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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 and addressing abnormally low tenders

Note by the Secretariat

Addendum

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II. Draft provisions to enable the use of electronic reverse auctions under the Model Law

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H. Tender securities in electronic submission of tenders and in electronic reverse auctions (article 32 of the Model Law, A/CN.9/590, paragraphs 49 and 100, and A/CN.9/WG.I/WP.40/Add.1, paragraph 13)

1. At the eighth session, it was observed that the question of tender securities might need specific provision, in the light of the experience of certain delegations and observers that tender securities remained paper-based documents, and simultaneous submission with electronic tenders might not be possible. It was noted that tenders had been rejected for failure to furnish tender securities when required in these circumstances (in practice the absence of tender securities may lead to automatic non-acceptance of tenders at an early stage of the procurement proceedings). The Secretariat was requested to provide the Working Group with further information and proposals on this question at its next session, for example considering whether there was any practice allowing for a short period for post-tender submission of tender securities.¹

2. The results of the Secretariat study show that verifications of tender securities provided in cash (bank transfers) should not pose a problem, as a procuring entity would be able to check funds transferred to a designated account simultaneously with receipt of electronic tenders. As regards other types of tender securities, the Secretariat was informed by specialists in the banking sector that the electronic transmission of bank undertakings (e.g., letters of credit or bank guarantees), for example among banks via SWIFT is fairly routine, but public procuring entities continue to insist on receiving them in paper form.² The position, however, may change as developments in technology and in procurement practices generate more confidence in non-tangible forms of tender securities.

3. In the case of some electronic purchasing techniques, such as the type of ERAs where the price is the only award criteria and dynamic purchasing systems, requests for tender securities appear to be uncommon, as those techniques are mostly used for procurement of “off-the-shelf” products. As regards procurement of more complex products, the Working Group may wish to consider the issue in a broader context as the need may arise for not only tender securities but also other parts of tender documents to be submitted in a non-electronic form. For example, it may be problematic to transmit electronically complex drawings or have electronic access to them without appropriate software.

4. The issue could be dealt with in the context of provisions on the form of communication (current article 9) and the content of solicitation documents (current article 27). In particular, the solicitation documents may envisage exceptions for the submission of those parts of tender documents that could not be submitted in the general form specified. In fact, subparagraph 1 of article 27 and article 32 of the Model Law already provide for a special treatment in the solicitation documents of tender securities. Together with the “accessibility standards”, these provisions might

provide sufficient flexibility to procuring entity and sufficient safeguards to suppliers or contractors in situations when tender securities cannot be transmitted electronically simultaneously with the electronic submission of the rest of the tender.

I. Examination, evaluation and comparison of tenders (article 34 of the Model Law, A/CN.9/590, paragraph 101, and A/CN.9/WG.I/WP.40/Add.1, paragraphs 14-17)

5. The Working Group requested the text set out following paragraph 15 of A/CN.9/WG.I/WP.40/Add.1 to be amended as follows, so as to prevent amendments to tenders that might make a non-responsive tender subsequently responsive:

“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 those elements of the [bids/tender] that are to be presented in an electronic reverse auction under [article 47 bis and 47 ter].”

6. Again, the location and phrasing of this provision would need to reflect the types of procurement method that may contemplate using ERAs.

III. Abnormally low tenders (see A/CN.9/590, paragraphs 106-111, and A/CN.9/WG.I/WP.40/Add.1, paragraphs 21-29)

7. The Working Group decided at its eighth session that minimum provisions to address abnormally low tenders should be included in the Model Law, supplemented by detailed discussion in the Guide. The main need is to address safeguards necessary to prevent arbitrary decisions and abusive practices when dealing with apparently abnormally low tender prices (that is, to avoid the rejection of tenders for being abnormally low, without justification).³

8. The Working Group also requested the following criteria to be included: (i) the procuring entity should be allowed but not required to reject abnormally low tenders; (ii) the possibility of assessing bid prices on the basis of cost rather than price should not be introduced, since cost assessment is cumbersome and complicated; (iii) only the procuring entity, and not a third party, should be able to take measures where an abnormally low tender was suspected, and the assessment of the tender concerned must be carried out on a purely objective basis; and (iv) it was important to address possible abnormally low tenders before the relevant contract had been concluded, as measures thereafter might lead to even higher prices and disruption to the procurement concerned.

A. Proposed additions to article 34 of the Model Law

“Article 34. Examination, evaluation and comparison of tenders

...

