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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**

#### **Addendum**

*[Chapters I through IV are published in document A/CN.9/WG.I/WP.40]*

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## **V. Draft provisions enabling the use of electronic reverse auctions in procurement proceedings conducted under the Model Law**

### **A. Amendments to articles of the 1994 text so as to enable the use of electronic reverse auctions in procurement proceedings**

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

1. The Working Group may wish to consider whether the following changes to the text of the Model Law may be necessary, so as adequately to provide for the use of electronic reverse auctions in procurement proceedings, if the Working Group decides to include a form of proposed draft articles 19 bis and 47 bis and ter in the revised text of the Model Law (for the proposed text and commentary regarding those drafts, see A/CN.9/WG.I/WP.40).

2. The text of the 1994 Model Law is restated below so as to aid the Working Group in its deliberations (in normal font), and proposed additional text is underlined in each case. This format will be followed throughout this Note where additions to the existing articles of the Model Law are proposed.

#### **2. Proposed revision to article 11 of the Model Law, addressing the record of procurement proceedings**

3. The Working Group may wish to include in the list of information to be maintained pursuant to Article 11 (record of procurement proceedings) a reference to the fact that the procurement was conducted by way of electronic reverse auction, as follows:

##### *Article 11. Record of procurement proceedings*

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

...

(i) bis In procurement proceedings involving the use of a procurement method pursuant to article 19 bis, the fact that electronic reverse auction was held.

#### **3. Proposed revision to article 18 of the Model Law, addressing methods of procurement**

4. Article 18 sets out the procurement methods available to procuring entities, and the Working Group may wish to consider whether reference to the article authorizing the use of electronic reverse auction should be made in paragraph (2) of that article, as follows:

##### *Article 18. Methods of procurement*

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.

(2) In the procurement of goods and construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 19, 19 bis 20, 21 or 22.

5. Paragraph (3) of article 18 of the Model Law would allow the use of electronic reverse auctions for the procurement of services, though the Working Group may wish to provide a statement to such effect in the Guide to Enactment on the question.

**4. Proposed revisions to article 25 of the Model Law, to require the invitation to tender and invitation to prequalify to state whether an electronic reverse auction will be held**

6. The Working Group may wish to consider whether the procuring entity should be required to state in the invitation to tender, or the invitation to prequalify as the case may be, that an electronic reverse auction will be held, as a condition of using the electronic reverse auction as a method of procurement. The aim of such a provision is to provide transparency in the proceedings.

*Article 25. Contents of invitation to tender and invitation to prequalify*

(1) The invitation to tender shall contain, at a minimum, the following information:

...

(d) bis Whether the tendering proceedings shall be conducted by way of an electronic reverse auction pursuant to article 47 bis and ter;<sup>a</sup>

...

(j) The place and deadline for the submission of tenders ~~or, if the tendering proceedings are to be conducted by way of an electronic reverse auction pursuant to article 47 bis and ter, the date and time of the opening of the electronic reverse auction.~~

**5. Proposed revisions to article 27 of the Model Law, to require the procuring entity to provide all relevant information in the solicitation documents**

7. The Working Group may wish to consider whether the procuring entity should be required to provide all information that will enable suppliers and contractors to decide whether or not to participate in the auction in the solicitation documents or to give the procuring entity the option of providing the information in the invitation to participate in the electronic reverse auction under proposed draft article 47 bis. As is noted in Chapter IV of document A/CN.9/WG.I/WP.40 as regards the conduct of an auction, the Working Group may wish to address information to be provided as regards an electronic reverse auction 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 sub-paragraphs (n)(i) to (n)(ix) could be presented as draft regulations, such that the obligation under the Model Law is to provide all information necessary to enable the supplier or

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<sup>a</sup> For the text of the proposed article 47 bis and ter, see Chapter IV of document A/CN.9/WG.I/WP.40.

contractor to participate in the auction. The information concerned is the same as that proposed regarding in the invitation to participate in the electronic reverse auction under draft article 47 bis. Details of the relevant information could alternatively be set out in regulations or guidance, as the case may be.

*Article 27. Contents of solicitation documents*

27. The solicitation documents shall include, at a minimum, the following information:

...

(n) bis Where the tendering proceedings are to be conducted by way of an electronic reverse auction pursuant to article 47 bis, a statement to such effect, and:

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

(ii) 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

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

(iv) The features of the tender that are to be presented at the auction;

(v) 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. The formula shall incorporate the weighting of all the criteria established to determine the lowest evaluated tender;

(vi) 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;

(vii) 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);

(viii) 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];

(ix) All relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection;

(x)] 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.]

