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**Possible revisions to the UNCITRAL Model Law on
Procurement of Goods, Construction and Services –
drafting materials for the use of framework agreements and
dynamic purchasing systems in public procurement**

Note by the Secretariat

Addendum

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III. Draft provisions to enable the use of dynamic purchasing systems in public procurement under the Model Law

A. Scope and terminology

1. This section deals with an electronic purchasing arrangement with the main characteristics of Model 2 framework agreements described in document A/CN.9/WG.I/WP.52, but new suppliers or contractors can be admitted to the system at any time, and all suppliers or contractors admitted to the system may revise their tenders at any time (without a new tender phase). This type of arrangement is substantively different from Models 1 and 2 framework agreements because of these features, and the Working Group may wish therefore to regulate them, if at all, separately.

2. Variations of such systems can be encountered in practice, which differ from each other mainly by the extent to which changes to the specifications of the system are allowed (at the most extreme, only generic specifications may be provided, which are refined or further defined when a procuring entity wishes to make a purchase). Some are paper-based, but most operate electronically as electronic catalogues, or electronic purchasing systems. Although called framework agreements in some jurisdictions, such arrangements may be more appropriately described as standing qualification lists, especially where only generic specifications may be provided.¹ For controls commonly imposed on such lists, see notes by the Secretariat on suppliers' lists (A/CN.9/WG.I/WP.45 and Add.1).

3. The Working Group may wish to base any provisions for regulating such systems in the Model Law on provisions for the "dynamic purchasing system" in the European Union public procurement directive 2004/18/EC (articles 1 (6) and 33) (hereinafter "the EU Procurement Directive"),² which is not based on a generic specification and so is not in essence a suppliers' list.

4. As regards the terminology for the system, pending the Working Group's decision on this question, and consistent with previous notes on the topic, this note will refer to "dynamic purchasing systems" (that is the term used in the English language version of the EU Procurement Directive).

B. Location of draft provisions

5. Pending the Working Group's consideration of the structure of the revised Model Law, the provisions for dynamic purchasing systems are presented in this note as three draft articles to be included in a composite draft section on dynamic purchasing systems, located in Chapter V (following the provisions on framework

¹ See further A/CN.9/WG.I/WP.44/Add.1, paras. 31-35.

² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, available as of the date of this note at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm.

agreements).³ The draft articles will be finally numbered once the structure of Chapter V is finalised.

C. Proposed draft text for the revised Model Law

6. Suggested provisions, which draw on the EU Procurement Directive but are drafted to be consistent with those proposed for framework agreements in document A/CN.9/WG.I/WP.52 and the provisions of the current Model Law, are set out below:

“Section [...]. Dynamic purchasing systems

Article [51 undecies]. General provisions

(1) A procuring entity may set up an [electronic] dynamic purchasing system [which shall operate electronically] [for commonly used purchases that are generally available on the market] that shall provide for the procedures, terms and conditions upon which procurement contracts for the supply of goods, construction or services may be awarded under the system during a given period.

(2) A dynamic purchasing system shall be set up for a given duration, which is not to exceed [...] years. The duration of the system operation may be extended for no longer than [...] years under exceptional circumstances, upon publication of a notice of the extension of the system in [...] (each enacting State specifies the official gazette or other official publication in which the notice is to be published). The procuring entity shall include in the record required under article 11 of this Law a statement of the grounds and circumstances on which it relied to justify the extension of the duration of the system.

Commentary and issues for discussion in the Guide to Enactment

Paragraph (1)

7. The Working Group may wish to consider elements that may be included in the definition of the dynamic purchasing system in paragraph (1), such as that it is a completely electronic process and suitable for particular types of procurement (the optional text in square brackets would so provide). In this regard, the attention of the Working Group is drawn to the definition of the dynamic purchasing systems provided in the EU Procurement Directive:

“A ‘dynamic purchasing system’ is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specifications.”

³ The Working Group may consider that dynamic purchasing systems are techniques that can be applied in tendering proceedings, rather than a procurement method per se. This consideration applies also to electronic reverse auctions and framework agreements (see A/CN.9/WG.I/WP.51, paras. 3-5, and A/CN.9/WG.I/WP.52, para. 9 and endnote 6).

8. The Working Group may also wish to consider the issues raised in paragraph 11 of document A/CN.9/WG.I/WP.52 regarding a possible amendment of the definition of the “procuring entity” in article 2 of the Model Law. In the context of draft article 51 undecies (1) above, that amendment would allow several procuring entities to set up a dynamic purchasing system or use the one set up by a central purchasing entity.

Paragraph (2)

9. The EU Procurement Directive limits the duration of dynamic purchasing systems to four years in normal circumstances (exceptions are permitted with appropriate justification). The Working Group may wish to consider inserting a maximum duration in the text of the Model Law, rather than allowing the procurement regulations or other rules to determine the maximum length. The text also provides that the duration could be extended if it would be desirable to extend the system, rather than setting it up de novo.