(4) (a) bis If a tender price is abnormally low in relation to the goods, construction or services to be procured, and:

(i) The procuring entity has requested in writing pursuant to article 34 (1) (a) details of constituent elements of the tender or tenders that give rise to [the assessment that the tender price(s) is or are abnormally low in relation to the goods, construction or services to be procured/concerns as to the ability of the tenderer(s) to perform the contract];

(ii) The procuring entity has taken account of the information supplied but continues to [consider that the tender price(s) is or are abnormally low/ 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 [assessment that a tender price is abnormally low/concerns as to the ability of the tenderer(s) to perform the contract] and the reasons therefor, and all communications between the procuring entity and the tenderer(s) regarding the issue;

the procuring entity may, prior to the determination of the successful tender in accordance with article 34 (4) (b), reject abnormally low-priced tenders.”

Commentary

9. The above draft has been revised so as to take account of the Working Group’s instructions that the question of qualification should not be confused with the evaluation of tenders,⁴ and that the text should provide that before a procuring entity could reject a tender on the basis that its price was abnormally low, the procuring entity had to follow a price investigation procedure.

10. The Working Group may also wish to consider whether the tenders concerned are to be rejected as non-responsive (in which case the provisions should be part of article 34 (3), and it would be mandatory to reject an abnormally low tender), whether the tenders are accepted in that they are responsive but rejected subsequently as being abnormally low (in which case the provisions should be part of article 34 (4) as provided above), or whether some flexibility is warranted (for example, by including a new paragraph, article 34 (3) bis).

11. The Working Group has also requested the phrase that the chapeau of the draft text before the Working Group at its eighth session, which introduced the price justification procedure as follows:

“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,”

should be amended so as to remove the second element, “and raises concerns as to the ability of the tenderer to perform the contract”.⁵

12. This phrase also appears in the remainder of the revised draft text, and the Working Group may wish to consider whether it should remain at all.⁶ In addressing that question, the Working Group may recall its observations that “the root of the issue [is the] performance risk,”⁷ and “a low price per se would not necessarily indicate a performance risk,”⁸ and may therefore consider whether the performance risk should be stated expressly as the issue to be addressed.

B. Proposed additions to the Guide to Enactment text addressing article 34 of the Model Law

13. As regards the proposed text for the Guide to Enactment, the Working Group may wish to consider the following additions to the draft before the Working Group at the eighth session, so as to reflect the concerns expressed at that session:⁹

“(1) bis A clarification request under paragraph [1 (a)] may be made, inter alia, if a procuring entity suspects that an abnormally low priced tender has been submitted, possibly arising from a misunderstanding of the solicitation documents, or other error. A tender price is assumed to be abnormally low if it seems to be unrealistic, that is, the price appears to be 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. It is important to note that a tender price may be low, but not abnormally low, especially in international procurement, in that an abnormally low price in one country may be perfectly normal in another, and selling old stock below cost or below cost pricing to keep the workforce occupied may be legitimate. Furthermore, the submission of an abnormally low tender may involve criminal acts (e.g., money-laundering) or illegal practices (e.g., non-compliance with minimum wage or social security obligations).

...

(1) quater The procuring entity should take account of the response supplied in evaluating the tenders. Enacting States [may/will] wish to ensure transparency and clarity, that proper procedures and safeguards are in place to prevent arbitrary decisions and abusive practices, and that the assessment of the procuring entity where abnormally low tenders are concerned is entirely objective. It is important to note that it is the realism of the price that is to be assessed (using such factors as pre-tender estimates, market prices and previous contracts where available), and not the underlying costs that will have been used by suppliers and contractors to determine the price itself. The reason for assessing prices and not costs is that cost assessment can be cumbersome and complicated, and is also not possible in all cases.”

[the remainder of the draft text in A/CN.9/WG.I/WP.40/Add.1, paragraph 28 remains unchanged]

Notes

¹ A/CN.9/590, paragraph 49.

² This information pertains to a jurisdiction advanced in the areas of electronic commerce, electronic banking and electronic procurement.

³ A/CN.9/590, paragraphs 107 and 109.

⁴ In this regard, the addition to article 34 (4) (b) considered by the Working Group at its eighth session (A/CN.9/WG.I/WP.40/Add.1, paragraph 23) has been deleted. See A/CN.9/590, paragraph 110.

⁵ A/CN.9/590, paragraph 110.

⁶ At its seventh session, the Working Group requested the provisions to address the issue using the following approach: “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. It was 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.” See A/CN.9/575, paragraph 79.

⁷ A/CN.9/575, paragraph 68.

⁸ A/CN.9/575, paragraph 69.

⁹ A/CN.9/590, paragraphs 106-108, commenting on the draft text in A/CN.9/WG.I/WP.40/Add.1, paragraph 28.