8. Paragraphs 16 to 18 of A/CN.9/WG.I/WP.35/Add.1 describe equivalent provisions under other existing procurement systems.

**6. Proposed revisions to article 28 of the Model Law, addressing the clarification and modifications of solicitation documents**

9. Article 28(2) allows the procuring entity to modify the documents at any time prior to the deadline for submission of tenders. However, in the context of an electronic reverse auction, although it may be appropriate to allow amendments before initial tenders (required under draft article 47 bis (3)) are submitted, modifications could be prohibited after that point and prior to commencing the auction, given the practical difficulties and costs such modifications would pose to contractors and suppliers.

10. Paragraph 19 of A/CN.9/WG.I/WP.35/Add.1 describes equivalent provisions under other existing procurement systems.

11. If the Working Group considers that the solicitation documents should not be revised after the submission of initial tenders, article 28(2) could be amended to provide as follows:

*Article 28. Clarification and modifications of solicitation documents*

...

(2) At any time prior to the deadline for submission of tenders, or of initial tenders in the case of an electronic reverse auction procedure to be carried out in accordance with article 47 bis, the procuring entity may, for any reason, ...

**7. Proposed revisions to article 31 of the Model Law, addressing the period of effectiveness; modification and withdrawal of tenders, and to article 32 of the Model Law, addressing tender securities**

12. The Working Group may wish to consider amendments to the rules on withdrawing and modifying initial tenders prior to the auction phase. Article 31 of the Model Law states that tenders are effective for the period specified in the contract documents, a provision that is suitable for electronic reverse auctions, since it is for the procuring entity to specify the period of validity. However, article 31(3) then provides that tenders may be withdrawn prior to the deadline for submission. Where an electronic reverse auction is used, the Working Group may consider that it is appropriate to allow entities to withdraw their tenders before the deadline for submitting initial tenders, but not subsequently. Consequential changes to paragraph (3) of article 31, which permits the withdrawal or modification of tender securities prior to the deadline for the submission of tenders without forfeit of tender security could therefore be made, with appropriate commentary in the Guide to Enactment.

*Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders*

...

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the

deadline for the submission of tenders, or of initial tenders in the case of an electronic reverse auction procedure to be carried out in accordance with article 47 bis and 47 ter, without forfeiting its tender security.

13. Consequential changes to article 32(1) (which refers to withdrawal of the tender before the deadline for submission tenders as being one of the permitted purposes of a tender security), and article 32(2)(d) (which provides for the return of a tender security where the tender is withdrawn before the deadline for submission of tenders) also could therefore be made, as follows, with appropriate commentary in the Guide to Enactment.

*Article 32. Tender securities*

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1(f) (i) Withdrawal or modification of the tender after the deadline for submission of tenders, or of initial tenders in the case of an electronic reverse auction procedure to be carried out in accordance with articles 47 bis and 47 ter, or before the deadline if so stipulated in the solicitation documents;

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(2) (d) The withdrawal of the tender prior to the deadline for the submission of tenders, or of initial tenders in the case of an electronic reverse auction procedure to be carried out in accordance with article 47 bis, unless the solicitation documents stipulate that no such withdrawal is permitted.

**8. Proposed revisions to article 34(1) of the Model Law, addressing the examination, evaluation and comparison of tenders**

14. Article 34(1)(a) of the Model Law provides as follows:

*Article 34. Examination, evaluation and comparison of tenders*

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. 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;

15. The last sentence provides, therefore, that no change in a matter of substance shall be sought offered or permitted during the evaluation of tenders. As offers are changed during an electronic reverse auction, this provision is inconsistent with the conduct of an auction. However, the provision is still relevant in respect of other changes to tenders. The Working Group may wish to adapt this provision for auctions, to add the following words to the end of that sentence:

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, except to the extent that elements

of the tender are presented in an electronic reverse auction under article 47 bis and 47 ter.

**9. Proposed revisions to article 34(8) of the Model Law, to permit the disclosure of information during an electronic reverse auction**

16. Article 34(8) provides as follows:

(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 article 11.

17. However, it is in the nature of an auction process that information on other bids is disclosed during the auction phase (although, as noted in draft article 47 ter (2)(c) in Chapter IV of A/CN.9/WG.I/WP.40, not the identity of bidders), and so the rules on auctions should make an exception to this provision for certain information, by adding the words “and article 47 ter (2)(c)” to the end of the article. Paragraphs 30 to 33 of A/CN.9/WG.I/WP.35/Add.1 describe equivalent provisions under other existing procurement systems.

