current article 19 ("Conditions for use of two-stage tendering, requests for proposals or competitive negotiation").

10. Commentary on the proposed text for the Model Law, and outstanding issues for the Working Group to address follow the draft itself. Suggestions for the Guide to Enactment text, which explains the features of the draft article appear thereafter. Amendments and additions to the drafting suggestions, notably to the Guide to

Enactment text, will therefore be required to reflect the Working Group's conclusions as to the outstanding issues. This format will be followed for each of the draft articles presented in this Note.

## **B. Proposed new text for the Model Law: new article 19 bis**

### *Article 19 bis. Conditions for use of electronic reverse auctions*

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of an electronic reverse auction in accordance with article 47 bis and ter,\* in the following circumstances:

(a) Where it is feasible for the procuring entity to formulate detailed [, and] precise [and accurate] specifications for the goods [construction or services] such that homogeneity in the procurement can be achieved [;

(b) Where there is a competitive market of at least [ten] suppliers or contractors [that are anticipated to be qualified to participate in the electronic reverse auction]; and]

[(c) The goods [, construction or services] to be procured are [standardized] [standard products] [commodities], [[such that] [and] the price [and other quantifiable criteria expressed in figures or percentages] thereof [is] [are] the only [criterion] [criteria] to be used in determining the successful bid] [[such that] [and] all criteria that are to be submitted and evaluated in the auction can be evaluated automatically].

## **C. Commentary and further issues for consideration by the Working Group and eventual inclusion in the Guide to Enactment regarding article 19 bis**

11. There are no definitions of the terms “electronic”, “reverse”, and “auction” provided for in the draft articles of the Model Law. The Working Group is to consider at its eighth session whether or not to include a definition of the term “electronic” in the context of the use of electronic communications in the procurement process (see, section III.D of A/CN.9/WG.I/WP.38/Add.1). The Working Group may wish to consider whether any definition of an “electronic reverse auction” in the text of the Model Law is necessary, or whether the definition proposed in the Guide to Enactment text will be sufficient.

12. The description of an electronic reverse auction assumes that all participants will use electronic means of communication in the auction itself (see para. 23 of A/CN.9/WG.I/WP.38, the drafting suggestions following which allow the compulsory use of electronic means of communication). It is possible for entities to facilitate the participation of suppliers that do not have Internet access by setting up a proxy (possibly in the offices of the procuring entity) to bid on the supplier's behalf during the auction, based on telephone instructions from the supplier. The draft article does not address this point,<sup>3</sup> and the Guide to Enactment could refer to

\* See chapter IV below for the proposed draft text of that article.

this possibility. The Guide could also address issues arising from the relative novelty of electronic reverse auctions, such as the provision of training and holding simulated auctions.

13. The main issue from the drafting perspective is the extent to which the Model Law should prescribe the conditions for the use of electronic reverse auctions, such as the level of detail and accuracy in the specification of the items to be procured (para. 1 (a) of the draft article), and the degree of competitiveness in the market (para. (1) (b)).

14. Paragraph (1) (c) presents options that would enable the procuring entity to use electronic reverse auctions for the procurement of construction and services as well as goods, sets out the extent to which appropriate goods must be specified in order to use electronic reverse auctions, and presents options for the presentation of only price criteria, or both price and non-price criteria through the auction. Paragraphs 20 to 25 of A/CN.9/WG.I/WP.35 discuss equivalent conditions for use that are in current use under various procurement systems. Most systems limit the use of electronic reverse auctions to items for which precise specification is possible, and exclude most construction procurement, but in other respects, there is some variation in the degree of prescription to be found. The Working Group may wish to consider the extent to which the article should be prescriptive or facilitative, and the level of guidance on these questions that should be included in the Guide to Enactment.