10. Unlike the case of extensions of framework agreements (see article 51 octies (4) in document A/CN.9/WG.I/WP.52, the text following paragraph 10), which are closed systems, the notice of an extension of the dynamic purchasing system must be made public (so as to reflect the fact that the system is open to all interested suppliers at any time). Additionally, the procuring entity must justify the extension in the record of the procurement proceedings, and the Guide to Enactment could note that the justification should normally relate to an ongoing need for the subject-matter of the dynamic purchasing system and lack of significant market changes in the interim.

Article [51 duodecies]. Setting up the dynamic purchasing systems

(1) Where a procuring entity seeks to set up a dynamic purchasing system, the procuring entity shall first publish an invitation to submit indicative tenders in [...] (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(2) The invitation to submit indicative tenders shall specify, in addition to the information referred to in article 25 (1)(a) and (e) to (i) and article 27 (a) to (c), (i) to (k), (t), (u) and (w) of this Law:

(a) That the procuring entity will set up a dynamic purchasing system;

(b) The nature, estimated quantity and desired place and time of delivery of the purchases envisaged under the dynamic purchasing system;

(c) The terms and conditions of the dynamic purchasing system, including the duration of the dynamic purchasing system, any minimum or maximum number of suppliers or contractors to be admitted to the dynamic purchasing system, the selection criteria and procedure for admittance to the system;

(d) Other necessary information concerning the dynamic purchasing system, the electronic equipment used and the technical connection arrangements;

(e) The [website or other electronic] address at which the specifications, the terms and conditions of the dynamic purchasing system, and other necessary information relevant to the operation of the system may be accessed;

(f) That suppliers or contractors may submit indicative tenders at any time during the period of operation of the dynamic purchasing system, subject to the maximum number of suppliers or contractors to be admitted to the dynamic purchasing system, if any;

(g) Procedures for the award of procurement contracts under the system, including:

(i) Whether an electronic reverse auction will be held and, if so, information required under article [...] of this Law; and

(ii) The criteria to be used by the procuring entity for the evaluation of tenders, including their relative weight and the manner in which they will be applied to that evaluation, and whether the award of a procurement contract will be based on lowest price or lowest evaluated tender.

(3) The procuring entity shall, on publication of the invitation to submit indicative tenders and during the entire period of the operation of the system, ensure unrestricted, direct and full access to the specifications and terms and conditions of the dynamic purchasing system and to any other necessary information relevant to the operation of the system.

(4) The procuring entity shall evaluate all indicative tenders received during the period of operation of the dynamic purchasing system [within a maximum of [...] days] in accordance with the selection criteria set out in the invitation to submit indicative tenders.

(5) Subject to a maximum number of suppliers or contractors to be admitted to the system and the criteria and procedure for the selection of that number specified in the invitation to submit indicative tenders, the procuring entity shall admit to the system all suppliers or contractors satisfying the selection criteria and having submitted indicative tenders that comply with the specifications and any other additional requirements set out in the invitation to submit indicative tenders.

(6) The procuring entity shall promptly notify the suppliers or contractors of their admittance to the system or of the rejection of their indicative tenders.

(7) Suppliers or contractors that are admitted to the dynamic purchasing system may improve indicative tenders at any time during the period of operation of the dynamic purchasing system, provided that they continue to comply with the specifications set out in the invitation to submit indicative tenders.

(8) The procuring entity shall promptly publish a notice that it has set up a dynamic purchasing system, in any manner that has been specified for the publication of contract awards under article 14 of this Law. The notice shall identify the suppliers or contractors admitted to the system.

Commentary

Paragraph (1)

11. The open nature of the systems requires open solicitation of indicative tenders. Paragraph (1) draws on provisions of article 24 (1).

Paragraph (2)

12. The content of the invitation to submit indicative tenders should include the information referred to in articles 25 (1) and 27. To avoid repetition, appropriate cross-references to the relevant provisions of these articles have been inserted in the paragraph. In addition, the paragraph lists information specific to the systems that have to be made public in the beginning of the procurement proceedings.

13. The wording in the square brackets in subparagraph (e) will be aligned with the similar provisions on electronic reverse auctions (see A/CN.9/WG.I/WP.51, paragraph 29).

14. As in the case of framework agreements, the Working Group may wish to state the transparency and objectivity requirements of evaluation criteria explicitly in this article such as by adding in the appropriate subparagraphs (such as subparagraphs (c) and (g)(ii) the following or similar wording: “the criteria, which, to the extent practicable, shall be objective and quantifiable, and shall be given a relative weight or be expressed in monetary terms wherever practicable” (see, further, A/CN.9/WG.I/WP.52, paragraph 21).

Paragraph (4)

15. The Working Group may wish to consider the timeframe during which indicative tenders should be evaluated and decision on their admittance to the system or rejection be taken. The equivalent provisions found in the EU Procurement Directive require that evaluation should be completed within a maximum of fifteen days from the date of submission of the indicative tender. However, under that system, the procuring entity may extend the evaluation period provided that no invitation to tender is issued in the meantime.