**10. Further issues to be addressed in procurement regulations and the Guide to Enactment**

18. The Working Group may wish to address some issues relating to auctions in more detail in regulations and the guidance to be provided in the Guide to Enactment. For example, and because of the novelty of this method of procurement, it might be useful for the Guide to Enactment to provide some guidance on when to make use of this procedure and how to conduct it within the framework of the law (see, further, the discussion of the conditions for use in Chapter III of A/CN.9/WG.I/WP.40).

19. In the light of the concern expressed by the Working Group that procurement practices could be developed that would be divergent and inconsistent with the principles of the Model Law (A/CN.9/575, paragraph 61), the Working Group may wish to include more detailed guidance on procedural matters than has hitherto been found in the Guide to Enactment—for example, on issues such as the need to train suppliers, holding simulated auctions, possible conflicts of interest arising in the use of centralized or commercial procurement agencies, etc.

20. In addition, guidance may be needed regarding the rules for dealing with technical problems during the auction phase, such as disconnection or equipment failure either by individual suppliers or by the procuring entity. There are various possible solutions: for example, providing a service for suppliers to relay instructions by telephone when individual suppliers experience problems, or extending the auction, or suspending it temporarily (see, for example, the Brazilian system discussed in paragraph 30 of A/CN.9/WG.I/WP.35/Add.1). Article 30(3) of the Model Law in general provides for a discretion to extend the deadline which, if left unamended, would apply to auctions. The Working Group may wish to regulate this subject in more detail or to require any such decision and reasons therefore to be included in the record of the procurement proceedings (see, further, section III.F of A/CN.9/WG.I/WP.38/Add.1).



## VI. Abnormally Low Tenders

21. The Working Group has decided to address the issue of abnormally low tenders as a discrete issue (see, further, A/CN.9/575, paragraphs 81 and 82, and A/CN.9/WG.I/WP.40, paragraph 31). The Working Group at its seventh session requested the Secretariat to provide it with drafting suggestions to address the topic (A/CN.9/575, paragraphs 76 and 79-82). An abnormally low tender is one that involves a risk that “the tenderer would be unlikely to be able to perform the contract at [the tender price] ... or could do so using only substandard workmanship or materials by suffering a loss ... it could also indicate collusion between the tenderers” (A/CN.9/WG.V/WP.22).

22. At its seventh session, the Working Group decided that the Model Law should be amended so as to allow procuring entities to investigate possible abnormally low tenders through a price justification procedure.

### A. Proposed revisions to article 34. Examination, evaluation and comparison of tenders

#### 11. Proposed additions to article 34, to provide for the investigation of abnormally low tenders and rejection thereof

23. As an abnormally low tender may be suspected on the basis of the qualifications of the supplier as well as the tender submitted, the Working Group may wish as a first step to consider the following draft addition to article 34(4)(b) of the Model Law:

*Article 34. Examination, evaluation and comparison of tenders*

(4)(b) The successful tender shall be that submitted by a supplier that has been determined to be fully qualified to undertake the contract, and whose tender is:

- (i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or ...

24. However, the Working Group has expressed the view that that this provision alone would be insufficient to address the concerns raised by abnormally low tenders (A/CN.9/575, paragraph 80), and that further provision in article 34 is required, together with guidance in the Guide to Enactment.

25. In this regard, the Working Group has requested the Secretariat to provide drafting suggestions for a new article 34 (3)(d) bis of the Model Law, or elsewhere, to provide that if a tender price were abnormally low and raised justified concerns as to the ability of the tenderer to perform the contract, the procuring entity should be authorized to reject the tender (A/CN.9/575, paragraph 79). The Working Group also noted that any rejection in such cases would be subject to two qualifications: first, that the tenderer had been given an opportunity to explain its prices through a price justification procedure and, second, that justification for the rejection should be included in the record of the procurement proceedings, such that any challenge to the rejection could be considered in the light of that justification.

26. Accordingly, the Working Group may wish to consider the following draft text for inclusion in the Model Law:

*Article 34. Examination, evaluation and comparison of tenders*

...

(3) The procuring entity shall not accept a tender:

...

(d) bis. If the tender price is abnormally low in relation to the goods, construction or services to be procured, and raises concerns as to the ability of the tenderer to perform the contract, provided that:

(i) The procuring entity has requested in writing pursuant to article 34(1)(a) details of the constituent elements of the tender that gives rise to the concerns as to the ability of the tenderer to perform the contract;

(ii) The procuring entity has taken account of the information supplied but continues to hold those concerns; and

(iii) The procuring entity has included in the record of the procurement proceedings that it is required to maintain under article 11 the concerns as to the ability of the tenderer to perform the contract and the reasons therefore, and all communications between the procuring entity and the tenderer regarding those concerns.

