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Report of Working Group I (Procurement) on the work of its twelfth session

(Vienna, 3-7 September 2007)

Contents

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the "Commission") entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh to eleventh sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, and New York, 21-25 May 2007, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615 and A/CN.9/623), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions (ERAs), including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and their procedural aspects. At its eleventh session, the Working Group came to preliminary agreement on the draft revisions to the Model Law and the Guide that would be necessary to accommodate the use of electronic communications and technologies (including ERAs) in the Model Law. At that session, the Working Group decided that at its twelfth session it would proceed with further consideration of those draft revisions (A/CN.9/623, para. 13).

3. At its seventh, eighth, tenth and eleventh sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders. At its eleventh session, the Working Group considered the revised provisions on ALTs and preliminarily agreed on their location in the Model Law, taking into account that the issue should be considered not only in the context of tendering proceedings, and that risks of ALTs should be examined and addressed by the procuring entity at any stage of the procurement, including through qualification of suppliers. At that session, the Working Group decided that at its twelfth session it would proceed with consideration of the proposals to the revised provisions made at its eleventh session (A/CN.9/623, paras. 33-41).

4. At its eleventh session, the Working Group also held a preliminary exchange of views on drafting materials for the Model Law on the use of framework agreements, submitted by the Secretariat pursuant to the request by the Working

Group at its tenth session (A/CN.9/615, para. 11), and decided to consider them in depth at its next session (A/CN.9/623, para. 12). The Working Group deferred to a future session consideration of documents A/CN.9/WG.I/WP.45 and Add.1 on suppliers' lists and WP.52/Add.1 on dynamic purchasing systems.

5. At its thirty-eighth session, in 2005, thirty-ninth session, in 2006, and fortieth session, in 2007, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172, A/61/17, para. 192, and A/62/17 (Part I), para. 170). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192). Pursuant to that recommendation, the Working Group, at its tenth session, agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide (A/CN.9/615, para. 11). At the fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part I), para. 170).

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its twelfth session in Vienna from 3 to 7 September 2007. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Bolivia, Cameroon, Canada, China, Colombia, Czech Republic, Egypt, France, Germany, Iran (Islamic Republic of), Latvia, Lebanon, Mexico, Morocco, Nigeria, Norway, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Angola, Brazil, Dominican Republic, Indonesia, Nicaragua, Philippines, Portugal, Qatar, Romania, Slovenia, Sweden, Syrian Arab Republic, Tunisia and Turkey.

8. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: United Nations Office of Legal Affairs and World Bank;

(b) *Intergovernmental organizations*: European Commission;

(c) *International non-governmental organizations invited by the Working Group*: International Law Institute (ILI) and the European Law Students' Association (ELSA).

9. The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON (Sweden)[1]

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.53);

(b) Drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders: note by the Secretariat (A/CN.9/WG.I/WP.54);

(c) Drafting materials for the use of electronic reverse auctions in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.55);

(d) Proposal by the United States regarding issues of framework agreements, dynamic purchasing systems, and anti-corruption measures (A/CN.9/WG.I/WP.56);

(e) Drafting materials for the use of framework agreements and dynamic purchasing systems in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1) (detailed consideration of the note was deferred to a future session at the eleventh session of the Working Group (see A/CN.9/623, para. 12)); and

(f) Issues arising from the use of suppliers' lists, including drafting materials: note by the Secretariat (A/CN.9/WG.I/WP.45 and Add.1) (the consideration of the note was deferred to a future session at the previous three sessions of the Working Group (see A/CN.9/595, para. 9, A/CN.9/615, para. 10, and A/CN.9/623, para. 12)).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

III. Deliberations and decisions

12. At its twelfth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group used the notes by the Secretariat referred to in paragraph 10 (a)-(e) above as a basis for its deliberations.

[1] Elected in his personal capacity.

13. The Working Group heard an introduction of the first part of the proposal contained in document A/CN.9/WG.I/WP.56, addressing framework agreements, and delegates had an opportunity to pose questions about the proposal. It deferred detailed consideration of that document as well as documents A/CN.9/WG.I/WP.45 and Add.1 and A/CN.9/WG.I/WP.52 and Add.1.

14. The Working Group requested the Secretariat to revise the drafting materials contained in documents A/CN.9/WG.I/WP.54 and 55, reflecting the deliberations at its twelfth session, for its consideration at the next session. The Working Group agreed to start its deliberations at the next session with discussion of issues of framework agreements on the basis of the note by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1) and the proposal contained in document A/CN.9/WG.I/WP.56.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

15. The Working Group noted that the Commission, at the first part of its fortieth session (Vienna, 25 June-12 July 2007), had recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part I), para. 170). The view was expressed that the time frame for the project should be considered taking into account the number of complex issues that the Working Group faced. The view was expressed that the progress so far made in the Working Group had been commendable especially in the context of intergovernmental negotiations of legal texts.

16. The prevailing view was that the Working Group would need time beyond 2009 to complete the project. The idea of basing its work on a concrete timetable and agenda for each session was considered useful. The Working Group adopted the timeline for its thirteenth to fifteenth sessions annexed to the present report and agreed to bring it to the attention of the Commission at its forty-first session, together with a proposal for completion of its work programme. It was also agreed that an updated timeline should be brought to the Commission's attention on a regular basis.

