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Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders

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 76 of document A/CN.9/WG.I/WP.57, which is before the Working Group at its thirteenth 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. This note has been prepared pursuant to the request of the Working Group at its twelfth session to the Secretariat to revise the draft provisions on the use of electronic communications in public procurement and those addressing publication of procurement-related information, and abnormally low tenders ("ALTs"), reflecting the Working Group's deliberations at that session.[1]

II. Draft provisions addressing publication of procurement-related information

A. Proposed revisions to article 5

3. The following draft article reflects the drafting suggestions made at the Working Group's twelfth session to the draft article 5 that was before the Working Group at its twelfth session:[2]

> **"Article 5. Publicity of legal texts and information on forthcoming procurement opportunities**
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> (1) Except as provided for in paragraph 2 of this article,[3] the text of this Law, procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.
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> (2) Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public and updated if need be.
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> (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."[4]

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[1] A/CN.9/640, para. 14. The revised text is cross-referred to paragraphs of that Report in the footnotes that follow, so as to highlight for the benefit of the Working Group the reasons for the changes in the text.

[2] Ibid., paras. 30-34.

[3] Ibid, para. 30.

[4] Ibid, para. 33.

B. Guide to Enactment text

4. The following draft text for the Guide reflects the suggestions made at the Working Group's twelfth session to the draft text for the Guide to accompany article 5 that was before the Working Group at that session:[5]

> "1. Paragraph (1) of this article is intended to promote transparency in the laws, regulations and other legal texts of general application relating to procurement by requiring that those legal texts be promptly made accessible and systematically maintained. Inclusion of this provision may be considered particularly important in States in which such a requirement is not found in existing administrative law. It may also be considered useful in States in which such a requirement is already found in existing administrative law, since a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers or contractors on the requirement for adequate public disclosure of legal texts referred to in the paragraph.
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> 2. In many countries, there exist official publications in which legal texts referred to in this paragraph are routinely published. The texts concerned could be published in those publications. Otherwise, the texts should be promptly made accessible to the public, including foreign suppliers or contractors, in another appropriate medium and manner that will ensure the required level of outreach of relevant information to intended recipients and the public at large. An enacting State may wish to specify the manner and medium of publication in procurement or any other appropriate regulations that address publicity of statutes, regulations and other public acts, with the goal of ensuring easy and prompt public access to the relevant legal texts. This should provide certainty to the public at large as regards the source of the relevant information, which is especially important in the light of proliferation of media and sources of information as a result of the use of non-paper means of publishing information. Transparency may be impeded considerably if abundant information is available from many sources, whose authenticity and authority may not be certain.
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> 3. The procurement or any other appropriate regulations should envisage the provision of relevant information in a centralized manner at a common place (the "official gazette" or equivalent) and establish rules defining relations of that single centralized medium with other possible media where such information may appear. Information posted in the single centralized medium should be authentic and authoritative and have primacy over information that may appear in other media. Regulations may explicitly prohibit publication in different media before information is published in a specifically designated central medium, and require that the same information published in different media must contain the same data. The single centralized medium should be readily and widely accessible.[6] Ideally, no fees should be charged for access to laws, regulations and other legal texts of general application in connection with procurement covered by this Law, and

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[5] Ibid., paras. 35-36.

[6] Ibid, para. 36.

all amendments thereto.[7] Regulations should also spell out what the requirement of "systematic maintenance" entails, including timely posting and updating of all relevant and essential information in a manner easy to use and understand by the average user.

4. Paragraph (2) of the article deals with a distinct category of legal texts – judicial decisions and administrative rulings with precedent value. The opening phrase in paragraph (1) intends to make it clear that publicity requirements in paragraph (1) do not apply to legal texts dealt with in paragraph (2). Due to the nature and characteristics of the legal texts dealt with in paragraph (2), including the procedure for their adoption and maintenance, application of the publicity requirements found in paragraph (1) to them may not be justifiable. For example, it may not be feasible to comply with the requirement to make these legal texts promptly accessible. In addition, the requirement of "systematic maintenance" may not be applicable to them in the light of the relatively static nature of these texts. Paragraph (2) of the article therefore requires that these texts are to be made available to the public and updated if need be. The objective is to achieve the necessary level of publicity of these texts and accuracy of publicised texts with sufficient flexibility.