**12. Proposed revisions to the Guide to Enactment text regarding article 34, to provide for the investigation of abnormally low tenders and rejection thereof**

27. First, following the instruction of the Working Group in A/CN.9/575, paragraph 79, the text of paragraph 1 of the current Guide to Enactment text addressing article 34(1)(a) could be amended by removing the statement that the clarification authority given to procuring entities is not to be used in the case of a suspected abnormally low tender, as follows:

(1) The purpose of paragraph (1) is to enable the procuring entity to seek from suppliers or contractors clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders, while making it clear that this should not involve changes in the substance of tenders. ~~Paragraph (1)(b), which refers to the correction of purely arithmetical errors, is not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or to other errors not apparent on the face of the tender."~~

28. Additional commentary could then be included as follows:

(1) bis A clarification request under paragraph 1(b) may be made, inter alia, if a procuring entity suspects that an abnormally low tender price has been submitted, possibly arising from a misunderstanding of or other error not apparent on the face of the tender. A tender price is assumed to be abnormally low if it seems to be unrealistic; that is, the

price is below cost, or if it may not be feasible to perform the contract at the price submitted and to make a normal level of profit. From the perspective of the procuring entity, an abnormally low tender involves a risk that the contract cannot be performed, or performed at the price tendered, and additional costs and delays to the project may therefore ensue. The procuring entity should therefore take steps to avoid running such a performance risk.

(1) ter Where an abnormally low tender is suspected, the procuring entity shall permit a supplier or contractor to justify the price tendered, by requesting in writing details of the constituent elements of the tender that the procuring entity considers relevant. Those details may include:

(a) the methods and economics of the manufacturing process for the goods or of the construction methods or of the services provided;

(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the construction or for the supply of the goods or services;

(c) the originality of the construction, supplies or services proposed by the tenderer.

(1) quater The procuring entity should take account of the response supplied in evaluating the tenders. A procuring entity may conduct a price justification procedure in any procurement, including one conducted by means of an electronic reverse auction (which may be suspended for the purpose), and should set out all relevant information in the record of the procurement proceedings required to be maintained under article 11. Only if there has been a price justification procedure, and the information supplied does not alleviate the concerns of the procuring entity, may the tender be rejected as constituting an abnormally low tender under [article 3(3)(d) bis].

(1) quinques Enacting States may also wish to take some or all of the following steps so as to assist in the avoidance of abnormally low tenders.

(a) To promote awareness of the adverse effects of abnormally low tenders, to provide training to procurement officers, and to ensure that the procurement entity has adequate resources and information, including reference or market prices where possible;

(b) To ensure appropriate emphasis is given to both price and non-price criteria in procurement proceedings;

(c) To allow for sufficient time for each stage of the procurement process;

(d) To ensure effective qualification criteria, authorizing the compilation of accurate and comprehensive information about the qualifications and past performance of a bidder;

- (e) To ensure that the specification is drafted as clearly as possible, and where appropriate, include potential suppliers in the drafting phase;
- (f) To include in the solicitation documents a statement to the effect that the procuring entity is not obligated to accept the lowest-priced, or any tender, and that a procuring entity may carry out analyses of potential performance risk and prices submitted, perhaps in addition to qualification criteria;
- (g) To ensure thorough evaluation of suppliers' qualifications and tenders, including risk and price analyses (incorporating maintenance and replacement costs where appropriate);
- (h) To require price justification as described in paragraph [cross refer to price justification paragraph] above if an abnormally low tender is suspected;
- (i) To regulate the factors that procuring entities may take into account when assessing the responses of suppliers to price justification requests;
- (j) To reinforce general prohibitions against post-tender negotiations, and to restrict negotiations appropriately; and
- (k) To require all steps taken to address a possible abnormally low tender be adequately reflected in the record of the procurement proceedings.

29. Secondly, the Working Group will note that some of the items set out above paragraph address stages of the procurement cycle which are not currently regulated in the Model Law: that is, the pre-procurement or planning stage. If the Working Group considers that commentary on those stages is appropriate, it may also wish in the interests of balance to address the contract administration phase, including commenting on setting limits to variations to the contract awarded, on ensuring that specifications are strictly enforced, on contractor and subcontractor relations, and on adequate dispute resolutions measures should it become necessary to terminate contracts or fire contractors. There is no current article in the Model Law to which such commentary could be attached, though as it flows from the discussion set out above, it could be included in the commentary to the current article 34 of the Model Law. The more general question of whether or not the Model Law should regulate the contract administration phase is addressed in more detail in paragraphs 12 and 13 of A/CN.9/WG.I/WP.38.