A. Draft provisions addressing the use of electronic communications in public procurement (A/CN.9/WG.I/WP.54, paras. 4-25)

1. Communications in procurement: article [5 bis] and Guide to Enactment text (A/CN.9/WG.I/WP.54, paras. 4-10)

17. It was agreed that the exceptions to the general rules regulating communications in procurement (contained in paragraph (2) of the draft article) should be limited to those expressly listed by cross reference to other articles of the Model Law text, and accordingly that the general description in the second set of square brackets in paragraph (2) should be deleted.

18. The requirement that no means of communications could be used by the procuring entity unless it had been reserved in the solicitation documents or their

equivalent, contained in paragraph 3 (b), was observed to be too stringent. It was explained that in some long-term procurement proceedings, such as framework agreements, and in the light of rapid technological developments, a procuring entity would not always be in a position to identify at the outset of the procurement proceedings all means that would be used to communicate information. The suggestion was made that the provisions should be drafted in more flexible terms to allow the procuring entity to switch to another means of communication, even if they were not explicitly specified at the outset of the procurement proceedings, without fear of review or challenge from suppliers or contractors.

19. It was suggested to this end that the text in square brackets in the chapeau to paragraph (3) of draft article [5 bis] should be amended, replacing the word "procurement" before the words "covered by this Law" with the word "procedures", with a consequential addition to the first sentence of paragraph (5) of the proposed Guide text of the words "required procedures for" before the words "a given procurement". Alternatively, the addition of the words "required by this Law" after the word "information" in paragraph 3 (b) was proposed. The aim of these proposed amendments would be to enable the use of means other than those in the solicitation documents for communications not mandated by the Model Law.

20. Concerns were expressed about these suggestions. Some delegates were of the view that the chapeau provisions in square brackets of paragraph (3) should be deleted as unnecessarily confusing in the light of the clear scope of the Model Law. It was suggested that the Guide, if necessary, could reiterate the scope of the Model Law in the context of paragraph (3) of article [5 bis].

21. It was also stressed that transparency in the procurement process, including as regards the means of communications to be used, was an important safeguard for suppliers and contractors, and promoted their participation. Consequently, the solicitation documents should indeed set out the relevant means of communication. Furthermore, the risk could arise of discrimination being introduced should procuring entities change the means of communication during the procurement process.

22. In response, it was observed that the safeguards (including those aimed at preventing discrimination) contained in paragraph (4) of the draft article would be continuing obligations throughout the procurement concerned, and that there were provisions in the Model Law that allowed the procuring entity to amend the solicitation documents (article 28 (2)), provided that prompt notification of any amendment was given to all suppliers. The difficulties of defining long-term procurement for which changes in means of communication as suggested might be justifiable were also stressed.

23. The prevailing view was that the provisions as drafted provided sufficient flexibility to procuring entities and that the transparency requirements should not be weakened by allowing amendments to the means of communication chosen during the process, unless this possibility had been expressly envisaged by the procuring entity in the solicitation documents.

24. It was therefore agreed that the words in the square brackets in the chapeau provisions of paragraph (3) should be deleted and paragraph (3) (b) should not be amended. It was also agreed that the Guide should address the issues raised (see paragraph 26 (d) below).

25. As regards paragraph (5), it was noted that ensuring the confidentiality of information submitted by suppliers was a critical element in promoting public confidence in the use of electronic communications, and consequently enabling their use where appropriate. The understanding was that the Model Law should provide basic principles, supplemented by detailed explanations in the Guide, to the effect that procuring entities could introduce electronic communications only when the necessary safeguards including confidentiality were in place. The point was made that the actual mechanics of safeguards were technical matters beyond the scope of the Model Law. Nevertheless, the text should establish a mechanism to ensure the confidentiality of information.

Guide to Enactment text

26. The view was expressed that it would be preferable for the Working Group to consider the text for the Guide together with the provisions of the Model Law as soon as the main issues of principle had been agreed by the Working Group.

27. As regards the proposed text for the Guide, it was suggested that:

(a) The potential inconsistency between the reference in paragraph 1 of the Guide text to "communications in the course of judicial proceedings or administrative review proceedings", which were governed by their own rules, and the statement in paragraph (1) of draft article [5 bis] that the means of communication chosen by the procuring entity would include those used in review proceedings under the Model Law, should be eliminated;

(b) The principle contained in article 28 (2) that all relevant information, such as clarifications and modifications to solicitation documents, should be made available to all potential suppliers or contractors for the procurement concerned should be reflected as appropriate in the fourth sentence of paragraph (3) of the Guide text;

(c) Pending the Working Group's consideration of article 52, the reference in paragraph 4 of the Guide text in square brackets should be retained (i.e. to a challenge under article 52 of the Model Law to the selection of the means of communication by the procuring entity);

(d) Paragraph 5 of the Guide text should discuss the possibility that a procuring entity might change the means of communication set out in the solicitation documents, should explain in which exceptional procurements and circumstances such a change would be justifiable (such as technological development), and should stress that the safeguards contained in draft article 5 bis (4) and article 28 (2), as regards prompt communication of all relevant changes to all concerned, would apply;

(e) At the end of paragraph 11, the Guide text should recommend that ideally no fees should be charged for access to, and the use of, information systems;

(f) The reference in paragraph 13 of the Guide text in square brackets to virus-scanning software should be deleted;

(g) In the last sentence of paragraph 13, additional reference be made to the public as relevant stakeholders in the context of building confidence in procurement

proceedings, especially where the question of third-party involvement was concerned; and

(h) To retain in paragraph 14 appropriate cross-references to the Guide text that would accompany article 30 (5), notably as regards confidentiality of submissions.