5. Depending on legal traditions and procurement practices in an enacting State, interpretative texts of legal value and importance to suppliers and contractors may already be covered by either paragraph (1) or (2) of the article. The enacting State may wish to consider making necessary amendments to the article to ensure that they are covered. In addition, taking into account that non-paper means of publishing information diminish costs, time and effort of making information public and its maintenance, it may be desirable to publish other legal texts of relevance and practical use and importance to suppliers and contractors not covered by article 5 of the Model Law, in order to achieve transparency and predictability, and to foster and encourage participation of suppliers and contractors, in procurement. These additional legal texts may include, for example, procurement guidelines or manuals and other documents that provide information about important aspects of domestic procurement practices and procedures and may affect general rights and obligations of suppliers and contractors. The Model Law, while not explicitly addressing the publication of these legal texts, does not preclude an enacting State from expanding the list of legal texts covered by article 5 according to its domestic context. If such an option is exercised, an enacting State should consider which additional legal texts are to be made public and which conditions of publication should apply to them. Enacting States may in this regard assess costs and efforts to fulfil such conditions in proportion to benefits that potential recipients are expected to derive from published information. In the paper-based environment, costs may be disproportionately high if, for example, it would be required that information of marginal or occasional interest to suppliers or contractors is to be made promptly accessible to the public and systematically maintained. In the non-paper environment, although costs of publishing information may become

[7] A/CN.9/640, para. 36.

insignificant, costs of maintaining such information, so as to ensure easy public access to the relevant and accurate information, may still be high.

6. Paragraph (3) of the article enables the publication of information on forthcoming procurement opportunities. The inclusion of such an enabling provision in the procurement law may be considered important by the legislature to highlight benefits of publishing such information. In particular, publication of such information may discipline procuring entities in procurement planning, and diminish cases of "ad hoc" and "emergency" procurements and, consequently, recourses to less competitive methods of procurement. It may also enhance competition as it would enable more suppliers to learn about procurement opportunities, assess their interest in participation and plan their participation in advance accordingly. Publication of such information may also have a positive impact in the broader governance context, in particular in opening up procurement to general public review and local community participation.[8]

7. The enacting States, in procurement regulations, might provide incentives for publication of such information, as is done in some jurisdictions, such as a possibility of shortening a period for submission of tenders in pre-advertised procurements. The enacting States, in procurement regulations, may also refer to cases when publication of such information would in particular be desirable, such as when complex construction procurements are expected or when procurement value exceeds a certain threshold. They may also recommend the desirable content of information to be published and other conditions for publication, such as a time frame that such publication should cover, which may be a half-year or a year or other period. The enacting States and procuring entities should be aware however that publication of such information may not be advisable in all cases and, if imposed, may be burdensome, and may interfere in the budgeting process and procuring entity's flexibility to handle its procurement needs. The position under the Model Law is therefore, as reflected in paragraph 3 of the article, that the procuring entity should have flexibility to decide on a case-by-case basis on whether such information should be published. When published, such information is not intended to bind the procuring entity in any way in connection with publicised information, including as regards future solicitations. Suppliers or contractors would not be entitled to any remedy if the procurement did not take place subsequent to pre-publication of information about it or takes place on terms different from those pre-publicised."

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[8] Ibid, para. 35. Paragraph 6 of previous text (following para. 16 of A/CN.9/WG.I/WP.54) has accordingly been separated into two paragraphs and consequential drafting amendments made.

III. Draft provisions on the use of electronic communications in public procurement

A. Communications in procurement

1. Draft article 5 bis

5. At its twelfth session, the Working Group preliminarily agreed on the following wording of draft article 5 bis:[9]

"Article [5 bis]. Communications in procurement

(1) Any document, notification, decision and other information generated in the course of a procurement and communicated as required by this Law, including in connection with review proceedings under chapter VI or in the course of a meeting, or forming part of the record of procurement proceedings under article [11], shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(2) Communication of information between suppliers or contractors and the procuring entity referred to in articles [*7 (4) and (6), 31 (2) (a), 32 (1) (d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1), to update for revisions to Model Law*] may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:

(a) Any requirement of form in compliance with paragraph (1) of this article;

(b) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf;

(c) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(d) The means to be used to hold any meeting of suppliers or contractors.

(4) The means referred to in the preceding paragraph shall be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. The means to be used to hold any meeting of suppliers or contractors shall in addition ensure that suppliers or contractors can fully and contemporaneously participate in the meeting.