15. Also, as regards paragraph (1) (c), the Working Group may wish to consider the extent to which the conditions for use of electronic reverse auctions should be specified. For example, should auctions be used only for standardized products, for those whose variable criteria can be expressed in figures or percentages, for products whose variable criteria can be expressed in price equivalents, or a combination of these features? An example of a product whose variable criteria can be expressed in price equivalents may arise as follows: the aesthetics of a building or product design can be given a score out of 100 that can be expressed in price terms (for every extra design point the procuring entity would be willing to pay an extra, say, 5,000 euros). Thus, design could be taken into account as an award criterion, by allocating points that have a price equivalent before the auction is held, and these points can then be taken into account automatically in the auction itself.<sup>4</sup> However, the design itself is not itself evaluated during the auction. The Working Group may care to note that the draft text for the conduct of the auction itself, set out in chapter IV below, implicitly requires that all criteria that are to be submitted and evaluated in the auction can be evaluated automatically.

16. A final issue that the Working Group may wish to consider is whether only electronic reverse auctions (as opposed to reverse auctions in their conventional, non-electronic form) are to be provided for in the Model Law (see, further, para. 63 of A/CN.9/575, in which are recorded the strong reservations expressed at the Working Group's seventh session as to whether the use of conventional reverse auctions constitutes the best practice that the Model Law should promote). The draft provisions and commentary above are presented on the basis of providing for electronic reverse auctions alone.

## D. Proposed text for the Guide to Enactment regarding article 19 bis

17. The Working Group may wish to consider the following draft text for the Guide to Enactment, noting that stylistic and other minor changes may be needed to ensure internal consistency in the Guide when finalized.

### *Article 19 bis. Conditions for use of electronic reverse auctions*

(1) An electronic reverse auction (electronic reverse auction) can be defined as an online, real-time dynamic auction between a buying organization and a number of suppliers who compete against each other to win the contract by submitting successively lower-priced or better-ranked bids during a scheduled time period. Such auctions have been increasing in use since the text of the original Model Law was adopted in 1994. It has been observed that electronic reverse auctions have many potential benefits. First, they can improve value for money (in that better value for money can be achieved through a competitive market price, and substantial cost savings can be realized through dynamic and real-time trading). Secondly, they can enhance the efficient allocation of resources (reducing the time required to conduct a procurement, and reducing the administrative costs of the traditional open tendering procedure). Thirdly, they can enhance transparency in the procurement process, in that information on other bids is available and the outcome of the procedure visible to participants, matters that also disfavour abuse and corruption. Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs. However, concerns have been expressed that electronic reverse auctions can encourage an excessive focus on price, and their ease of operation can tend to overuse and use in inappropriate situations.

(2) In order to allow procuring entities in enacting States to take advantage of this new procurement method in an appropriate way, the Model Law has been revised so as expressly to authorize the use of electronic reverse auctions as a procurement method, but subject to the conditions set out in articles 19 bis, and 47 bis and ter. Further guidance on the various aspects of the provisions is set out in the article-by-article commentary below.

(3) *[insert guidance on conditions in paragraph (1)(c)—see paragraphs 13 and 14 above].*

(4) In the light of the matters set out above, enacting States may wish to specify further conditions for the use of electronic reverse auctions in regulations. For example, their use may be restricted to [standardized goods] [standard products] [commodities], [and some simple types of construction and services], such as commodities (fuel, standard information technology equipment, office supplies and primary building products), and items with no or limited impact from post-acquisition costs and without services or added benefits after the initial contract is completed. Although illustrative lists may be used to identify goods [construction and services] that may be procured using electronic reverse auctions, enacting States should be aware that such lists will require periodic updating as new commodities or other appropriate items appear. It has been observed that some construction works and services (e.g. road maintenance) may be appropriately procured through electronic

reverse auctions, but the requirement for detailed [, and] precise [and accurate] specifications will exclude most services and construction from the use of this procurement method.

(5) In order to minimize the risk of collusive practices, including price signalling, and to preserve bidders' anonymity during the electronic reverse auction, enacting States may wish to specify the minimum number of suppliers or contractors in the appropriate market [that are anticipated to participate in the electronic reverse auction]. Article 47 bis\* provides that the electronic reverse auction is to be [suspended/abrogated] should the number of bidders drop below that minimum before the opening of the electronic reverse auction itself.

#### **IV. Draft provisions addressing the conduct of electronic reverse auctions under the Model Law—proposed new article 47 bis and ter**

18. For the ease of the Working Group during its deliberations, the proposed text to provide for the conduct of electronic reverse auctions has been separated into two periods—the pre-auction period and the auction itself, presented as new articles 47 bis and ter respectively—and with suggested Guide to Enactment text and additional commentary thereafter. The Working Group may wish to consider whether the final version of the provision should be combined into a single article, for the ease of use of enacting States.

##### **A. Pre-auction period**

###### **1. General remarks**

19. The Working Group may wish to address the conduct of the electronic reverse auction itself entirely in the Model Law or in draft regulations, or some combination thereof, with appropriate commentary in the Guide to Enactment in each case. The draft below is presented as a draft article for the Model Law, but some of the text could equally take the form of draft regulations. For example, and given their specificity, regulations may be more suitable for the items in paragraph (4) (e) (ii) to (xi) (which are accordingly presented in square brackets).

20. Paragraphs 7 to 21 of A/CN.9/WG.I/WP.35/Add.1 describe equivalent provisions under other existing procurement systems.

###### **2. Proposed new text for the Model Law: new article 47 bis**

*Article 47 bis. Conduct of electronic reverse auctions in the pre-auction period*

(1) The provisions of chapter III of this Law shall apply to procurement by means of electronic reverse auctions except to the extent that those provisions are derogated from in this article.

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\* See chapter IV below for the proposed draft text of that article.



[(2) In any procurement by means of an electronic reverse auction, the procuring entity [shall] [may] engage in prequalification proceedings in accordance with article 7].

(3) Suppliers or contractors shall, prior to the auction, submit initial tenders that are complete in all respects, except that the tenders need not include the features that are to be presented through the auction. [The procuring entity may, however, require that tenders include such features.]

(4) (a) The procuring entity shall carry out an initial evaluation of tenders to determine responsiveness in accordance with article 34, and to assess all features of tenders that are not to be presented in the auction in accordance with the award criteria set and with the weighting fixed for them. [The procuring entity shall rank the tenders on the basis of the features of tenders that are not to be presented in the auction in accordance with the award criteria.]

(4) (b) Following the evaluation referred to in paragraph (4) (a), the procuring entity [shall send an invitation to participate in the auction to all suppliers or contractors except for those whose tenders have been rejected under paragraph (4) (a)] [may send an invitation to participate in the auction to the tenders that have received the highest ranking in accordance with the preceding paragraph, subject to the provisions of paragraph (e) below].

(4) (c) The invitation to participate shall set out the manner and deadline by which suppliers and contractors shall register to participate in the auction.

(4) (d) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction is sufficient to ensure effective competition. If the number of suppliers or contractors [qualified to participate in/admitted to/that have registered to participate in] the auction [falls below [number]] [is in the opinion of the procuring entity insufficient to ensure effective competition], the procuring entity shall [withdraw the electronic reverse auction].

(4) (e) Unless already provided to suppliers or contractors, the invitation to participate in the electronic reverse auction shall include [the following information] [the items set out in article 27 (n) bis,\* and]:

(i) If features of tenders other than price have been used in the initial evaluation, the results of the initial evaluation of the invitee's own tender;

[(ii) The date and time of the opening of the electronic reverse auction;

(iii) The website address at which the electronic reverse auction will be held, and at which the auction rules, the tender and other relevant documents will be accessible;

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\* For the text of article 27 (n) bis (contents of the solicitation documents), see chapter V of A/CN.9/WG.I/WP.40/Add.1.