2. Electronic submission of tenders: article 30 and Guide to Enactment text (A/CN.9/WG.I/WP.54, paras. 11-12)

Article 30 (5)

28. The proposed draft article 30 (5) was accepted without amendment.

Guide to Enactment text

29. It was agreed, as regards paragraph (3 bis), that the current presentation of the issues was sufficient and that no further cost-benefit discussion should be included. It was also agreed that reference should be made at the end of the paragraph to additional regulations that might be required to address the issues raised. As regards paragraph (3 ter), it was noted during the discussion that the word "strictly" should be deleted from the fourth sentence. It was decided that all the square brackets in the text should be removed.

3. Publicity of legal texts and information on forthcoming procurement opportunities: article 5 and Guide to Enactment text (A/CN.9/WG.I/WP.54, paras. 13-16)

30. The meaning of the reference to "other legal texts" in paragraph (1) was questioned. Various suggestions were made to make the ambit of the paragraph clearer (i.e. to state unambiguously that it referred to procurement law and procurement regulation of general application, rather than to judicial decisions or administrative rulings, which were addressed in paragraph (2)). It was agreed that a clear statement of the items that would be covered by the paragraph was required, and explanation as necessary in the Guide, taking account of the different ways in which the law was provided in different systems and the need for terms that would be equivalent in various languages.

31. The need for paragraph (1) was questioned, given that the procurement law (as any law) would have to be published in any event. In response, it was noted that the aim of the provision was to ensure that the texts concerned were accessible as a package, and went beyond a simple requirement to publish laws.

32. The need for less stringent publication standards for the judicial decisions and administrative rulings in paragraph (2) was queried. Support was expressed for the approach in the current draft that the strict requirements of accessibility and systematic maintenance found in paragraph (1) should not apply to information covered in paragraph (2). Reference was made to earlier discussions on the subject and it was noted, in addition, that as judicial review might lead to the revocation of administrative rulings, publication before appeals were exhausted could compromise suppliers' rights and their subsequent participation in procurement proceedings.

33. It was agreed that the introductory words "notwithstanding the provisions of paragraph (1) of this Law" should be deleted from paragraph (2), because no items were included in both paragraphs.

34. The following wording was agreed to replace paragraph (3): "Procuring entities may publish information regarding procurement opportunities from time to time. Such publication does not constitute a solicitation and does not obligate the procuring entity to issue solicitations for the procurement opportunities identified."

Guide to Enactment text

35. The concern was expressed that the suggested text for paragraph (3) of article 5 weakened the requirements of the provision, which would be undesirable in the light of the importance of the publication of information on forthcoming procurement opportunities for prompting procurement planning, and in order to allow potential suppliers to prepare for future opportunities in regional markets. It was also observed that recourse to single-source procurement had been seen to be the result of poor procurement planning. For these reasons, it was noted, the publication of future procurement opportunities had been made mandatory in some systems. Although the text of paragraph (3) of article 5 would not be mandatory, it was agreed that the Guide text should support and strengthen the recommendation that this information should be published. In addition, it was suggested that the sequence of presenting materials in paragraph (6) of the proposed Guide should be reordered, so that the guidance started by explaining the benefits of such publication and thereafter discussed why the provision was not mandatory. It was also suggested that the Guide might recommend the period that publication of forthcoming opportunities might cover.

36. As regards paragraph (3) of the Guide, it was suggested that the words "without charge" should be deleted. Recalling the relevant consideration in the context of draft article [5 bis] (see paragraph 26 (e) above) and in order to ensure consistency in the Guide in treating similar issues, the Working Group agreed that the Guide should state that ideally no fees should be charged for access to laws, regulations and other procurement law texts. However, it was recognized that not all jurisdictions in fact provided free access to laws and regulations.

4. Other provisions of the Model Law and the Guide (A/CN.9/WG.I/WP.54, paras. 17-25)

Article 11 and the text for the Guide to accompany the article

37. The Working Group noted that it would consider the provisions in article 11 and relevant guidance addressing electronic communications when considering the record of the procurement proceedings as a whole in due course.

Article 33 (2) and the text for the Guide to accompany the relevant provisions

38. It was agreed that the second sentence of paragraph (2) of article 33 should read as follows: "Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders."

39. It was also agreed that the Guide should address the meaning of the term "contemporaneously" in this context, and in particular how the requirement for full

and contemporaneous notification could be satisfied using information technology systems.

Liability for failures of procuring entities' systems

40. It was agreed that the Model Law should not address the general issue of potential liability of a procuring entity should its automatic systems fail. The general understanding was that article 30 (3) gave sufficient flexibility to procuring entities to extend the deadlines for submission of tenders inter alia in case of system failure and no changes to that article were necessary. It was also agreed that the issue of system failure after submission of tenders did not require separate provision in the Model Law. The suggestion was made that the Guide might provide more guidance on this issue, addressing the requirements upon procuring entities and the risks of protests by suppliers.

41. The Working Group agreed to reflect in the Guide that failures in automatic systems inevitably occurred; where they occurred, the procuring entity had to determine whether the system could be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for submission of tenders would be necessary. If, however, the procuring entity determined that a failure in the system would prevent it from proceeding with the procurement, the procuring entity could cancel the procurement and announce new procurement proceedings. It was suggested that the Guide should reflect that failures occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of automatic systems, could give rise to a right of review by aggrieved suppliers and contractors under article 52 of the Model Law or to other recourse, depending on the ambit of the recourse provisions concerned.