Article [51 ter decies]. Award of procurement contracts under the dynamic purchasing systems

(1) The procuring entity may subsequently award one or more procurement contracts under the dynamic purchasing system in accordance with the procedures set out in the invitation to submit indicative tenders, subject to the provisions below.

(2) Each specific procurement contract shall be the subject to an invitation to tender.

(3) The procuring entity shall invite all suppliers or contractors admitted to the system to submit tenders for the supply of the items to be procured for each procurement contract it proposes to award. The invitation shall:

(a) Restate, or formulate where necessary more precisely, information referred to in article [51 duodecies (2)(g)] of this Law;

- (b) Set out the terms and conditions of the procurement contract, to the extent that are already known to the procuring entity; and
- (c) Include instructions for preparing tenders.
- (4) The procuring entity shall fix a specific date and time as the deadline for submitting tenders. The deadline shall afford suppliers or contractors sufficient time to prepare and submit their tenders.
- (5) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria set out in the invitation to submit tenders under paragraph (3)(a) of this article.
- (6) Subject to articles [12, 12 bis and other appropriate references] of this Law, the procuring entity shall accept the successful tender(s), and shall promptly notify the successful supplier(s) or contractor(s) that it has accepted their tender(s). The procuring entity shall also notify all other suppliers and contractors that submitted tenders of the name and address of the supplier(s) or contractor(s) whose tender(s) was or were accepted and the contract price.
- (7) The procurement contract, on the terms and conditions of the successful tender(s), comes into force when the notification to the successful supplier or contractor(s) is dispatched.
- (8) Where the price payable pursuant to a procurement contract concluded under the provisions of this article exceeds [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations]], the procuring entity shall promptly publish notice of the award of the procurement contract in any manner that has been specified for the publication of contract awards under article 14 of this Law. The procuring entity shall also publish, in the same manner, [quarterly] notices of all procurement contracts issued under the dynamic purchasing system.

Commentary

16. The drafting follows the equivalent provisions for framework agreements, and the Working Group may therefore wish to consider the issues raised in paragraphs 29 and 35 of document A/CN.9/WG.I/WP.52.

Issue of a notice before invitation to tender

17. Under the EU Procurement Directive, when wishing to award procurement contracts under the system, a procuring entity must first publish a simplified contract notice inviting all interested suppliers to submit an indicative tender. The procuring entity may not invite all tenderers admitted to the system to submit a tender until it has completed evaluation of all the indicative tenders received within a fixed time limit after the simplified contract notice was published. Commentators have observed that the transparency advantages of these requirements of the award process may operate as a significant disincentive to their use.⁴

⁴ See A/CN.9/WG.I/WP.44/Add.1, para. 35.

18. If the Working Group considers that provision for a simplified contract notice would be desirable, it could include a paragraph before paragraph (3) in the above text, to provide for example:

“(3) Before inviting suppliers or contractors admitted to the system to submit their tenders, the procuring entity shall:

(a) Publish a simplified notice on the existence of the dynamic purchasing system and inviting all interested suppliers or contractors to consider joining the system by submitting indicative tenders. Article 51 [duodecies (1) and (2)] shall apply to publication of such a simplified notice;

(b) Complete evaluation of all indicative tenders submitted within the timeframe to be fixed in the simplified notice, which may not be less than [...] days from the date of the publication of the simplified notice. Article [51 duodecies (4) to (6)] shall apply to the evaluation of indicative tenders and admittance to the system.”

19. The Working Group may also then wish to consider the timeframe after the publication of the simplified notice within which the procuring entity must allow all interested suppliers or contractors to submit their indicative tenders. This timeframe should be sufficiently long to allow new suppliers to prepare their indicative tenders. The respective provisions of the EU Procurement Directive required that the timeframe should be not less than fifteen days after the simplified notice has been published. This timeframe does not include the additional time that procuring entity may need to complete evaluation of all indicative tenders received by the established deadline (see draft article 51 duodecies (4)).

IV. Consequential changes to provisions of the Model Law

20. Some consequential changes to the existing provisions of the Model Law will be required in the light of the provisions on framework agreements and dynamic purchasing systems. In particular, article 11 on record of procurement proceedings will have to be amended.

21. The Working Group may wish to consider inserting references to framework agreements, where appropriate, in article 11, such as in paragraph (1)(b), (d) and (g) and in paragraph (2). In addition, a new subparagraph (n) may be added in paragraph (1) reading “any other information required to be included in the record of procurement proceedings under provisions of this Law”, which would ensure that such provisions as in articles 51 octies (4) (see A/CN.9/WG.I/WP.52, the text following paragraph 10) and 51 undecies (2) above are covered.

22. This wording would also cover information required to be included in the records of procurement proceedings under other new provisions of the Model Law, such as on electronic reverse auctions. It is to be recalled that, at its tenth session, the Working Group decided to defer its consideration of revisions to article 11 necessitated by the use of electronic reverse auctions.⁵

⁵ A/CN.9/615, para. 65.

23. Furthermore, when considering review provisions under Chapter VI of the Model Law, the Working Group may wish to consider whether the use of framework agreements and dynamic purchasing systems as well as their operation should be subject to review.