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[9] Ibid., paras. 17-25, 27 (a).

(5) Appropriate measures shall be put in place to secure the authenticity, integrity and confidentiality of information concerned."

2. Guide to Enactment text

6. At its twelfth session, the Working Group preliminarily agreed on the following text for the Guide to Enactment to accompany provisions of article 5 bis:[10]

"1. Article 5 bis seeks to provide certainty as regards the form of information to be generated and communicated in the course of the procurement conducted under the Model Law and the means to be used to communicate such information, to satisfy all requirements for information to be in writing or for a signature, and to hold any meeting of suppliers or contractors (collectively referred to as "form and means of communications"). The position under the Model Law is that, in relation to the procuring entity's interaction with suppliers and contractors and the public at large, the paramount objective should be to seek to foster and encourage participation in procurement proceedings by suppliers and contractors and at the same time to support the evolution of technology and processes. The provisions contained in the article therefore do not depend on or presuppose the use of particular types of technology. They set a legal regime that is open to technological developments. While they should be interpreted broadly, dealing with all communications in the course of procurement proceedings covered by the Model Law, the provisions are not intended to regulate communications that are subject to regulation by other branches of law, such as tender securities.[11]

2. Paragraph (1) of the article requires that information is to be in a form that provides a record of the content of the information and is accessible so as to be usable for subsequent reference. The use of the word "accessible" in the paragraph is meant to imply that information should be readable and capable of interpretation and retention. The word "usable" is intended to cover both human use and automatic processing. These provisions aim at providing, on the one hand, sufficient flexibility in the use of various forms of information as technology evolves and, on the other, sufficient safeguards that information in whatever form it is generated and communicated will be reliably usable, traceable and verifiable. These requirements of reliability, traceability and verification are essential for the normal operation of the procurement process, for effective control and audit and in review proceedings. The wording found in the article is compatible with form requirements found in UNCITRAL texts regulating electronic commerce, such as article 9 (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts. Like these latter documents, the Model Law does not confer permanence on one particular form of information, nor does it interfere with the operation of rules of law that may require a specific form. For the purposes of the Model Law, as long as a record of the content of the information is provided and information is accessible so as to be usable for subsequent reference, any form of information may be used. To ensure transparency and

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[10] Ibid., para. 27.

[11] Footnote 9, supra.

predictability, any specific requirements as to the form acceptable to the procuring entity have to be specified by the procuring entity at the beginning of the procurement proceedings, in accordance with paragraph 3 (a) of the article.

3. Paragraph (2) of the article contains an exception to the general form requirement contained in paragraph (1) of the article. It permits certain types of information to be communicated on a preliminary basis in a form that does not leave a record of the content of the information, for example if information is communicated orally by telephone or in a personal meeting, in order to allow the procuring entity and suppliers and contractors to avoid unnecessary delays. The paragraph enumerates, by cross-reference to the relevant provisions of the Model Law, the instances when this exception may be used. They involve communication of information to any single supplier or contractor participating in the procurement proceedings (for example, when the procuring entity asks suppliers or contractors for clarifications of their tenders).[12] However, the use of the exception is conditional: immediately after information is so communicated, confirmation of the communication must be given to its recipient in a form prescribed in paragraph (1) of the article (i.e., that provides a record of the content of the information and that is accessible and usable). This requirement is essential to ensure transparency, integrity and the fair and equitable treatment of all suppliers and contractors in procurement proceedings. However, practical difficulties may exist to verify and enforce compliance with this requirement. Therefore, the enacting State may wish to allow the use of the exception under paragraph (2) only in strictly necessary situations. Overuse of this exception might create conditions for abuse, including corruption and favouritism.

4. Paragraph (3) of the article gives the right to the procuring entity to insist on the use of a particular form and means of communications or combination thereof in the course of the procurement, without having to justify its choice. No such right is given to suppliers or contractors but, in accordance with article [52] of the Model Law, they may challenge the procuring entity's decision in this respect.[13] Exercise of this right by the procuring entity is subject to a number of conditions that aim at ensuring that procuring entities do not use technology and processes for discriminatory or otherwise exclusionary purposes, such as to prevent access by some suppliers and contractors to the procurement or create barriers for access.

5. To ensure predictability and proper review, control and audit, paragraph (3) of the article requires the procuring entity to specify, when first soliciting the participation of suppliers or contractors in the procurement proceedings, all requirements of form and means of communications for a given procurement. The procuring entity has to make it clear whether one or more form and means of communication can be used and, if more than one form and means can be used, which form and means is/are to be used at which stage of the procurement proceedings and with respect to which types of information or classes of information or actions. For example, special

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[12] Ibid., para.27 (b).
[13] Ibid., para 27 (c).

arrangements may be justifiable for submission of complex technical drawings or samples or for a proper backup when a risk exists that data may be lost if submitted only by one form or means. The procuring entity may at the outset of the procurement envisage that it may make a change in requirements of form and/or means of communications during a given procurement. This option might be justifiable, for example, in long-term procurements, such as involving framework agreements under article […] of this Law. In such case, the procuring entity, apart from reserving such a possibility when first soliciting the participation of suppliers or contractors in the procurement proceedings, will be required to ensure that safeguards contained in article [5 bis (4)] are complied with in the choice of any new form and/or means of communications and that all concerned are promptly notified about the change.[14]

6. To fulfil the requirements specified by the procuring entity under paragraph (3) of the article, suppliers or contractors may have to use their own information systems or procuring entity may have to make available to the interested suppliers or contractors information systems for such purpose. (The term "information system" or the "system" in this context is intended to address the entire range of technical means used for communications. Depending on the factual situation, it could refer to a communications network, applications and standards, and in other instances to technologies, equipment, mailboxes or tools.) To make the right of access to procurement proceedings under the Model Law a meaningful right, paragraph (4) of the article requires that means specified in accordance with paragraph (3) of the article must be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. As regards the means to be used to hold meetings, it in addition requires ensuring that suppliers or contractors can fully and contemporaneously participate in the meeting. "Fully and contemporaneously" in this context means that suppliers and contractors participating in the meeting have the possibility, in real time, to follow all proceedings of the meeting and to interact with other participants when necessary. The requirement of "capable of being utilized with those in common use by suppliers or contractors" found in paragraph (4) of the article implies efficient and affordable connectivity and interoperability (i.e., capability effectively to operate together) so that to ensure unrestricted access to procurement. In other words, each and every potential supplier or contractor should be able to participate, with simple and commonly used equipment and basic technical know-how, in the procurement proceedings in question. This however should not be construed as implying that procuring entities' information systems have to be interoperable with those of each single supplier or contractor. If, however, the means chosen by the procuring entity implies using information systems that are not generally available, easy to install (if need be) and reasonably easy to use and/or the costs of which are unreasonably high for the use envisaged, the means cannot be deemed to satisfy the requirement of "commonly used means" in the context of a specific procurement under paragraph (4) of the article.

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[14] Ibid., para 27 (d).

7. The paragraph does not purport to ensure readily available access to public procurement in general but rather to a specific procurement. The procuring entity has to decide, on a case-by-case basis, which means of communication might be appropriate in which type of procurement. For example, the level of penetration of certain technologies, applications and associated means of communication may vary from sector to sector of a given economy. In addition, the procuring entity has to take into account such factors as the intended geographic coverage of the procurement and coverage and capacity of the country's information system infrastructure, the number of formalities and procedures needed to be fulfilled for communications to take place, the level of complexity of those formalities and procedures, the expected information technology literacy of potential suppliers or contractors, and the costs and time involved. In cases where no limitation is imposed on participation in procurement proceedings on the basis of nationality, the procuring entity has also to assess the impact of specified means on access to procurement by foreign suppliers or contractors. Any relevant requirements of international agreements would also have to be taken into account. A pragmatic approach, focusing on its obligation not to restrict access to the procurement in question by potential suppliers and contractors, will help the procuring entity to determine if the chosen means is indeed "commonly used" in the context of a specific procurement and thus whether it satisfies the requirement of the paragraph.

8. In a time of rapid technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible or usable (whether for technical reasons, reasons of cost or otherwise). The procuring entity must seek to avoid situations when the use of any particular means of communication in procurement proceedings could result in discrimination among suppliers or contractors. For example, the exclusive choice of one means could benefit some suppliers or contractors who are more accustomed to use it to the detriment of others. Measures should be designed to prevent any possible discriminatory effect (e.g., by providing training or longer time limits for suppliers to become accustomed to new systems). The enacting State may consider that the old processes, such as paper-based ones, need to be retained initially when new processes are introduced, which can then be phased out, to allow a take-up of new processes.

9. The provisions of the Model Law do not distinguish between proprietary or non-proprietary information systems that may be used by procuring entities. As long as they are interoperable with those in common use, their use would comply with the conditions of paragraph (4). The enacting State may however wish to ensure that procuring entities should carefully consider to what extent proprietary systems, devised uniquely for the use by the procuring entity, may contain technical solutions different and incompatible with those in common use. Such systems may require suppliers or contractors to adopt or convert their data into a certain format. This can render access of potential suppliers and contractors, especially smaller companies, to procurement impossible or discourage their participation because of additional difficulties or increased costs. Effectively, suppliers or contractors not using the same information systems as the procuring entity would be excluded, with the risk of discrimination among suppliers and contractors, and higher risks of

improprieties. The use of the systems that would have a significantly negative effect on participation of suppliers and contractors in procurement would be incompatible with the objectives, and article [5 bis (4)], of the Model Law.

10. On the other hand, the recourse to off-the-shelf information systems, being readily available to the public, easy to install and reasonably easy to use and providing maximal choice, may foster and encourage participation by suppliers or contractors in the procurement process and reduce risks of discrimination among suppliers and contractors. They are also more user-friendly for the public sector itself as they allow public purchasers to utilize information systems proven in day-to-day use in the commercial market, to harmonize their systems with a wider net of potential trading partners and to eliminate proprietary lock-in to particular third-party information system providers, which may involve inflexible licences or royalties. They are also easily adaptable to user profiles, which may be important for example in order to adapt systems to local languages or to accommodate multilingual solutions, and scalable through all government agencies' information systems at low cost. This latter consideration may be especially important in the broader context of public governance reforms involving integration of internal information systems of different government agencies.

11. The Model Law does not address the issue of charges for accessing and using the procuring entity's information systems. This issue is left to the enacting State to decide taking into account local circumstances. These circumstances may evolve over time with the effect on the enacting State's policy as regards charging fees. The enacting State should carefully assess the implications of charging fees for suppliers and contractors to access the procurement, in order to preserve the objectives of the Model Law, such as those of fostering and encouraging participation of suppliers and contractors in procurement proceedings, and promoting competition. Fees should be transparent, justified, reasonable and proportionate and not discriminate or restrict access to the procurement proceedings. Ideally, no fees should be charged for access to, and use of, the procuring entity's information systems.[15]

12. The objective of paragraph (5) of the article (which requires appropriate measures to secure the authenticity, integrity and confidentiality of information) is to enhance the confidence of suppliers and contractors in reliability of procurement proceedings, including in relation to the treatment of commercial information. Confidence will be contingent upon users perceiving appropriate assurances of security of the information system used, of preserving authenticity and integrity of information transmitted through it, and of other factors, each of which is the subject of various regulations and technical solutions. Other aspects and relevant branches of law are relevant, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality, intellectual property and copyright. The Model Law and procurement regulations that may be enacted in accordance with article 4 of the Model Law are therefore only a narrow part of the relevant legislative framework. In addition, reliability of procurement proceedings should be addressed as part of a comprehensive good

[15] Ibid., para 27 (e).

governance framework dealing with personnel, management and administration issues in the procuring entity and public sector as a whole.

13. Legal and technical solutions aimed at securing the authenticity, integrity and confidentiality may vary in accordance with prevailing circumstances and contexts. In designing them, consideration should be given both to their efficacy and to any possible discriminatory or anti-competitive effect, including in the cross-border context. The enacting State has to ensure at a minimum that the systems are set up in a way that leaves trails for independent scrutiny and audit and in particular verifies what information has been transmitted or made available, by whom, to whom, and when, including the duration of the communication, and that the system can reconstitute the sequence of events. The system should provide adequate protection against unauthorized actions aimed at disrupting normal operation of public procurement process. Technologies to mitigate the risk of human and non-human disruptions must be in place.[16] So as to enhance confidence and transparency in the procurement process, any protective measures that might affect the rights and obligations of potential suppliers and contractors should be specified to suppliers and contractors at the outset of procurement proceedings or should be made generally known to public. The system has to guarantee to suppliers and contractors the integrity and security of the data that they submit to the procuring entity, the confidentiality of information that should be treated as confidential and that information that they submit will not be used in any inappropriate manner. A further issue in relation to confidence is that of systems' ownership and support. Any involvement of third parties need to be carefully addressed to ensure that the arrangements concerned do not undermine the confidence of suppliers and contractors and the public at large in procurement proceedings.[17]

14. Further aspects relevant to the provisions of article 5 bis are discussed in the commentary to article[s][30 (5) and …], in paragraphs […] of this Guide."[18]

B. Electronic submission of tenders

1. Proposed revisions to article 30 (5)

7. At its twelfth session, the Working Group preliminarily agreed on the following wording of draft article 30 (5):[19]

"Article 30. Submission of tenders

(5) (a) A tender shall be submitted in writing, and signed, and:

(i) if in paper form, in a sealed envelope; or

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[16] Ibid., para 27 (f).
[17] Ibid., para 27 (g).
[18] Ibid., para 27 (h).
[19] Ibid., para. 28.

(ii) if in any other form, according to requirements specified by the procuring entity, which ensure at least a similar degree of authenticity, security, integrity and confidentiality;

(b) The procuring entity shall provide to the supplier or contractor receipt showing the date and time when its tender was received;

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law."

2. Guide to Enactment text

8. At its twelfth session, the Working Group preliminarily agreed on the following text for the Guide to Enactment to accompany provisions of article 30 (5):[20]

"3. Paragraph (5) (a) of the article contains specific requirements as regards the form and means of submission of tenders that complement general requirements of form and means found in article 5 bis (see the commentary to article 5 bis in paragraphs [cross-reference] above). The paragraph provides that tenders have to be submitted in writing and signed, and that their authenticity, security, integrity and confidentiality have to be preserved. The requirement of "writing" seeks to ensure the compliance with the form requirement found in article [5 bis (1)] (tenders have to be submitted in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference). The requirement of "signature" seeks to ensure that suppliers or contractors submitting a tender identify themselves and confirm their approval of the content of their submitted tenders, with sufficient credibility. The requirement of "authenticity" seeks to ensure the appropriate level of assurance that a tender submitted by a supplier or contractor to the procuring entity is final and authoritative, cannot be repudiated and is traceable to the supplier or contractor submitting it. Together with the requirements of "writing" and "signature", it thus seeks to ensure that there would be tangible evidence of the existence and nature of the intent by the suppliers or contractors submitting the tenders to be bound by the information contained in the tenders submitted and that evidence would be preserved for record-keeping, control and audit. Requirements of "security", "integrity" and "confidentiality" of tenders seek to ensure that the information in submitted tenders cannot be altered, added to or manipulated ("security" and "integrity"), and that it cannot be accessed until the time specified for public opening and thereafter only by authorized persons and only for prescribed purposes, and according to the rules ("confidentiality").

3 bis. In the paper-based environment, all the requirements described in the preceding paragraph of this Guide are met by suppliers or contractors submitting to the procuring entity, in a sealed envelope, tenders or parts thereof presumed to be duly signed and authenticated (at a risk of being rejected at the time of the opening of tenders if otherwise), and by the procuring entity keeping the sealed envelopes unopened until the time of their

[20] Ibid., para. 29.

public opening. In the non-paper environment, the same requirements may be fulfilled by various standards and methods as long as such standards and methods provide at least a similar degree of assurances that tenders submitted are indeed in writing, signed and authenticated and that their security, integrity and confidentiality are preserved. The procurement or other appropriate regulations should establish clear rules as regards the relevant requirements, and when necessary develop functional equivalents for the non-paper based environment. Caution should be exercised not to tie legal requirements to a given state of technological development. The system, at a minimum, has to guarantee that no person can have access to the content of tenders after their receipt by the procuring entity prior to the time set up for formal opening of tenders. It must also guarantee that only authorized persons clearly identified to the system will have the right to open tenders at the time of formal opening of tenders and will have access to the content of tenders at subsequent stages of the procurement proceedings. The system must also be set up in a way that allows traceability of all operations in relation to submitted tenders, including the exact time and date of receipt of tenders, verification of who accessed tenders and when, and whether tenders supposed to be inaccessible have been compromised or tampered with. Appropriate measures should be in place to verify that tenders would not be deleted or damaged or affected in other unauthorized ways when they are opened and subsequently used. Standards and methods used should be commensurate with risk. A strong level of authentication and security can be achieved through, for example, public key infrastructure with accredited digital certificate service providers, but this will not be appropriate for low risk small value procurement.[21] These and other issues will have to be addressed in the procurement or other appropriate regulations.[22]

3 ter. Paragraph 5 (b) requires the procuring entity to provide to the suppliers or contractors a receipt showing the date and time when their tender was received. In the non paper-based environment, this should be done automatically. In situations where the system of receipt of tenders makes it impossible to establish the time of receipt with precision, the procuring entity may need to have an element of discretion to establish the degree of precision to which the time of receipt of tenders submitted would be recorded. However, this element of discretion should be regulated by reference to applicable legal norms of electronic commerce, in order to prevent abuses.[23] When the submission of a tender fails, particularly due to protective measures taken by the procuring entity to prevent the system from being damaged as a result of a receipt of a tender, it shall be considered that no submission was made. Suppliers or contractors whose tenders cannot be received by the procuring entity's system should be instantaneously informed about the event in order to allow them where possible to resubmit tenders before the deadline for submission has expired. No resubmission after the expiry of the deadline shall be allowed.

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[21] Ibid., para 27 (c).
[22] Ibid., para 29.
[23] Ibid., para 29.

3 quater. Paragraph 5 (c) raises issues of security, integrity and confidentiality of submitted tenders, discussed above. Unlike subparagraph 5 (a)(ii), it does not refer to the requirement of authenticity of tenders since issues of authenticity are relevant at the stage of submission of tenders only. It is presumed that upon receipt of a tender by the procuring entity at the date and time to be recorded in accordance with paragraph 5 (b) of the article, adequate authenticity has already been assured.

3 quinquies. It is recognizes that failures in automatic systems, which may prevent suppliers or contractors to submit their tenders before the deadline, may inevitably occur. The Model Law leaves the issue to be addressed by procurement or other appropriate regulations. Under the provisions of article 30 (3), the procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control. In such case, it would have to give notice of any extension of the deadline promptly to each supplier or contractor to which the procuring entity provided the solicitation documents (see article 30 (4) of the Model Law). Thus, where the failure occurs, the procuring entity has to determine whether the system can 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 determines that a failure in the system will prevent it from proceeding with the procurement, the procuring entity can cancel the procurement and announce new procurement proceedings. Failures in automatic systems 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, can give rise to a right of review by aggrieved suppliers and contractors under article 52 of the Model Law."[24]

C. Opening of tenders

1. Proposed revisions to article 33 (2)

9. At its twelfth session, the Working Group preliminarily agreed on the following wording of draft article 33 (2):[25]

"Article 33. Opening of tenders

(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. 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."

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[24] Ibid., paras 40-41.

[25] Ibid., para. 38.

2. Guide to Enactment text

10. The following text is proposed for the Guide to accompany the revised provisions of article 33 (2) of the Model Law. It has been drafted to reflect the relevant suggestions made at the Working Group's previous sessions.[26] It is proposed that the text would be included in paragraph (2) of the current Guide's commentary to article 33. This would result in splitting the paragraph into several paragraphs, as follows:

> "2. Paragraph (2) sets forth the rule that the procuring entity must permit all suppliers or contractors that have submitted tenders, or their representatives, to be present at the opening of tenders. The presence may be in person or by means that comply with requirements of article 5 bis of the Model Law (for the discussion of the relevant requirements, see paragraphs […] of this Guide). In particular, article [5 bis (3) (d)] requires that the procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, specify the means to be used to hold any meeting of suppliers or contractors. In accordance with article [5 bis (4)], such means must be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context and must ensure that suppliers or contractors can fully and contemporaneously participate in the meeting. The second sentence of paragraph (2) of article 33 supplements these provisions of article [5 bis (4)] clarifying that, in the context of the opening of tenders, suppliers or contractors are 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. This provision of article 33 (2) has been found consistent with other international instruments addressing the matter. The term "fully and contemporaneously" in this context means that suppliers or contractors are given opportunity to observe in real time the opening of tenders, including by receiving (hearing or reading) properly immediately and at the same time all and the same information communicated during the opening, such as the announcements made in accordance with article 33 (3). [They should also be able to interfere where any improprieties take place. The system in place has to be capable to receive and respond to suppliers' feedback without delay]. Different methods may exist to satisfy the requirement for full and contemporaneous appraisal using information technology systems. Regardless of methods used, sufficient information about them have to be communicated to suppliers or contractors well in advance to enable them to take all required measures to connect themselves to the system in order to observe opening of tenders.[27]
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> 3. The rule requiring the procuring entity to permit all suppliers or contractors that have submitted tenders, or their representatives, to be present at the opening of tenders contributes to transparency of the tendering

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[26] Ibid., para. 39, and A/CN.9/623, para. 25.

[27] Text proposed to be additional to that in existing para. 2 of the Guide text addressing article 33. Additional observations, such as whether suppliers should be able to intervene in the process, e.g., by claiming non-observance of procedures or infringement of rights and insisting and able to insist that the record of the opening reflect their concerns for subsequent audit could be included. Further, guidance on scheduling in the light of time differences in international procurement could also be included.

proceedings. It enables suppliers and contractors to observe that the procurement laws and regulations are being complied with and helps to promote confidence that decisions will not be taken on an arbitrary or improper basis. For similar reasons, paragraph (3) requires that at such an opening the names of suppliers or contractors that have submitted tenders, as well as the prices of their tenders, are to be announced to those present. With the same objectives in view, provision is also made for the communication of that information to participating suppliers or contractors that were not present or represented at the opening of tenders.[28]

4. Where automated opening of tenders takes place, the enacting State should be aware of additional safeguards that must be in place to ensure transparency and integrity of the process of the opening of tenders. The system must guarantee that only authorized persons clearly identified to the system will have the right to set or change in the system the time for opening tenders in accordance with article 33 (1), without compromising the security, integrity and confidentiality of tenders. Only such persons will have the right to open tenders at the set time. The enacting State may consider establishing the "four eyes" principle, found in many relevant international instruments addressing the subject. Under this principle, the system ensures that at least two authorised persons should by simultaneous action perform opening of tenders. "Simultaneous action" in this context means that the designate authorized persons within almost the same time span shall open the same components of a tender and produce logs of what components have been opened and when. It is advisable that before the tenders are opened, the system should confirm the security of tenders by verifying that no authorised access has been detected. The authorized persons should be required to verify the authenticity and integrity of tenders and their timely submission. Where tenders are to be submitted in separate parts (for example, as separate technical and economic offers), the information system should allow the deferred opening of the separate files of the tender in the required sequence in the same way as with two sealed envelopes, without compromising the security, integrity and confidentiality for the unopened parts. Measures should be in place to prevent [mitigate risks of] compromising the integrity of tenders (for example, their deletion) by the system upon their opening as well destructing the procurement system by opened tenders. The system must also be set up in a way that allows traceability of all operations during the opening of tenders, including verification of who opened, which tender and components thereof and at which date and time. It must also guarantee that the data opened will remain accessible only to persons authorized to acquaint themselves therewith (such as to members of an evaluation committee or auditors at subsequent stages of the procurement proceedings). These and other issues have to be addressed in procurement and other regulations to be adopted by the enacting State."

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[28] See existing para. 2 of the Guide text addressing article 33.

IV. Draft provisions addressing abnormally low tenders

A. Draft article 12 bis

11. At its twelfth session, the Working Group preliminarily agreed on the following wording of draft article 12 bis:[29]

"Article [12 bis]. Rejection of abnormally low tenders, proposals, offers, quotations or bids

(1) 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:[30]

(a) The procuring entity has requested in writing from the supplier or contractor concerned details of constituent elements of a tender, proposal, offer, quotation or bid that give rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;[31]

(b) The procuring entity has taken account of the information supplied, if any, but continues, on a reasonable basis, to hold those concerns; and

(c) The procuring entity has recorded those concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a tender, proposal, offer, quotation or bid in accordance with this article and grounds for the decision shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned."

B. Guide to Enactment text

12. The Working Group considered the accompanying provisions of the Guide at its eleventh session. The revised text incorporating the suggestions made to the text at that and twelfth sessions[32] and any other suggestions that may be made will be presented for consideration by the Working Group in due course.

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[29] A/CN.9/640, paras. 44-55.
[30] Ibid., para. 54 (a).
[31] Ibid., para. 54 (b).
[32] Ibid., paras. 48, 53 and 55 and A/CN.9/623, paras. 42, 48 and 49.