Revisions to the text for the Guide accompanying article 36

42. The Working Group noted that it would consider guidance to accompany article 36 when finalizing the revisions to that article in due course.

Introductory remarks on the use of electronic procurement under the Model Law in general

43. The Working Group noted the approach suggested.

B. Draft provisions addressing abnormally low tenders: article 12 bis (A/CN.9/WG.I/WP.54, paras. 26-28)

44. Strong support was expressed for deletion of paragraphs (1) (a) and (2) from the draft article. It was stated that the provisions were unnecessary, in that general provisions of law already gave the procuring entity the right to reject ALTs irrespective of whether it had been reserved in the solicitation or equivalent documents, and for good governance reasons, this right should not be fettered by introducing additional requirements. It was also said that the procuring entity, by intentionally not reserving such a right in the solicitation or equivalent documents, could open the possibility of accepting ALTs to accommodate the interests of some suppliers, and that this situation should be avoided.

45. On the other hand, it was pointed out that deleting these paragraphs could indicate an inconsistent approach compared with that taken in article 12 (1) of the Model Law. Article 12 (1) provided that the procuring entity could reject all tenders only if the right to do so had been expressly reserved in the solicitation documents. The Working Group recalled its consideration of the issue at its eleventh session (A/CN.9/623, para. 36). The view was expressed that article 12 bis addressed separate issues and factual circumstances, and there would be no inconsistency in approach simply because the provisions were different. Another view was that, although the approach taken in articles 12 and 12 bis was not consistent with some local regulations, paragraphs (1) (a) and (2) might be retained in article 12 bis, in the light of desirability of ensuring consistency in treating similar issues in the Model Law.

46. Concern was also expressed that, unless the ground relied upon for rejecting a tender as abnormally low had been specified either among qualification or evaluation criteria in the solicitation or equivalent documents, there would be no justification for a procuring entity's rejection of a tender as abnormally low. Cross-reference in this regard was made in particular to the relevant provisions of article 6 (3) of the Model Law.

47. For this reason, support was expressed for the retention of paragraphs (1) (a) and (2). The retention of these provisions was also considered important for reasons of transparency, especially in the context of international procurement. Otherwise, it was explained, the revised Model Law would introduce the possibility of allowing rejection of responsive tenders by qualified suppliers, but without providing sufficient safeguards against arbitrary decision-taking on the part of procuring entities.

48. The view prevailed that both paragraphs (1) (a) and (2) should be deleted for the reasons set out in paragraph 44 above, but that the Guide should draw the attention of procuring entities to the desirability of specifying in the solicitation or equivalent documents that tenders could be rejected on the basis that they were abnormally low.

49. It was noted that the current article 52 excluded any decision of a procuring entity to reject all tenders under article 12 from review, and questions of consistency between articles 12 and 12 bis in this particular respect were also raised. It was agreed that a final decision on the issue of review should be taken at a later stage, when article 52 would be considered as a whole. Strong support was, however, expressed for including decisions under article 12 bis within the scope of review under article 52, as an important safeguard against abuse in the exercise of discretion on the part of procuring entities when considering whether to reject an ALT.

50. The need for a definition of an ALT in the Model Law was stressed, to avoid subjectivity and any abuse on the part of procuring entities. It was emphasized that, left undefined, the concept in the Model Law might cause more harm than good. On the other hand, difficulties in defining the term were highlighted. Support was expressed for the current approach of not linking an ALT exclusively to price but rather to a broader notion of performance risk. The extensive discussion of the relevant issues at the Working Group's previous sessions was recalled.

51. The question was also raised that using the term "abnormally low tender" when the concept was not linked to price but rather to performance risk was confusing and another term, such as "unsustainable bids", "inadequate or unrealistic tenders", should be found, to convey better the intended meaning.

52. The view prevailed that clarifying the term ALT in the chapeau provisions of paragraph (1) would be sufficient, by referring to the constituent elements of tender in the context of the price that might raise concern on the part of the procuring entity as regards performance risks.

53. It was also questioned whether linking ALTs only to the risk of performance of procurement contracts, as the draft currently did, was sufficient. It was stressed that it was necessary to acknowledge that ALTs might arise from criminal activities, such as money-laundering. The Working Group noted that the text for the Guide to accompany article 12 bis (as proposed in document A/CN.9/WG.I/WP.50, paragraph 49 (5)) observed that procuring entities might be required to reject bids in which there were suspicions of money-laundering or other criminal activity under other law. It was agreed that a discussion of these questions in the Guide would be sufficient.

54. The Working Group agreed to make the following amendments to draft article 12 bis:

(a) To redraft the chapeau provisions of paragraph (1) as follows: "The procuring entity may reject a tender, proposal, offer, quotation or bid if the procuring entity has determined that the submitted price with constituent elements of a tender, proposal, offer, quotation or bid is, in relation to the subject matter of the procurement, abnormally low and raises concerns with the procuring entity as to the ability of the supplier or contractor to perform the procurement contract, provided that…"; and

(b) To delete the words "that submitted such a tender, proposal, offer, quotation or bid" from paragraph (1) (b).

55. It was also suggested that the phrase in paragraph 1 (c) that the procuring entity "continues, on a reasonable basis, to hold those concerns" should be revised, to require greater objectivity in the justification for the concerns. On the other hand, it was observed that the "reasonable basis" test had been included precisely because it was based on the notion of objectivity, and doubt was expressed as to whether drafting a more objective statement would be feasible. It was therefore agreed that as long as remedies against unjustifiable and unreasonable decisions by procuring entities were available, the reference to "reasonable basis" alone was sufficient. However, the Guide should stress the requirement of objectivity.

C. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law (A/CN.9/WG.I/WP.55)

1. Conditions for the use of electronic reverse auctions: draft article 22 bis and Guide to Enactment text (A/CN.9/WG.I/WP.55, paras. 3-9)

56. It was agreed that the words "the invitation to the reverse auction shall be accompanied by the outcome of a full evaluation of initial bids" should be added at

the end of paragraph (3), to reflect a similar provision in article 54 (5) of the European Union directive 2004/18/EC. In connection with that amendment, the point was made that, in order to preserve the anonymity of bidders, the results of the full evaluation of initial bids should be communicated individually and simultaneously to each supplier or contractor concerned, but in order not to prejudice the legitimate commercial interests of the parties or to inhibit subsequent fair competition, only to the extent relevant to each such supplier or contractor.

57. The Working Group also agreed to replace the phrase "full initial evaluation of bids" with the phrase "full evaluation of initial bids" in paragraph (3). The Working Group requested the Secretariat to make other drafting changes in paragraphs (2) (b) and (3), to ensure clarity and consistency in the use of terms and in presentation, in particular with reference to evaluation and award criteria.

Guide to Enactment text

58. It was agreed to make the following amendments to the draft text for the Guide:

(a) To replace in paragraph (1) the words "[in addition]" with "price and";

(b) To delete the words "but does not require or encourage" from paragraph (3);

(c) To delete the text in square brackets from paragraphs (3), (5) and (10);

(d) To make references to paragraphs and subparagraphs of article 22 bis more specific throughout the text of the Guide;

(e) To reword the last sentence to read as follows: "It also gives the right to the procuring entity to cancel the auction in accordance with article 51 quater if the number of suppliers or contractors registered to participate in the auction is insufficient to ensure effective competition during the auction";

(f) In the second sentence of paragraph (10), to delete the word "thus", to move the reference to "figures and percentages" after the word "quantifiable" and add the words "can be" before the words "expressed in monetary terms". It was stressed that the references in paragraph (10), which explained the provisions of article 22 bis, were referring to the quantifiable, non-price criteria that would be evaluated prior to or submitted to the auction, and neither to pass/fail elements of the specifications that would determine whether or not a bid was responsive, nor to points systems;

(g) To delete the last two sentences from paragraph (10) as they were currently drafted, and to discuss, in the general section of the Guide, concerns regarding objectivity arising from the use of non-price criteria and their weighting in the award of contracts in a more general and broader context, as they were relevant to all procurement methods. Nonetheless, paragraph (10) would include a discussion of this issue as it applied in the specific context of ERAs, and would cross refer to the general discussion; and

(h) To add a discussion of practical measures that enacting States, when introducing ERAs, could usefully undertake, such as disseminating knowledge about this procurement technique and providing necessary training to bidders and other relevant stakeholders.

59. As regards paragraph (6), it was noted that it would not be possible in practice to have up-to-date exhaustive lists of items suitable or not suitable for ERAs. Different views were expressed concerning any specific recommendation that the Guide should provide on the use of positive or negative lists. On the one hand, preference was expressed for the use of positive lists and successful experience with such use in some jurisdictions was cited. On the other hand, caution was expressed as regards recommending the use of lists at all in the light of technological development, which might impact the use and relevance of lists. It was agreed that the final part of paragraph (6) should be reworded to refer to non-exhaustive or indicative groupings of items that might suitably be procured through ERAs, and to retain the existing references to generic characteristics of items that were or were not suitable for this procurement technique.

60. It was also observed that references to "price" in this section of the Guide were to the price as an element of a bid that would be evaluated through the auction, and not to the contract amount that would eventually be recorded in the procurement contract.

61. The Working Group considered whether the Guide should recommend only ERAs based exclusively on price (see A/CN.9/WG.I/WP.55, para. 7), or those based on price and quality. The prevailing view was that the Guide should follow a flexible approach and not make any recommendation in this regard. The text currently proposed for the Guide was considered to be well balanced in that respect.

2. Procedures in the pre-auction and auction stages: draft articles 51 bis to sexies (A/CN.9/WG.I/WP.55, paras. 10-33)

Draft article 51 bis and points for reflection in an accompanying Guide text (A/CN.9/WG.I/WP.55, paras. 10-13)

62. Some reservation was expressed regarding the provisions of paragraph 2 (c), which envisaged allowing the procuring entity to set a maximum number of bidders. It was observed that this provision might lead to an unjustifiable restriction of competition. On the other hand, it was observed that there had been examples in practice where the sheer number of bidders trying to participate in the ERA had overwhelmed the system capacity. The prevailing view was that the imposition of a limit on the numbers of suppliers might be justifiable, but that an assessment would be required on a case-by-case basis. However, safeguards would need to be set out in the Model Law text to ensure that any limitation was carried out on a justified and objective basis. Thus, for example, the text could apply the reasoning behind permitting limiting the number of participants in restricted tendering set out in article 20 (b) of the current text (that the time and cost required to allow full participation would not be cost-effective). It was also observed that the manner in which numbers of participants should be limited should be objective, and addressed consistently throughout the Model Law, and that procuring entities should be obliged to seek to ensure maximum and not just sufficient competition.

