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

Note by the Secretariat

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## **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”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 53 of document A/CN.9/WG.I/WP.46, which is before the Working Group at its tenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments, including the use of electronic communications and technologies, in public procurement.

2. Such use, including the use of electronic reverse auctions (ERAs), was included in the topics before the Working Group at its sixth to ninth sessions.<sup>1</sup> At its ninth session, the Working Group requested the Secretariat to revise the drafting materials that it had considered at the session on this topic.<sup>2</sup> This note has been prepared pursuant to that request, and sets out the drafting materials revised to take account of the Working Group’s deliberations at its ninth session.

## **II. Drafting materials addressing the use of electronic reverse auctions in public procurement**

### **A. Conditions for use of electronic reverse auctions**

#### **1. Proposed draft text for the revised Model Law**

3. The Working Group has decided to continue its deliberations on the basis of the following draft article for the Model Law:<sup>3</sup>

“Article [36 bis]. Conditions for use of electronic reverse auctions

“A procuring entity may engage in procurement by means of an electronic reverse auction in accordance with article[s ...] in the following circumstances:

(a) Where it is feasible to formulate detailed and precise specifications for the goods, construction or services;

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

(c) Where the procurement concerns:

(i) Commonly used goods[, which are generally available on the market]; or

(ii) Commonly used construction or services, [which are generally available on the market and] provided that the construction or services are of a simple nature; and

[(d) Where the price is the only criterion to be used in determining the successful tender;

*or*

(d) Where the price and [only/any] other criteria that can be expressed in figures or transformed into monetary units and can be [evaluated automatically/evaluated in automatic processes] are to be used in determining the successful tender.]”

#### **Commentary—aims and location of the provisions**

4. The aim of the above provisions is to establish the essential legal framework for operation of ERAs, to reflect both general procurement principles and those specific to the operation of such auctions. However, the Working Group has also noted that the relative novelty of ERAs requires that the text be as broad as possible to allow for evolution of the practice.<sup>4</sup> There was agreement in the Working Group that all provisions in the proposed article 36 bis should be taken as a package, so as to preserve the effect of all safeguards contained therein.<sup>5</sup>

5. As regards location, the Working Group has provisionally decided to include the article as a new section IV entitled “Electronic reverse auctions” within chapter III of the Model Law (Tendering proceedings), while not excluding the possibility of using ERAs as a stand-alone procurement method or as a phase in multi-stage framework agreements.<sup>6</sup> As chapter III addresses the procedures to be followed in tendering proceedings, but not the conditions for use of particular types of tendering (such as two-stage tendering), the Working Group may wish to consider whether an alternative location for provisions regulating ERAs would be more consistent with the structure of the current Model Law. In the case of two-stage tendering, for example, the conditions for use are set out in article 19 of the Model Law (which falls within chapter II), and the procedures to be followed in article 46 (which falls within chapter V). The Working Group may also wish to recall that the first paragraph of article 46 states that “[t]he provisions of chapter III of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.” If this formulation were followed for ERAs, the above article would be included within chapter II, and the procedural provisions discussed in sections II.C and II.D of A/CN.9/WG.I/WP.43 within chapter V.

6. The Working Group may also wish to consider that this approach could ease the use of ERA procedures for a stand-alone procurement method (akin to the request for quotations procedure, with which it could also be combined in circumstances where a fully open procedure is not required) or for a phase in multi-stage framework agreements.

7. On the other hand, and in the light of the striving for consistency in the Model Law, the Working Group may alternatively decide to incorporate those parts of chapters II and V that address forms of tendering proceedings within chapter III, including ERAs.

#### **Commentary—the text**

8. As regards paragraph (a) of the proposed text, the Working Group has noted that its provisions may be redundant in the light of article 27 (d) of the Model Law,<sup>7</sup> and has agreed further to consider whether the paragraph should be included. In this regard, the Working Group may consider that the requirement for “detailed and precise specifications” is one of the overriding criteria that determine whether an

ERA is a suitable method of procurement in any given case, and therefore the paragraph should be included in this article even if not strictly necessary.

9. As regards the second option for paragraph (d), the Working Group has agreed to reconsider whether the auction of non-price criteria should be recognized in the text of the Model Law, or whether reference to non-price criteria should be made in the Guide to Enactment alone.<sup>8</sup> In this regard, the Working Group may wish to consider whether the Guide can introduce variations to the text of the Model Law, rather than provide detailed guidance as to the application of the Model Law's provisions.

10. The precise drafting of the following items in the text remains outstanding:<sup>9</sup>

(a) In paragraph (c), whether to retain the reference to "generally available on the market";

(b) In the second option for paragraph (d), whether to insert the word "only" or "any" before the phrase "other criteria"; and

(c) Also in the second option for paragraph (d), whether to amend the phrase "evaluated automatically", such as by replacing it with the phrase "evaluated in automatic processes".

## **2. Guide to Enactment text**

11. The Working Group has noted that the following criteria are critical for the successful use of ERAs, and should receive detailed commentary in the Guide to Enactment text:

(a) That clear specifications must be established and made known to suppliers at the outset of procurement;<sup>10</sup>

(b) That ERAs are suitable for commonly used goods and services;<sup>11</sup>

(c) The importance of a sufficient number of participating suppliers to ensure competition;<sup>12</sup>

(d) Preservation of the anonymity of bidders (also in the broader context of competition and fair dealing);<sup>13</sup>

(e) That consolidated purchases are to be encouraged to amortize costs;<sup>14</sup>

(f) The critical need to allow price and, if at all, only limited non-price criteria that fulfil the conditions of the second option for paragraph (d) of the proposed article 36 bis (such as delivery times and technical considerations) to be auctioned, so as to avoid the introduction of subjective elements when quantifying such criteria, and to guard against the possibility of abuse;<sup>15</sup>

(g) That ERAs are to be a single and final round before a winner is selected, also so as to guard against abuse;<sup>16</sup>

(h) That the winning price is to figure in the contract, including in the case of framework agreements;<sup>17</sup> and

(i) That the timing of the opening and criteria governing the closing of ERAs are to be clearly specified in advance.<sup>18</sup>

12. In addition, the Working Group has expressed the view that the Guide should explain that construction or services would not normally fulfil the conditions for use of ERAs, unless they were of a highly simple nature.<sup>19</sup> It was also understood in the Working Group that paragraph 35 of A/CN.9/WG.I/WP.43, in particular its provisions on 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, should remain as the text for the Guide accompanying the proposed article 36 bis.

13. Although the proposed article envisages criteria other than price to be subject to the auction in the second option for paragraph (d), the understanding in the Working Group was that the Guide should alert to potential dangers of using such other criteria.<sup>20</sup> In this regard, the Working Group may consider that the Guide should encourage enacting States that have not yet used the technique to introduce ERAs in a staged fashion: that is, to allow price only to be auctioned initially, and subsequently to allow non-price criteria to be introduced as experience in the technique is gained and practices evolve.

14. The Guide will also clarify that the term “qualified” used in sub-paragraph (b) does not mean that pre-qualification will necessarily be a feature of ERAs.<sup>21</sup>

15. In addition, the Working Group has suggested that the Guide should note that the use of a common procurement vocabulary to identify goods, construction or services by codes or by reference to general market-defined standards would be of assistance. Developing lists with goods, construction or services that were not suitable for ERAs or a list that would describe characteristics of goods, construction or services, which if present would make such goods, construction or services suitable for ERAs could also be discussed in the Guide (as opposed to developing a positive list that would be difficult to update).<sup>22</sup>

16. The Working Group has also noted that establishing the lowest price below which bids would not be accepted could be an important safeguard for proper management of ERAs and to guard against abnormally low tenders.<sup>23</sup>

17. The Working Group will be provided with draft Guide text to reflect these points and the decisions on outstanding issues for its consideration at a future session.

## **B. Procedures in the pre-auction period**

18. The Working Group has requested the Secretariat to redraft proposed article 47 bis<sup>24</sup> to confer sufficient flexibility as regards distinct types of ERAs and the withdrawal of suppliers from the ERA before its closure, provided that sufficient safeguards were in place against fraud and abuse.<sup>25</sup> The revised draft for the consideration by the Working Group follows:

**“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.]

(2) The invitation to tender shall set out whether suppliers or contractors are required to submit initial tenders that are complete in all respects prior to the auction.

(3) If the submission of initial tenders is required, the procuring entity shall carry out an initial examination of the tenders to determine their responsiveness in accordance with article 34 (3), [the qualification of suppliers or contractors,] [and to assess all elements of tenders that are not to be presented in the auction in accordance with the award criteria set].

(4) 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 (3).

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

(6) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction is sufficient to secure effective competition. If the number of suppliers or contractors at any time before the closure of the auction, is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity [may/shall] withdraw the electronic reverse auction.

(7) Unless already provided to suppliers or contractors, the invitation to participate in the auction shall include all information necessary to enable the supplier or contractor to participate in the auction.”

**Commentary**

19. The Working Group has noted that there are two ways in which provision may be made for ERAs—in the first, an ordinary tendering proceeding would be conducted, including an assessment of the responsiveness of the initial tender and the qualifications of the suppliers, with all the safeguards of the sealed envelope system. Thereafter, all qualified suppliers who submitted responsive tenders would be invited to participate in the ERA that would determine the winner. In the second, there would be no initial assessment, and no control of the responsiveness of the tender or qualifications of the supplier until after the auction had closed.<sup>26</sup>

20. The Working Group has requested that the text be drafted in a manner that is sufficiently wide for either type of ERAs to be conducted provided that sufficient safeguards are in place to protect against fraud and abuse.<sup>27</sup> The above draft follows that request. The paragraphs of the draft text have been renumbered to allow for one procedure for either system, with an additional step in new paragraph 3 if initial tenders are required.

21. Paragraph 1 of the draft text will not be required if the text is located together with draft article 36 bis above within chapter III of the Model Law, as was suggested at the Working Group's ninth session.<sup>28</sup>
22. Paragraph 2 of the draft text makes it clear that either of the systems for conducting ERAs can be used, with the safeguard that the system is specified at the outset. The provisions of article 27 (a) of the current text of the Model Law, which require the solicitation documents to provide instructions for preparing tenders, will then require the procuring entity to set out appropriate detail to reflect the relevant circumstances. Appropriate guidance on this aspect would be set out in the Guide to Enactment text.
23. The words "the qualification of suppliers or contractors" can be included in paragraph 3 of the draft text if the Working Group considers that attention should be drawn to the fact that the qualifications of suppliers should be examined before the invitations to participate are issued if the second system is used, so as to ensure sufficient number of qualified participants.
24. In the light of the proposed article 36 bis (d) that does not envisage ERAs where not all elements of tenders are presented to and assessed in the auction, the Working Group may wish to consider whether the wording "[and may assess all elements of tenders that are not to be presented in the auction in accordance with the award criteria set]" should be retained so as to allow the ranking of tenders in more complex electronic reverse auctions using non-price criteria. Alternatively, any appropriate guidance in the Guide to Enactment on why this type of ERAs should not be envisaged may be formulated.
25. The Working Group has expressed concerns that allowing suppliers to withdraw from the ERA may endanger the effectiveness of the auction (and also may mean that the use of the technique ceases to be cost-effective). The withdrawal of suppliers may jeopardize effective competition, and the revisions to former paragraph 3 (d) of the proposed article 47 bis (now paragraph 6 above) reflect the Working Group's reflections at its ninth session on the question. The Working Group has deferred to a future session its consideration of whether a procuring entity should be obliged or enabled to withdraw the auction if competition is insufficient, and as to when and how suppliers might withdraw from the auction process before its closure, guidance on which point will be provided in the text of the Guide to Enactment.<sup>29</sup>
26. Paragraph 7 of the text would be supplemented by commentary in the Guide as to the information required (such as that described in subparagraphs 4 (e)(ii)-(v) and (vii)-(xii) following paragraph 20 of A/CN.9/WG.I/WP.40).
27. The Working Group has also requested that the Guide should explain that the provisions in the Model Law were intended to confer sufficient flexibility to allow ERAs to be conducted in either of the ways described above, depending on the circumstances prevailing in the country concerned, and should address the safeguards that should be in place to allow either systems to operate consistently with the objectives and main procedures of the Model Law, including any differences between procedures at ERAs and those main procedures.<sup>30</sup> The Working Group will be provided with draft text to reflect these points and the decisions on outstanding issues for its consideration at a future session.

### **C. Procedures in the auction phase, and further revisions to the text of the Model Law and Guide to Enactment required to enable the conduct of electronic reverse auctions**

28. The Working Group has deferred to a future session its consideration of the matters discussed in sections II.D-G of A/CN.9/WG.I/WP.43 and in A/CN.9/WG.I/WP.43/Add.1.

#### *Notes*

<sup>1</sup> See A/CN.9/WG.I/WP.35, A/CN.9/WG.I/WP.40, A/CN.9/WG.I/WP.43 and their addenda. For other related topics, see A/CN.9/WG.I/WP.47.

<sup>2</sup> A/CN.9/595, paras. 87-111.

<sup>3</sup> A/CN.9/595, para. 95. Minor changes have also been made to the draft before the Working Group at its ninth session so as to conform the text with the Model Law's style.

<sup>4</sup> A/CN.9/595, para. 89.

<sup>5</sup> A/CN.9/595, para. 96.

<sup>6</sup> A/CN.9/595, paras. 95 and 103.

<sup>7</sup> See, further, A/CN.9/595, para. 99. Article 27(d) requires the solicitation documents to contain at least the following information regarding specifications: "The nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided."

<sup>8</sup> A/CN.9/595, para. 99.

<sup>9</sup> A/CN.9/595, para. 98.

<sup>10</sup> A/CN.9/595, para. 89.

<sup>11</sup> A/CN.9/595, paras. 102 and 103.

<sup>12</sup> A/CN.9/595, para. 101.

<sup>13</sup> A/CN.9/595, paras. 89 and 101.

<sup>14</sup> A/CN.9/595, para. 90.

<sup>15</sup> A/CN.9/595, para. 101.

<sup>16</sup> A/CN.9/595, para. 101.

<sup>17</sup> A/CN.9/595, para. 101.

<sup>18</sup> A/CN.9/595, para. 101.

<sup>19</sup> A/CN.9/595, para. 100.

<sup>20</sup> A/CN.9/595, para. 100.

<sup>21</sup> A/CN.9/595, para. 100.

<sup>22</sup> A/CN.9/595, para. 102.

<sup>23</sup> A/CN.9/595, para. 91.

<sup>24</sup> See A/CN.9/WG.I/WP.43, text following para. 39.

<sup>25</sup> A/CN.9/595, para. 108.

<sup>26</sup> A/CN.9/595, paras. 106 and 107.

<sup>27</sup> A/CN.9/595, para. 108.

<sup>28</sup> A/CN.9/595, para. 95.

<sup>29</sup> A/CN.9/595, para. 111.

<sup>30</sup> A/CN.9/595, para. 109.

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