- (iv) The requirements for registration and identification of bidders at the opening of the auction;
- (v) The features of the tender that are to be presented at the auction;
- (vi) If the award is to be based on the lowest evaluated tender, the formula to be used to quantify the non-price features to be presented [any such feature is to be quantifiable and capable of expression as a figure or percentage]. The formula shall incorporate the weighting of all the criteria established to determine the lowest evaluated tender;
- (vii) The information that will be made available to bidders in the course of the auction and, where appropriate, how and when it will be made available;
- (viii) All relevant information concerning the auction process itself, including any identification data for the procurement, technical requirements as to information technology equipment to be utilized, whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage);
- (ix) The conditions under which the bidders will be able to bid and, in particular, any minimum differences in price or other features that will [be required when bidding] [must be improved in any individual new submission during the auction] [and the time which the procuring entity will allow to elapse after receiving the last submission before closing the auction];
- (x) All relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection;
- (xi) The criteria that shall determine the closure of the auction;] and
- (xii) All [other] information necessary to enable the supplier or contractor to participate in the auction. [The procurement regulations may prescribe the information that is to be so provided.]

(5) ] The procuring entity shall allow a period of time to elapse between the issuance of the invitation to participate in the electronic reverse auction and the opening of the auction sufficient so as to ensure sufficient participation in the auction. The procurement regulations may set out a minimum time period for this purpose.

### **3. Commentary and further issues for consideration by the Working Group and possible inclusion in the Guide to Enactment**

21. Paragraph 2 of the draft article addresses the qualification of potential bidders. The aim of prequalification proceedings is to ascertain that applicants meet the minimum requirements for performance of the contract, such that the successful supplier or contractor is known at the closure of the auction. A pre-qualification phase also enables the number of participants to be invited to the electronic reverse auction to be assessed. If a smaller number than anticipated is received, and if no effective competition can be expected, a procuring entity may be required to withdraw the auction under paragraph 4 (d).

22. In electronic reverse auctions conducted under the Brazilian system, there is no qualification phase until after the closure of the auction, so as to save the time and costs involved in a pre-auction qualification phase that could involve the qualifications of many suppliers being assessed.<sup>5</sup> The Working Group may wish to consider the costs and benefits of pre- and post-auction qualification, and whether the procuring entity should be given the option of selecting when to conduct the qualification phase, prior to instructing the Secretariat as to how to provide for qualification in the context of electronic reverse auctions.

23. Paragraph 4 (a) of the draft article presents as an option that the procuring entity is to rank the tenders on the basis of the features of tenders that are not to be presented in the auction in accordance with the award criteria. This option is appropriate if Model 2 electronic reverse auctions as described in paragraph 33 of A/CN.9/WG.I/WP.35 are to be permitted (rather than just Model 1 auctions, in which all aspects of tenders that are to be evaluated in selecting the winning bidder are presented through the electronic reverse auction, and no ranking is required). The Working Group may therefore wish to consider whether both Models 1 and 2 should be provided for in the Model Law, or only Model 1.

24. Paragraphs 4 (a) and 4 (d) of the draft article also address the question of the number of potential bidders to be invited to participate in the auction. The issue for consideration is the additional time and costs burden of running larger auctions as against their more rigorous competitive effect. The Working Group may wish to consider whether open tendering should be required, whether limiting the number of participants in the auction should always be permissible, or whether the procuring entity should be entitled to adopt either approach, for example, taking into consideration the conditions for use of restricted tendering set out in article 20 of the text of the current Model Law. Article 20 provides that “the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with article 47, when: (a) the goods, construction or services, by reason of their highly complex or specialized nature, are 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 goods, construction or services to be procured.”

25. As regards paragraph (4) (e), the Working Group may wish to consider whether details of the information necessary to enable the supplier or contractor to decide whether to participate in the auction (items 4 (e) (ii) to (xi)) should be set out expressly in the text of the draft article. Alternatively, the obligation under draft article 47 bis of the Model Law could be to provide all relevant information to the extent that the solicitation documents have not already done so. Details of the information could also or alternatively be included in procurement regulations, with appropriate further commentary in the Guide to Enactment.<sup>6</sup>

#### **4. Proposed additional text for the Guide to Enactment regarding new article 47 bis**

##### *Article 47 bis. Conduct of electronic reverse auctions in the pre-auction period*

(1) The electronic reverse auction is to be conducted as a tendering procedure, and accordingly the provisions of chapter III of the Model Law apply unless they are inconsistent with the nature of an auction procedure.

(2) [insert guidance on qualification of bidders—see paragraph 21 above].

(3) Paragraph 3 considers the contents of initial tenders. Requiring initial tenders to include all features, including those to be presented through the auction, may assist the procuring entity in setting a starting price for the auction. However, procuring entities may find this information unnecessary, and it may become a costly burden for suppliers. Such information may become less important as experience with auctions increases.

(4) Paragraphs 4 (a) and (b) allow for either open tendering principles to be adopted (that is, all qualified suppliers can participate), or limited tendering, such that only those bidders that have the best-ranked bids are invited to participate. *[insert guidance regarding ranking of initial tenders—see paragraph 23 above—and guidance on use of open and restricted tendering—see paragraph 24 above]*.

(5) Paragraph 4 (d) addresses the registration of prospective participants, a procedure that involves assigning an identification code and password to allow the participants to log in to the system to participate in electronic reverse auction, giving security information if necessary.

(6) Paragraph 4 (e) is aimed at ensuring transparency of information for suppliers. Among other things, the provision requires the formula for evaluation of non-price criteria that are to be presented in the auction to be disclosed in the invitation documents. The Model Law does not, in general, require entities to formulate and disclose precise formulae for evaluation, although its rules encourage enacting States to be as objective as possible. However, an auction including non-price criteria requires the procuring entity to develop a precise evaluation formula, which should, in the interests of transparency, be disclosed. In addition, only features of tenders that are quantifiable as price equivalents so as to allow for automatic evaluation during the auction itself may be presented through the auction. Even if the use of auctions is limited to standardized goods and services, non-price considerations (such as running and maintenance costs of vehicles) may be significant.

(7) As regards paragraph 5, enacting States may wish to set a minimum period by regulation, though allowing for longer periods in cases of complicated procurement.

## **B. The holding of the auction**

### **1. General remarks**

26. As for the pre-auction period set out above, the Working Group may wish to address the conduct of the auction itself in the Model Law or in draft regulations, with appropriate commentary in the Guide to Enactment in either case. The draft below is presented as a draft article for the Model Law, but the text could equally take the form of draft regulations.

27. Paragraphs 22 to 37 of A/CN.9/WG.I/WP.35/Add.1 describe equivalent provisions under existing procurement systems.

## 2. Proposed new text for the Model Law: article 47 ter

*Article 47 ter. Conduct of electronic reverse auctions during the auction itself*

(1) During an electronic reverse auction:

(a) There shall be automatic evaluation of all bids;

(b) Procuring entities must [provide] [instantaneously communicate to] all bidders on a continuous basis during the auction [with] sufficient information [to enable each to establish its own current ranking in the auction] [whether it has the top ranking in the auction] [to establish the changes needed to any bid to give it the top ranking in the auction]];

(c) All participating suppliers and contractors shall have an equal and continuous opportunity to revise their tenders in respect of those features presented through the auction process.

(2) The auction shall be closed in accordance with the precise method, dates and times specified in the solicitation documents or in the invitation to participate in the auction, as follows:

(a) When the date and time specified for the close of the auction has passed; or

(b) When a certain period of time, as specified, has elapsed [without a valid new submission that improves on the top-ranked bid] [when the procuring entity receives no more new prices or new values which meet the requirements concerning minimum differences];

(c) The procuring entity [may also at any time announce the number of participants in the auction but] shall not disclose the identity of any bidder [during the auction] [until the auction has closed. Articles 33 (2) and (3) shall not apply to a procedure involving an electronic auction].

(3) The procuring entity may suspend the electronic reverse auction in the case of system or communications failures.

(4) There shall be no communication between the procuring entity and suppliers or contractors during the electronic reverse auction other than as provided for in paragraphs 1 (b) and (c) above.

(5) The successful bid shall be the bid that is first in the ranking as determined by the automatic evaluation mechanism at the time the auction closes.

(6) If the supplier or contractor submitting the successful bid in a procedure involving an electronic auction is requested to demonstrate again its qualifications in accordance with article 34 (6) but fails to do so, if the supplier or contractor fails to sign a written procurement contract when required to do so, and/or fails to provide any required security for the

performance of the contract, the procuring entity may [not] select another bid in accordance with article 34 (7) or article 36 (5) [, but shall reopen the electronic reverse auction, which shall then be conducted in accordance with the provisions of this article/adopt another method of procurement].

(7) Where appropriate, [any reference to a tender in the Model Law] [the reference to a tender in articles [see paragraphs 33 and 34 below] shall be read to include a reference to an initial tender submitted in a procedure involving an electronic reverse auction.\*

### **3. Commentary and further issues for consideration by the Working Group and eventual inclusion in the Guide to Enactment**

28. As regards paragraph 2 (c), the identity of the winner of a contract will generally be made available under article 11 of the Model Law. Information on the other tenders may also be available under article 11, but may be withheld when there is good reason (article 11 (3)). In tendering procedures, articles 33 (2) and (3) also provide for the opening of tenders in the presence of participants, and the provision of information to suppliers on the identity and price of other tenders, to enable suppliers to monitor the application of the rules, but only once the tendering phase is complete. Without further provision, this procedure would apply to the opening of the initial tenders submitted under article 47 bis (3), and auction anonymity would be compromised. As final prices are determined through the auction, prior disclosure of bidders' identities may be unnecessary, and such disclosure also contravenes the principle that the identity of the parties should not be disclosed while the procurement proceedings are not complete. The second alternative given in square brackets in paragraph 2 (c) would therefore disapply articles 33 (2) and (3) in the case of auctions.<sup>7, 8</sup>

29. As regards paragraph 1 (b) of the draft article, the Working Group may wish to review the matters set out in paragraphs 30 to 33 of A/CN.9/WG.I/WP.35/Add.1, prior to giving guidance to the Secretariat as to the extent of the disclosure obligation (for example, whether in addition to a bidder's ranking, information is provided as to the extent to which the bid must be improved to win the contract).

30. As regards paragraph 2 of the draft article, the Working Group may wish to restrict the manner in which extensions to the auction time can be granted. See, further, paragraphs 25 and 26 of A/CN.9/WG.I/WP.35/Add.1. It has been observed that extensions may be appropriate only for high value procurements, as they can be seen as imposing undue pressure on bidders to lower prices and disadvantaging bidders who may have allocated a fixed period of time to attend the electronic reverse auction. On the other hand, it has been observed that bids increase in volume and prices fall most just before an auction closes, and so it may improve value for money should there be a possibility of extension.

31. As regards paragraph 6 of the proposed draft article, the electronic reverse auction normally identifies only the best bid, and not (unless specifically requested) the best bids that other participants could have offered. If the successful bidder fails to enter into a procurement contract, one option is to allow the procuring entity to negotiate with other bidders. However, as it cannot generally be known who would

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\* See paras. 33 and 34 for an explanation of this provision.

have submitted the next best bid had the auction continued (since bidders may withdraw without submitting their best bid, if other bidders bid too low a price and it may not therefore be possible to identify the second-best bidder), negotiations would be required with all other bidders. The solicitation documents or the instructions for the auction could require all suppliers to submit their best possible bid even if it is not the apparently winning bid, so that the next best bidder can be identified. It would then be appropriate to use the Model Law's usual procedure in article 36 for dealing with cases in which the apparent winner does not conclude the contract—that is, awarding the contract to the second best bidder. The solicitation documents in such a case could also set out that the second best bidder would be awarded the contract. The other options presented may be more transparent from some perspectives, but involve additional time and costs. This issue is discussed in paragraphs 39 to 41 of A/CN.9/WG.I/WP.35/Add.1, and the Working Group may wish to consider the various options and how they should be regulated, perhaps in the form of guidance in the Guide to Enactment.

32. Another reason why a procuring entity may not wish to award a contract to the successful bidder is because the price (or other terms) offered in the bid are so favourable to the entity that it considers that the bidder will not be able to fulfil the contract on those terms (see, further, A/CN.9/WG.I/WP.36). The Working Group has decided to address the issue of abnormally low bids separately (see, further, A/CN.9/575, paras. 81 and 82, and A/CN.9/WG.I/WP.40/Add.1, chap. VI).

33. Paragraph 7 of draft article 47 *ter* addresses the articles in the Model Law that refer to a “tender”. In procedures involving an electronic auction, some of these provisions apply to the initial tenders envisaged under paragraph 4 (a) of that draft article (that is, the tenders submitted and evaluated prior to the auction phase). The relevant articles include:

- (e) Article 30 (1) (requirement to fix the place for and a specific date and time as a deadline for submission of tenders);
- (f) Article 30 (2) (requiring entities to extend the tendering deadline when it makes changes to its requirements);
- (g) Article 30 (3) (extension of the deadline for submitting tenders);
- (h) Article 30 (6) (requirement to return late tenders unopened);
- (i) Article 33 (1) (opening of tenders at the deadline);
- (j) Article 34 (1) (a) (possibility for asking for clarifications of tenders);
- (k) Article 34 (1) (b) (rules on correcting errors);
- (l) Article 34 (3) (on tenders that the entity cannot accept); and
- (m) Article 34 (2) on when a tender is responsive.

34. The Working Group may wish to specify the articles concerned as listed above in paragraph 7 of draft article 47 *ter* or to modify the reference to “tender” in the various relevant provisions. This latter approach, although providing clarity, would make the relevant provisions more difficult to read for the majority of cases in which no auction is used. Alternatively, the Working Group may wish to include as

paragraph 7 a simpler provision that the word tender should apply to initial tenders, when appropriate, perhaps listing the articles concerned in the Guide to Enactment.

35. The Working Group may wish the Guide to Enactment to refer enacting States to the possibility of providing specific procedures for the right to review in the conduct of electronic reverse auctions, such as the issue of the invitation, exclusion from participation, the selection of participants for auctions with a limited number of participants, any suspension of the auction, and the closure of the auction and award. The Working Group may also wish to specify that the review periods in such cases are shorter than those for other procurement methods (normally 20 days under article 52), such as periods of 3-7 days, and whether the electronic reverse auction may be reopened in such cases. This issue is discussed in paragraphs 46 and 47 of A/CN.9/WG.I/WP.35/Add.1.

#### **4. Proposed additional text for the Guide to Enactment regarding new article 47 ter**

##### *Article 47 ter. Conduct of electronic reverse auctions during the auction itself*

(1) At the beginning of the auction: (a) the participating bidders access a screen by logging in to the auction address provided in the notice of auction or invitation to the auction, as applicable, using their respective identification and personal password that permits them to participate in the auction; (b) the object of the electronic reverse auction is announced (usually a screen is completed to describe the items to be procured); (c) the auction rules are announced (i.e. start time, duration, minimum bid, the method of termination etc.); and (d) the call for bids is communicated simultaneously to all bidders. The extent of appropriate regulation in a given case may depend on the size and complexity of the procurement.

(2) Enacting States may wish to stipulate whether online bids only are acceptable, or whether bids through a proxy may be presented, if technical reasons or difficulties in connection so dictate, whether each bid cancels the previous one and whether each bid has to be necessarily lower than the value of the last bid registered by the system, whether participants who did not bid at all or did not vary their bids within the fixed increment are subsequently excluded, and whether bidders may disconnect at any time.

(3) The provision of information during electronic reverse auctions as provided for in paragraph 1 (b) may give rise to concerns, in that so doing may encourage price signalling or collusive behaviour. *[insert guidance on the provision of information, whether the lowest current price in particular should be disclosed—see paragraph 29 above]*.

(4) Enacting States may wish to provide guidance as to how auctions may be closed under paragraph 2. The software used for the auction may provide for the closure to be effected electronically or the procuring entity may close the auction, with safeguards in place to avoid the risk of abuse. The requirement for the record of the procurement proceedings to include all decisions taken in the proceedings should include details of how any decision to close the auction was arrived at.\* Events that may trigger closure include:

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\* For a fuller discussion of the requirement of the record of the procurement that is to be



(a) the date and time fixed in advance as communicated to bidders in the invitation; (b) when procuring entities receive no more new prices or new values which meet the requirements concerning minimum differences; (c) when the number of phases fixed in the invitation has been completed, and (d) if there are serious and objective grounds for so doing (in which case, the ground should be publicized on the relevant website immediately). In practice, the greater the value and complexity of the procurement, the longer the normal duration of the electronic reverse auction. It has been observed that electronic reverse auctions rarely close after a fixed duration of time has expired (known as a “hard close time”). More commonly, the closing time of the electronic reverse auction is automatically extended for a specified period of time (e.g. 5 minutes) if a new lowest bid or a bid that changes top bid rankings is received in the last few minutes (e.g. within 2 minutes of the closing time). Such extensions may be continuous for an indefinite period of time (known as “unlimited soft close”) or limited (e.g., maximum of three 5-minute extensions). This process continues until there are no longer any lower bids being submitted within the stated period prior to closing. *[insert further guidance as regards closure of auction—see paragraph 30 above]*.

(5) Paragraph 2 (c) protects the anonymity of the bidders prior to the closure of an electronic reverse auction. *[insert guidance as regards articles 33 (2) and (3)—see paragraph 28 above]*.

(6) As regards paragraph 3, and to guard against abuse, any decision to suspend an auction and the reasons therefor should be included in the record of the procurement proceedings.\* Similarly, paragraph 4 is designed to avoid the risk of abuse if communications between the procuring entity and bidders were enabled.

(7) The term “successful bid” used in paragraph 5 is the same term used in article 34 (4) (b): it denotes the bid selected at the end of the regular procurement process. Enacting States may wish to provide in regulations that the name of the successful bidder is to be posted immediately after closure of the auction at the Internet address fixed in the invitation documents, and to provide for the content of the notice of the winning bid, including the identity and coordinates of the winning bidder, the price of the winning bid.

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maintained under article 11 of the Model Law, and for each decision in the procurement process to be verified and traceable (and automatic data processing or calculations can be reconstituted), see section III.F of A/CN.9/WG.I/WP.38/Add.1.

\* For a fuller discussion of the requirement of the record of the procurement that is to be maintained under article 11 of the Model Law, and for each decision in the procurement process to be verified and traceable, see paragraphs 45 and 46 of A/CN.9/WG.I/WP.38.

*Notes*

- <sup>1</sup> For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum* (A/49/17 and Corr.1), annex I (also published in the *Yearbook of the United Nations Commission on International Trade Law, Volume XXV: 1994* (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procure/ml-procure.htm>).
- <sup>2</sup> The Secretariat has been advised in consultations with the World Trade Organization that there is as yet no decision as to whether electronic reverse auctions will be included in the revised text of the GPA.
- <sup>3</sup> If enacting States' domestic systems allow suppliers to operate through agents, explicit provision may not be needed.
- <sup>4</sup> An auction with such a criterion would be a Model 2 electronic reverse auctions as described in paragraph 33 of A/CN.9/WG.I/WP.35.
- <sup>5</sup> See, further, para. 40 and endnote 68 of A/CN.9/WG.I/WP.35.
- <sup>6</sup> See, also, chap. V of A/CN.9/WG.I/WP.40/Add.1, discussing equivalent information to be provided under article 27 (n) bis (regulating the contents of the solicitation documents).
- <sup>7</sup> A provision disapplying article 33 (2) and (3) could, alternatively, be placed instead in the paragraph dealing with the initial evaluation of tenders, but as its importance relates to the conduct of the electronic reverse auction, the Working Group may consider that it is better located within draft article 47 ter.
- <sup>8</sup> Two-stage tendering, like an auction, involves successive tendering phases, but the Model Law does not give any guidance on how article 33 applies to two-stage tendering. The Working Group may also wish to make an equivalent provision in two-stage tendering.
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