63. Some delegates stated that the procuring entity should not be permitted to limit the number of bidders. It was noted that the general principle in the Model Law was to ensure full and fair competition, but alternative procurement methods did permit limiting the number of participants for reasons of efficiency in procurement (in the case of restricted tendering, one reason for limiting numbers was if the time and

cost required to examine or evaluate a large number of bids would be disproportionate to the value of the procurement (article 20 (b) of the Model Law)).

64. As regards the principle of limiting participants, it was questioned why the same considerations should not be valid in the context of ERAs, especially given the conditions for their use in draft article 22 bis. Additionally, some delegates reported experience with excessive numbers of suppliers incapacitating automatic systems, which would require the numbers to be limited, but others considered that this concern might be alleviated as technology advanced. As regards the elimination of bidders, concern was expressed that it would be difficult in practice to establish objective criteria for eliminating qualified suppliers submitting responsive bids. On the other hand, it was pointed out that the "first come first served" principle would be an objective criterion.

65. Another view was that draft articles 22 bis (1) (a) and 51 quater contained sufficient safeguards through requiring the procuring entity to ensure "effective competition", for which they would be responsible and accountable to oversight bodies and courts. It was suggested that the requirement for "effective competition" might need to be strengthened in draft article 51 bis and in draft article 51 quater to ensure the maximum competition possible in the circumstances. It was also stated that "effective competition" was not a precise concept, depending on specific procurements, conditions of markets, and rules and regulations and their interpretation in various jurisdictions.

66. In relation to paragraph (2) (e)(i), it was agreed that the reference to article 25 (f) to (j) should be replaced with reference to article 25 (1) (f) to (j). With reference to paragraph (2) (e)(ii), it was agreed that the drafting of the paragraph should be reworded, so as to ensure that the purposes for which initial bids could be submitted were clear. Support was expressed for the view that an assessment of responsiveness before the auction should be made mandatory in all ERAs, and that the submission of initial bids for the purposes of evaluation should be mandatory in all ERAs in which criteria other than price would determine the successful bid. An alternative view was also expressed, i.e. that it would be preferable to retain the flexibility currently given to procuring entities in this respect, by allowing the procuring entity, where appropriate, to assess the responsiveness of bids after the auction (though in this case there could be a certification from the bidders prior to the ERA that they could supply the items to be procured through the ERA).

67. It was suggested that the last sentence in paragraph (6) (d) should be redrafted along the following lines: "Where an evaluation of initial bids had taken place, the procuring entity should also report to each supplier or contractor in the invitation to the auction information on the outcome of their respective evaluation." A question was raised about the extent of the information that should be disclosed to suppliers or contractors pursuant to this requirement, considering both the objective of full transparency and the need to avoid revealing confidential and commercially sensitive information, and the need to avoid providing information that might facilitate collusion. It was considered that the information disclosed should allow suppliers or contractors to determine before the auction the amendments to their bids that would be required to improve their status vis-à-vis other suppliers invited to the auction.

68. With reference to the requirement to ensure effective competition (set out in draft article 51 quater), some delegates stated that it would be desirable to require the procuring entity to specify in the notice of ERA the minimum number of suppliers required to be registered to participate in the auction to ensure effective competition. (This requirement would then be included as part of the relevant requirements in article 51 bis.) Reservation was expressed about this suggestion, on the basis that ensuring effective competition and preventing collusion would require more than just a certain number of bidders (for example, where branches of a company or linked entities colluded to participate in the auction to give the appearance of genuine competition). The prevailing view was that a minimum number of bidders would be part of ensuring effective competition, that no specific number should be set out in the Model Law or the Guide to Enactment, but views differed as to whether the procuring entity should be required to include a minimum number in the notice of the ERA.

69. One view was that even if the procuring entity were required to specify a minimum number of bidders in the notice of ERA, it should still have the right to cancel the auction in accordance with draft articles 51 bis and quater, if effective competition were not assured (though some delegates considered that this right would be subject to specification in the solicitation documents pursuant to article 12 (1)).

70. The experience of some jurisdictions in requiring a minimum number of bidders was shared. It was pointed out that the Model Law as well, for example in article 50, referred to the desirable minimum of participants in some procurement methods, such as at least three participants where possible in a request for quotations procedure.

71. The prevailing view was that flexibility should be given to the procuring entity to decide whether a maximum or minimum number of bidders would be justifiable in each procurement; such flexibility should be subject to the requirements of effective competition and non-discrimination in the treatment of bidders; and any such decision should be reflected in the notice of an ERA under draft article 51 bis. The Working Group agreed to finalize its consideration of the matter in the context of draft article 51 quater, for which a new paragraph (3) addressing these issues was proposed (see paragraphs 76-81 below).

72. As regards the structure of article 51 bis, it was noted that the article had been drafted to address the pre-auction procedures for all types of stand-alone ERAs, and that in order to avoid an excessively long text, extensive cross-references to other articles of the Model Law had been used. The Working Group considered that the result was complex and difficult to follow, and therefore whether alternative approaches to drafting might make the article and procedures easier to comprehend. One suggested approach was to set out in full all the relevant provisions in the text. Although, in electronic publications, the use of hyperlinks could alleviate the difficulties in using cross-references, readers might also use a paper version of the text. The considerations of making the article user-friendly and self contained, it was said, should outweigh concerns over the length of the provisions.

73. It was agreed that the text should be separated into several articles, and definitions of the concepts should be provided to facilitate the understanding of some of its provisions. As regards how to separate the text, various suggestions

were made. One was that a separate article might be dedicated to various procedural elements or steps, such as the content of a notice of an ERA. Another approach suggested was to provide in one article all the procedural and related steps for the simplest ERAs, and in subsequent articles to address the procedures that would be required for more complex ERAs. The Secretariat was requested to consider ways of presenting materials contained in the text in a more user-friendly way.

Draft article 51 ter and points for reflection in an accompanying Guide text (A/CN.9/WG.I/WP.55, paras. 14-17)

74. The Working Group considered whether any procurement methods, such as tendering, should be expressly excluded from the ambit of the draft article. Recalling the decision taken by the Working Group at its eleventh session (A/CN.9/623, para. 74), the Working Group agreed with the current approach in drafting that left open options of using ERAs in various procurement methods envisaged by the Model Law, with the understanding that the Guide should provide precise guidance on all the relevant issues involved.

75. It was suggested that paragraph (1) of the draft article should be redrafted along the following lines: "The procurement contract in procurement methods envisaged under the Model Law may be awarded after an electronic reverse auction has taken place. The auction should be compatible with the conditions for use of the relevant procurement proceedings and preceding phases of the procedure." It was noted that consequential changes would be required in paragraph (2) of the draft article.

Draft article 51 quater and points for reflection in an accompanying Guide text (A/CN.9/WG.I/WP.55, paras. 18-20)

76. It was agreed that the draft article should be expanded to address effective competition not only in quantitative but also qualitative terms, and that the right to cancel the ERA in the case of insufficient competition would apply both prior to and during the auction.

77. It was proposed that a new paragraph (3) along the following lines be included in draft article 51 quater: "Depending on the nature of goods, services or construction to be procured, and subject to the method of electronic reverse auction, the procuring entity may establish a requirement for a minimum, or a minimum and maximum number of bidders, in order to guarantee effective competition to the greatest reasonable extent as indicated in the previous paragraphs of this article and in order to guarantee non-discrimination or arbitrary exclusion thereby respecting what is contained in article 51 bis (4)." It was noted that a consequential change would be required in draft article 51 bis, to ensure that the procuring entity's decision on the maximum or minimum number was properly reflected in the notice of an ERA.

78. Some delegates questioned whether the requirement should depend on the nature of the procurement or the type of electronic reverse auction. It was also observed that the requirement would be independent of the value of the goods since the principle of effective competition was of general application. In addition, it was noted that costs in the context of ERAs would be marginal, whereas the efficiency of the whole procurement administration process would be the benefit to take into

account. Others considered that these notions were important in the specific context of ERAs, because otherwise the provisions would not add anything to the general principles of competition and fair treatment of participants applicable to all procurement methods, and that they also made criteria for taking the procuring entity's decision on any maximum number of bidders more objective and clearer.

79. The prevailing view was in favour of an alternative wording for a new paragraph (3), along the following lines: "the procuring entity may establish a minimum or maximum number of bidders, or both, if it has satisfied itself that in doing so it would ensure effective competition and fairness," but that the factual circumstances of each procurement were relevant criteria and a further discussion would be included in the Guide.

80. As regards strengthening the requirement for effective competition, it was suggested that article 51 quater should include a requirement to ensure "effective competition to the greatest reasonable extent", especially in the light of the understanding in some jurisdictions that "effective competition" had been interpreted as the minimum required by law, and was no guarantee of adequacy. Others considered that this interpretation was not a common one.

81. It was stressed that the Model Law as a general principle required full and open competition, that the reasons for limiting participation were both exceptional and practical, and the concept was to limit the number of participants but not the principle of competition. Accordingly, limiting participants would be permitted only to the extent necessary for the reasons justifying the limitation. It was also observed that the same reasons for limiting participation should apply to all procurement methods in which full and open competition could be curtailed. It was agreed that the concept of "effective competition" in the Model Law should be explained in an early section of the Guide as a reference to full and open competition or only such limitations as were permitted by the Model Law in specified circumstances and with the safeguards discussed above, and that the limitation had to be carried out in a non-discriminatory way. Cross-references would be made to that general discussion in all guidance discussing those articles that permitted the limiting of participation.

82. The Working Group requested the Secretariat to draft a new paragraph (3) taking into account suggestions made, the understanding being that establishing a minimum number of bidders would be part of ensuring effective competition, while establishing the maximum number addressed practical necessities.

Draft article 51 quinquies and points for reflection in an accompanying Guide text (A/CN.9/WG.I/WP.55, paras. 21-28)

83. With reference to draft article 51 quinquies (1) (c), the Working Group considered the information that should be disclosed to participants during the auction. It was stressed that the considerations of transparency should be balanced against considerations of competition (such as to prevent collusion) and the legitimate interests of bidders (such as to prevent the disclosure of commercially sensitive information). The Working Group recalled its relevant discussion in the context of draft article 51 bis (6) (d) that addressed the extent of disclosure of the outcome of the pre-auction evaluation before the auction (see paragraph 66 above) and agreed that approaches taken in both draft articles should be consistent.

84. One view was that only restricted information should be disclosed during the auction, such as information on whether or not a bidder was leading the auction. As a result at no time during the auction would the leading price be disclosed, since, it was stated, so doing could encourage very small reductions in the bid price, and thereby prevent the procuring entity from obtaining the best result; it could also encourage the submission of abnormally low bids. On the other hand, the view was expressed that experience of some jurisdictions indicated that the disclosure of the leading price during the auction had not proved harmful.

85. In the light of the variety in and evolving practice, the prevailing view was that the current flexible approach of the text should be retained, and the Guide should explain different possibilities and advantages and disadvantages of various approaches.

86. It was agreed that in paragraph (4) of the draft article: (i) the provisions should make it clear that the provisions referred to failures in the procuring entities' systems or communication, and not systems of suppliers or contractors; (ii) the words "[that prevent holding the auction]" should be replaced with the words "that endangered the proper conduct of the auction" or similar; and (iii) the second set of square brackets (but not the text they contained) should be deleted.

87. In order to prevent possible manipulation of communication systems for the purpose of excluding some bidders from participating in the ERA, the view was expressed by several delegations that the procuring entity should suspend the ERAs in the case of failures of communication systems. It was suggested that the word "may" should be replaced with the word "must" or "shall". It was suggested that safeguards should be included to prevent manipulation with respect to failures in the system on the part of the procuring entity, in particular by providing opportunities to verify the causes, nature and authenticity of failures and the actions taken by the procuring entity to rectify them. The issue was considered relevant not only throughout the conduct of ERAs, but in procurement systems in general, and it was agreed that it would be vital not only to allow suppliers to have effective recourse after the event, but also to provide recourse prior to any award of the procurement contract. It was observed that this could be a difficult exercise, and that addressing manipulation in the dynamic environment might be especially problematic. The Working Group agreed to consider the issue and proposed solutions in the context of possible revisions to the review provisions under article 52.

88. Although it was suggested that paragraph (4) should explicitly provide that the procuring entity should be responsible for the system to operate an ERA, it was considered that relevant issues had been considered in the context of draft article 30 (5) (c) and paragraph 23 of A/CN.9/WG.I/WP.54 (see paragraphs 39-40 above).

Draft article 51 sexies and points for reflection in an accompanying Guide text (A/CN.9/WG.I/WP.55, paras. 29-33)

89. It was agreed to reflect in the draft article that there were four possible options that could be followed if the successful bidder did not enter into the procurement contract: the three options in the text, or to cancel the procurement. The Working Group requested the text to be revised to include the fourth option, and to ensure that the options were clearly presented (possibly by splitting paragraph (1) (b)). It

was also agreed to reflect in the text that responsiveness could be assessed after the auction. The suggestion was made that some guidance should be provided to enacting States as regards procedural aspects of checking qualifications, responsiveness and ALTs after the auction, taking into account the specific circumstances of ERAs, including that they were designed to limit or exclude human intervention in the award of procurement contracts on the basis of the results of the auction.

3. Consequential changes to provisions of the Model Law: record of procurement proceedings (article 11 of the Model Law) (A/CN.9/WG.I/WP.55, paras. 34-37)

90. With respect to paragraph 36 of document A/CN.9/WG.I/WP.55, it was suggested that no changes should be made to article 11 (2) but the Guide should note possible risks of collusion in subsequent procurement if the names of unsuccessful bidders, or of bidders in suspended or terminated procurement proceedings were disclosed. The Secretariat was requested to ensure that the procuring entity would be able rely on the protection included in article 11 (3) enabling such information to be withheld so as to ensure future competition, and to include appropriate guidance as discussed at its eleventh session.

91. It was agreed to add the words “the opening and closing” after the words “the date and time of”, and to discuss in the Guide the meaning of the term “opening of the auction”.

92. It was also agreed that the Secretariat should ensure that all provisions and safeguards applying to tenders, proposals and other submissions would also apply where appropriate to initial bids submitted prior to an ERA.

D. Draft provisions to enable the use of framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.52 and WP.56, annex, paras. 2-9)

1. General remarks

93. Support was expressed for the current drafting approach in A/CN.9/WG.I/WP.52, applying the transparency and competition safeguards of the Model Law to all stages of procurement involving framework agreements including the second stage (the award of the procurement contract itself), particularly in the light of some difficulties in ensuring effective competition that had been experienced in systems with a less encompassing approach.

2. Proposed article [51 octies]. General provisions (A/CN.9/WG.I/WP.52, paras. 10-17)

94. It was proposed to replace in paragraph (1) the reference to a framework agreement with the reference to framework agreements, so as to enable the procuring entity to conclude more than one agreement in each procurement. The proposed change was suggested so as to allow different contractual arrangements with different suppliers (such as for conflict of interest purposes) or for reasons of confidentiality (for example as regards intellectual property rights). Some doubt was expressed as to the need for and practical implications of this approach. Particular

concerns were expressed about a potentially anti-competitive and non-transparent character, and potential abuse in awarding contracts under separate framework agreements.

95. Views were exchanged regarding whether the procuring entity should be permitted to purchase outside the framework agreement. It was noted that some jurisdictions permitted procuring entities to do so by conducting new procurement proceedings. The value for suppliers of participating in framework agreements under such conditions was questioned. It was argued that parties to the framework agreement should be confident that they would be awarded a contract at least for a minimum value or quantity specified in the agreement; otherwise, suppliers might consider that the costs of participation exceeded the possible benefit. On the other hand, it was argued that these costs might be marginal, but the benefits significant.

Annex

Tentative timetable and agenda for the Working Group's thirteenth to fifteenth sessions agreed at the Working Group's eleventh session

Session	*Day 1*	*Day 2*	*Day 3*	*Day 4*	*Day 5*
13th, Spring 2008	Framework agreements	Framework agreements	Suppliers' lists	ERAs	Remedies
14th, Autumn 2008	Remedies	Remedies/ Framework agreements	Framework agreements/ Suppliers' lists	Framework agreements/ Suppliers' lists	Conflict of interest/ Services and goods
15th, Spring 2009	Conflict of interest/ Services and goods	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment