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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, electronic reverse auctions 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 12 to 85 of document A/CN.9/WG.I/WP.60, which is before the Working Group at its fourteenth 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 to record the Working Group’s review of the draft provisions, and supporting Guide to Enactment text, on the publication of procurement-related information, the use of electronic communications in public procurement, electronic reverse auctions (“ERAs”), and the avoidance of abnormally low tenders (“ALTs”). At the thirteenth session, some drafting changes were proposed, which are recorded below so as to facilitate the Working Group’s continuing review of those provisions at a future session.¹

II. Draft provisions addressing publication of procurement-related information (A/CN.9/WG.1/WP.58, paras. 3-4)²

3. The Working Group at its thirteenth session considered the proposed draft article entitled “Article 5. Publicity of legal texts and information on forthcoming procurement opportunities”, paragraph 3 of which reads as follows:

“(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.” (emphasis added)

4. The issue discussed by the Working Group was how broad the scope of the “procurement opportunities” described was intended to be. It was noted that there was no definition of “procurement opportunities” in the text or Guide to Enactment.

5. It was also recalled that the aim of the provision was to facilitate competition by making suppliers aware of procurement that might take place in the short- to medium-term, and to assist in imposing planning discipline upon procuring entities (these aims were explained in the remainder of the Guide to Enactment text addressing proposed article 5, contained in para. 4 of A/CN.9/WG.1/WP.58).

¹ A/CN.9/648, para. 15. The Working Group was reviewing documents A/CN.9/WG.1/WP.58 and A/CN.9/WG.1/WP.59. The detailed comments of the Working Group were not recorded in its Report for reasons of space and, accordingly, are reproduced in this note to assist the Working Group when it reconsiders the drafting materials. References are therefore given in the section titles in this document to assist the Working Group in locating the drafting materials concerned. Where there were no comments made to the drafting materials in documents A/CN.9/WG.1/WP.58 and A/CN.9/WG.1/WP.59, the relevant sections are omitted, but the Working Group may wish to review them when it returns to those notes in due course.

² The Working Group observed at its thirteenth session that the suggestions made were of a preliminary nature, and further suggestions would probably be made at a future session.

6. It was suggested that these aims should be supported by including a reference to procurement plans as an addition to “information on forthcoming procurement opportunities”, and that this reference should be made in the Guide to Enactment rather than in the text of the Model Law. The guidance currently stressed the optional and non-binding nature of this publication, so that publication would be encouraged but not required by the provisions, and accordingly any such publication would not constitute any form of solicitation, and noted that there would be no remedy for suppliers should the information turn out to be inaccurate or should it change. Thus procuring entities would not run risks in publishing procurement plans, which would be an important factor in encouraging such information-sharing, which was one of the aims of the provision.

7. The Working Group may wish to consider the following revised section of paragraph 6 of the proposed Guide to Enactment text, which seeks to clarify the aims of the provision as described above:

“6. Paragraph (3) of the article enables the publication of information on forthcoming procurement opportunities and procurement plans. The legislature may consider it appropriate to highlight the benefits of publishing such information, and that procuring entities do not bind themselves by doing so. For example, 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. ...”

III. Draft provisions on the use of electronic communications in public procurement (A/CN.9/WG.1/WP.58, paras. 5-6)³

A. Guide to Enactment text addressing Article [5 bis]: Communications in procurement

8. At its thirteenth session, when considering draft article 5 bis, Communications in procurement, the Working Group emphasized the importance of permitting the use of more than one means of communication in procurement.

9. However, it was queried whether complete flexibility in this regard might mean that the information contained in the solicitation documents was effectively meaningless. For example, the solicitation documents might permit all possible means of communication at any stage of the process, to prevent difficulties in changing from one means to another during the procurement. In addition, it was observed that there was no suggestion that efficiency would dictate the use of one

³ The Working Group observed at its thirteenth session that the suggestions made were of a preliminary nature, and further suggestions would probably be made at a future session.

means of communication, or as few means as possible, and that the text could make this point.

10. The Working Group may therefore wish to consider the following proposals for paragraph 5 of the draft Guide to Enactment addressing article 5 bis:

“(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 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 this 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. However, the use of several means of communication, or advising that the means may freely change during the procurement, will have implications both for the efficiency of the procurement procedure and the validity of the information regarding the means of communication, and therefore procuring entities should envisage only those means of communication and changes to them that are both justifiable and anticipated to be appropriate for the procurement concerned.”

11. Finally, as the Guide to Enactment text addressing communications in procurement does not seek to encourage the use of electronic communications, in large part because of the need to discuss whether it would be appropriate to permit the procuring entity to insist on particular means in individual enacting States, it was suggested that comments about the benefits of electronic communications in procurement and the safeguards to be applied would be useful in a general introduction to electronic procurement in the Model Law.

12. In this regard, the Working Group may recall that it has agreed to include such a general introduction in the section of the Guide preceding the article-by-article remarks, to discuss the benefits and concerns arising from electronic procurement (including the use of electronic communications in procurement), the interaction between electronic procurement and electronic commerce legislation, and general approach of the revised Model Law towards regulating electronic procurement.⁴ The Working Group may wish to include the following elements in the guidance

⁴ A/CN.9/595, paras. 18-22, A/CN.9/WG.I/WP.42, para. 13, A/CN.9/WG.I/WP.42/Add.1, para. 2. and A/CN.9/WG.I/WP.54, para. 25.

concerned, so as to introduce concepts that will be discussed in detail in the article-by-article remarks (with cross references where appropriate):

(a) A discussion of the “functional equivalent approach”, which allows any writing, signature, record or meeting to be made by electronic communication;

(b) A discussion of the implications of legal recognition being found in electronic commerce laws and not in the Model Law itself;

(c) A discussion of the safeguards necessary when providing for electronic communications, notably that the procuring entity’s choice of communications is subject to non-discrimination provisions, that the choice is to be set out in the solicitation documents, and that measures to ensure authenticity, integrity and confidentiality are required;

(d) A discussion of how to achieve the benefits of electronic procurement, including both administrative efficiency during procurement and transparency and oversight gains. In this regard, the guidance could observe that the latter are best achieved where procurement, accountability and oversight systems are integrated, and where all stages of procurement from planning to contract administration are included;

(e) That the administrative efficiency benefits might not arise in all procurement equally: they are generally considered to be particularly applicable to simple procurement and of lesser impact in complex procurement.

B. Opening of tenders (A/CN.9/WG.1/WP.58, paras. 9-10)

13. At its thirteenth session, the Working Group considered the suggested Guide to Enactment text to accompany draft article 33 (2), Opening of tenders, focusing on the requirements for participants in a virtual opening of tenders to be able to follow proceedings “fully and contemporaneously”, which was explained in paragraph 2 of the draft. It was suggested that the text in its current form was too long, and would benefit from a separate discussion of the terms “fully and contemporaneously”, and how to address improprieties that surfaced during an auction. The proposed paragraph has accordingly been split into three and revised to read as follows:

“2. Paragraph (2) sets out a 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 otherwise by any means that complies with requirements of article 5 bis of the Model Law (for a discussion of the relevant requirements, see paragraphs [...] of this Guide).⁵ The second sentence of paragraph (2) of article 33 supplements these provisions of article [5 bis (4)] clarifying that, in the

⁵ Article [5 bis (3) (d)] requires the procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, to 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 Working Group may wish to consider whether a cross reference to those provisions would be sufficient, or whether they should be included in this section of the Guide, either in the paragraph or as a footnote.

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 is consistent with other international instruments.

The term “fully and contemporaneously” in this context means that suppliers or contractors must be given the opportunity to observe (either by hearing or reading) all and the same information given out during the opening. This opportunity must be given at the same time as any person physically present at the opening of tenders would observe or hear the information concerned, subject to the time taken to upload it where it is to be read. The information concerned includes the announcements made in accordance with article 33 (3).

Suppliers must also be able to intervene where any improprieties take place, to the extent that they would be able to do so if they were physically present. The system in place therefore has to be capable of receiving and acknowledging or responding to suppliers’ feedback without delay. Different methods may exist to satisfy the requirement for full and contemporaneous appraisal using information technology systems. Regardless of the method used, sufficient information about them must be communicated to suppliers or contractors well in advance to enable them to take all measures required to connect themselves to the system in order to observe opening of tenders.”

14. As regards the risks to the integrity of tenders where there is an automated opening of tenders, it was observed at the thirteenth session that the final part of paragraph 4 of the Guide to Enactment text accompanying article 33 (2) should be revisited. The Working Group may wish to consider the following revised draft:

“4. ... Measures should be in place to prevent the integrity of tenders from being compromised, to prevent their deletion or to prevent the destruction of the system when the system opens them. The system must also be set up in a way that provides for the traceability of all operations during the opening of tenders, including the identification of the individual that opened each tender and its components, and the date and time each was opened. It must also guarantee that the tenders opened will remain accessible only to persons authorized to acquaint themselves with their contents and data (such as to members of an evaluation committee or auditors at subsequent stages of the procurement proceedings). These and related technical issues should be addressed in procurement and other regulations to be adopted by the enacting State.”

IV. Draft provisions addressing abnormally low tenders: Guide to Enactment text accompanying draft article 12 bis

15. The Working Group considered draft provisions of the Guide supporting proposed article 12 bis, Rejection of abnormally low tenders, proposals, offers,

quotations or bids, at its eleventh and twelfth sessions.⁶ The revised text, incorporating the suggestions made, reads as follows:

“(1) The purpose of the article is to enable the procuring entity to reject abnormally low tenders, proposals, offers, quotations or bids (henceforth referred to as “abnormally low tenders”) that give rise to procuring entity’s concerns as to the ability of the supplier or contractor that submitted such an abnormally low tender to perform the procurement contract. The article applies to any procurement proceedings under the Model Law, including one involving an electronic reverse auction, where risks of abnormally low tenders may be considered higher than in other procurement, particularly where the technique is new to the system concerned.

(2) The article does not require any approval of a higher administrative authority for the procuring entity to take measures referred to in the article, and nor does it oblige the procuring entity to reject an abnormally low tender.

(3) The article provides safeguards that aim to protect the legitimate interests of both parties (procuring entities, and suppliers and contractors). On the one hand, it enables the procuring entity to address possible abnormally low tenders before a procurement contract has been concluded. From the perspective of the procuring entity, an abnormally low tender involves a risk that the contract cannot be performed, or performed at the price tendered, and additional costs and delays to the project may ensue leading to higher prices and disruption to the procurement concerned. The procuring entity should therefore take steps to avoid running such a performance risk.

(4) On the other hand, the procuring entity cannot automatically reject a tender simply on the basis that the tender price appears to be abnormally low. Conferring such a right on a procuring entity would introduce the possibility of abuse, as tenders could be rejected for being abnormally low without justification, or on the basis of a purely subjective criterion. Such a risk would be acute in international procurement, where an abnormally low price in one country might be perfectly normal in another. In addition, some prices may seem to be abnormally low if they are below cost; however, selling old stock below cost, or engaging in below cost pricing to keep a workforce occupied, subject to applicable competition regulations, might be legitimate.

(5) For these reasons, the article protects suppliers and contractors against the possibility of arbitrary decisions and abusive practices by procuring entities by allowing the rejection of an abnormally low tender only when the procuring entity has concerns as to the ability of the supplier or contractor to perform the procurement contract, and by requiring those concerns to be substantiated. This, however, is without prejudice to any other applicable law that may require the procuring entity to reject the abnormally low tender, for example, if criminal acts (such as money-laundering) or illegal practices (such as non-compliance with minimum wage or social security obligations) are involved.

⁶ A/CN.9/623, paras. 48, 53 and 55 and A/CN.9/640, paras. 42, 48 and 49. The Working Group observed at those sessions that the suggestions made were of a preliminary nature, and further suggestions would probably be made at a future session.

(6) Accordingly, subparagraphs 1 (a) to (c) of the article specify the steps that the procuring entity has to take before the abnormally low tender may be rejected, to ensure due process is followed and to ensure that the rights of the supplier or contractor concerned are preserved.

(7) First, a written request for clarification must be made to the supplier or contractor concerned seeking details of constituent elements of the submitted tender that the procuring entity considers relevant to justify the price submitted. Those details may include: the methods and economics of the manufacturing process for the goods, of the construction or of the provision of the services concerned; the technical solutions chosen and/or any exceptionally favourable conditions available to the supplier or contractor for the execution of the construction or for the supply of the goods or services; or the originality of the construction, supplies or services proposed by the supplier or contractor.

(8) The enacting State may choose to regulate which type of information the procuring entity may require for this price justification procedure. It should be noted in this context that the assessment is whether the price is realistic (by reference to the constituent elements of the tender, such as those discussed in the preceding paragraph), and using such factors as pre-tender estimates, market prices or prices of previous contracts, where available. It might not be appropriate to request information about the underlying costs that will have been used by suppliers and contractors to determine the price itself. Since cost assessment can be cumbersome and complicated, and is also not possible in all cases, the ability of the procuring entities to assess prices on the basis of cost may be limited. In some jurisdictions, procuring entities may be barred by law from demanding information relating to cost structure, because of risks that such information could be misused.

(9) Secondly, the procuring entity should take account of the response supplied by the supplier or contractor in the price assessment. If a supplier refuses to provide information requested by the procuring entity, the refusal will not give an automatic right to the procuring entity to reject the abnormally low tender.

(10) Thirdly, and if after the price justification procedure the procuring entity continues to hold concerns about the ability of the supplier or contractor to perform the procurement contract, it must record those concerns and its reasons for holding them in the record of procurement proceedings pursuant to subparagraph (1) (c) of the article. This provision is included to ensure that any decision to reject the abnormally low tender is made on an objective basis, and before that step is taken, all information relevant to the decision is properly recorded for the sake of accountability, transparency and objectivity in the process.

(11) Only after the steps outlined in subparagraphs 1 (a) to (c) have been fulfilled may the procuring entity reject the abnormally low tender. The decision on the rejection of the abnormally low tender must be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned, under paragraph (2) of the article. [If the Working Group decides that an appeal against the rejection should be allowed,

a matter to be decided when the Working Group considers Chapter VI of the Model Law, appropriate reference and comment would appear here]

(12) Enacting States should be aware that, apart from the measures envisaged in this article, other measures can effectively prevent the performance risks resulting from abnormally low tenders. Thoroughly assessing suppliers' qualifications (in accordance with articles 6 and 7 of the Model Law), and evaluating their tenders, proposals, offers, quotations or bids (in accordance with article 34 and its equivalent for non-tendering procurement methods) can play a particularly important role in this context. These steps in turn depend on the proper formulation of qualification requirements and the precise drafting of specifications. Procuring entities should be appropriately instructed to that end, and should be aware of the needs to compile accurate and comprehensive information about the qualifications of suppliers or contractors, including information about their past performance, and to pay due attention in evaluation to all aspects of submitted tenders, proposals, offers, quotations or bids, not only to price (such as to maintenance and replacement costs where appropriate). These steps can effectively identify performance risks.

(13) Additional measures may include: (i) promotion of awareness of the adverse effects of abnormally low tenders; (ii) provision of training, adequate resources and information to procurement officers, including reference or market prices; and (iii) allowing for sufficient time for each stage of the procurement process. To deter the submission of abnormally low tenders and promote responsible tendering on the part of suppliers and contractors, it may be desirable for procuring entities to specify in the solicitation documents or other equivalent documents that submissions may be rejected if they are abnormally low and raise concerns with the procuring entity as to the ability of the supplier or contractor to perform the procurement contract.”

V. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law

A. Guide to Enactment text accompanying draft article 22 bis, Conditions for the use of electronic reverse auctions (A/CN.9/WG.1/WP.59, para. 3)

16. At its thirteenth session, when considering draft article 22 bis, Conditions for use of electronic reverse auctions (ERAs), the Working Group made some preliminary suggestions to the Guide to Enactment text to accompany that article. One additional comment made to the Secretariat was that there should be a general introduction to the use of ERAs before the article-by-article remarks. The Working Group may therefore wish to consider the following revised text for the introductory comments and the remarks on article 22 bis, and whether they should be retained together, or the former presented elsewhere in the Guide.

“Article 22 bis: Conditions for use of electronic reverse auctions

(1) An electronic reverse auction can be defined as an online, real-time dynamic auction between a buying organization and a number of suppliers

who compete against each other to win the contract by submitting successively lower-priced or better-ranked bids during a scheduled time period. The auction is thus a repetitive process to select a successful submission, which involves suppliers' use of electronic communications to present either new lower prices, or a lower revised submission combining the price and values for the other criteria to be used by the procuring entity in determining the successful submission.

(2) Such auctions have been increasing in use since the text of the original Model Law was adopted in 1994 (that text did not then make provision for them). Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs, and by permitting the anonymity of bidding suppliers (the "bidders") to be preserved as the auctions take place virtually, rather than in person.

(3) It has been observed that electronic reverse auctions have many potential benefits. First, they can improve value for money (in that better value for money can be achieved through increased competition among bidders, and substantial cost savings can be realized through dynamic and real-time trading). Secondly, they can enhance the efficient allocation of resources (reducing the time required to conduct each procurement, and reducing the administrative costs by comparison with the traditional open tendering procedure).

(4) Thirdly, they can enhance transparency in the procurement process and assist in the prevention of abuse and corruption, in that information on other bids is available and the outcome of the procedure visible to participants. Information on the successive results of evaluation of submissions at every stage of the auction and the final result of the auction are made known to all bidders instantaneously and simultaneously. Each revised submission results in a ranking or re-ranking⁷ of bidders using automatic evaluation methods and a mathematical formula. The Model Law allows only auctions with automatic evaluation processes, where the anonymity of the bidders, and the confidentiality and traceability of the proceedings, can be preserved. Thus they are characterised by an evaluation process that is fully automated or with limited human intervention, a factor which itself can also discourage abuse and corruption.

(5) On the other hand, electronic reverse auctions can encourage an excessive focus on price, and their ease of operation can lead to their overuse and use in inappropriate situations. They may also have an anti-competitive impact in the medium and longer-term. In particular, they are more vulnerable than other procurement processes to collusive behaviour by bidders, especially in projects characterized by a small number of bidders, or in repeated bidding in which the same group of bidders participate.*

⁷ The Working Group may wish to consider whether this term should be replaced by a synonym.

* Collusion may occur when two or more bidders work in tandem to manipulate and influence the price of an auction keeping it artificially high or share the market by artificially losing submissions or not presenting submissions. For more discussion of this matter, see paragraphs [...] of this Guide.

(6) It is common for third-party agencies to set up and administer the auction for procuring entities, and to advise on procurement strategies. Procuring entities should be aware of the possible negative implications of outsourcing of decision-making beyond government, such as to third-party software and service providers when electronic reverse auctions are held. These agencies may represent and have access to both procuring entities and bidders, raising potential organizational conflicts that may pose a serious threat to competition. All these factors in turn may negatively affect the confidence of suppliers and contractors in procurement proceedings involving electronic reverse auctions. Procuring entities may also incur overhead costs in training and facilitating suppliers and contractors in bidding through electronic reverse auctions. As a result, the procuring entity may face additional costs arising from the use of electronic reverse auctions (opportunity costs such as those arising should suppliers or contractors abandon the government market if required to bid through electronic reverse auctions) and higher prices than those they would have obtained if other procurement techniques were used. Furthermore, in the setting of an electronic auction environment, the risk of suppliers' gaining unauthorized access to competitors' commercially sensitive information may be elevated.

(7) Recognizing both the potential benefits of electronic reverse auctions and the concerns over their use, the Model Law enables recourse to them subject to the safeguards contained in the conditions for use in article [22 bis] and procedural requirements in articles [51 bis to septies] of the Model Law. The following criteria are viewed as particularly important for the successful use of electronic reverse auctions, and further guidance on these criteria and the various aspects of the provisions in the Model Law is set out in the article-by-article commentary below.

(a) That clear terms and conditions and specifications must be established and made known to suppliers at the outset of procurement, together with all information regarding how the electronic reverse auction will be conducted;

(b) That electronic reverse auctions are suitable for commonly used goods and services, for which there is a competitive market, but enacting States should ensure that procuring entities are aware of both the relevant conditions for use and the circumstances in which they are appropriate;

(c) That electronic reverse auctions are suitable for procurement in which price is the determining, or a significant determining, factor;

(d) The importance of a sufficient number of participating suppliers to ensure competition;

(e) The importance of preservation of the anonymity of bidders;

(f) The critical need to allow price and objectively quantifiable non-price criteria (such as delivery times and technical considerations) to be auctioned, and to avoid the introduction of subjective elements when quantifying such criteria, so as to guard against the possibility of abuse;

(g) That electronic reverse auctions are to be a single and final round before a winner is selected, also so as to guard against abuse;

(h) That the winning price is to figure in the contract; and

(i) That the timing of the opening and criteria governing the closing of electronic reverse auctions are to be clearly specified in advance.

(8) Electronic reverse auctions under the Model Law may be conducted either as a procurement method in itself or as the final phase preceding the award of the procurement contract in other procurement methods, as and where appropriate. Using electronic reverse auctions as a phase may not be appropriate in all procurement methods envisaged under the Model Law. Whether such an option is appropriate would depend first of all on whether the conditions for the use of electronic reverse auctions specified in article [22 bis] of the Model Law and the conditions for the use of a procurement method in question are both fulfilled. For example, article 19 of the Model Law enables a procuring entity to engage in procurement by means of request for proposals where it is not feasible for the procuring entity to formulate detailed specifications. This condition is in direct contrast with the primary condition for the use of electronic reverse auction specified in article [22 bis] (1) (a) and therefore the use of electronic reverse auction in request for proposals proceedings would not comply with the requirements of the Model Law. The procedural requirements of some procurement methods may also be in contrast with the inherent features of electronic reverse auctions. For example, in tendering proceedings, the prohibitions of negotiations with suppliers or contractors and of submission of tenders after a deadline for submission of tenders would contradict the natural course of an electronic reverse auction where suppliers or contractors are expected to present successively lower submissions.⁸

(9) Electronic reverse auctions may appropriately be used for second-stage competition in framework agreements. [cross reference to framework agreements provisions]

(10) Article [22 bis] sets out the conditions for the use of electronic reverse auctions, which are one of the principal methods to ensure the critical criteria set out above apply in practice. They are based on the notion that electronic reverse auctions are primarily intended to satisfy the needs of a procuring entity for standardized, simple and generally available goods that arise repeatedly, such as for off-the-shelf products (e.g., office supplies), commodities, standard information technology equipment, and primary

⁸ The Working Group may wish to consider whether the concern that the submission of revised bids is inconsistent with the general tenet of tendering proceedings also applies at least to some extent to all procurement under the Model Law other than negotiated procurement. An amendment to article 35 of the Model Law could address the concern relating to tendering proceedings, similar to that agreed by the Working Group to article 34 (1)(a) (see A/CN.9/WG.I/WP.40/Add.1, paras. 14-17, A/CN.9/590, para. 101, and A/CN.9/WG.I/WP.43/Add.1, para. 3). Thus article 35 could be amended to read as follows: “No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or tenderer. This prohibition does not encompass the submission of revised bids during an electronic reverse auction conducted under articles [22 bis and 51 bis et seq] of this Law. The Working Group may also consider whether a provision should be included to permit revised submissions in any procurement method using this or a similar formulation.

building products. In these types of procurement, the determining factor is price or quantity; a complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated. The types of procurement involving multiple variables and where qualitative factors prevail over price and quantity considerations should not normally be subject to electronic reverse auctions.

(11) The requirement for detailed and precise specifications found in paragraph (1) (a) will preclude the use of this procurement technique in procurement of most services and construction, unless they are of a highly simple nature (for example, straightforward road maintenance works). In addition, and in order for an electronic reverse auction to function correctly in eliciting low but realistic prices, it is important for bidders to be fully aware of their cost structures, which is unlikely to be the case where there are many layers of sub-contractors, common in more complex construction procurement. It would also be inappropriate, for example, to use auctions in procurement of works or services entailing intellectual performance, such as design works. Depending on the circumstances prevailing in an enacting State, including the level of experience with electronic reverse auctions, an enacting State may choose to restrict the use of electronic reverse auctions to procurement of goods by excluding references to construction and services in the article.

(12) Some jurisdictions maintain lists identifying specific goods, construction or services that may suitably be procured through electronic reverse auctions. Enacting States should be aware that maintaining such lists could prove cumbersome in practice, since it requires periodic updating as new commodities or other relevant items appear. If lists are intended to be used, it is preferable to develop illustrative lists of items suitable for acquisition through electronic reverse auctions or, alternatively, to list generic characteristics that render a particular item suitable or not suitable for acquisition through this procurement technique.

(13) In formulating detailed and precise specifications, procuring entities have to take special care in referring to objective technical and quality characteristics of the goods, construction and services procured, as required in article 16 (2) of the Model Law, so that to ensure that bidders will bid on a common basis. The use of a common procurement vocabulary to identify goods, construction or services by codes or by reference to general market defined standards is therefore desirable.

(14) Paragraph (1) (b) aims at mitigating the risks of collusion and ensuring acceptable auction outcomes for the procuring entity. It requires that there must be a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction. This provision is included to recognize that higher risks of collusion are present in the auction setting than in other procurement methods, and therefore the maintenance of anonymity is critical. Electronic reverse auctions are therefore not suitable in markets with only a limited number of potentially qualified and independent suppliers, or in markets dominated by one or two major players, since such markets are especially vulnerable to price manipulation or other anti-competitive behaviour. Paragraph 1 (b) is also supplemented by

article [51 quater (6)] that requires procuring entities in inviting suppliers or contractors to the auction to keep in mind the need to ensure effective competition during the auction. The procuring entity has the right to cancel the auction in accordance with article [51 quinquies (2)] if the number of suppliers or contractors registered to participate in the auction is insufficient to ensure effective competition during the auction. [Appropriate cross-reference to Guide text that would accompany the relevant articles].

(15) The reference in article 22 bis (1)(b) to potential suppliers anticipated to be qualified to participate in the electronic reverse auction should not be interpreted as implying that pre-qualification will necessarily be involved in procurement through electronic reverse auctions. It may be the case that, in order to expedite the process and save costs, qualifications of only the supplier or contractor that presented the accepted submission are checked. [Appropriate cross-reference to Guide text that discusses the relevant options, in particular in conjunction with article 51 septies (2)].

(16) The article is intended to apply to procurement where the award of contracts is based on either the price or the price and other criteria that are specified in the beginning of the procurement proceedings, that is, in the notice of the electronic reverse auction. The notion of an auction is that price competition is a significant (if not the only) determining factor: electronic reverse auctions are not suitable for complex procurement, in which value judgements are important. When non-price criteria are involved in the determination of the successful submission, paragraph (1) (c) (as elsewhere in the Model Law) requires that such criteria should be transparent, objective and quantifiable (e.g., figures, percentages) and capable of expression in monetary terms. These non-price criteria should be differentiated from those elements of the specifications that determine whether or not a submission is responsive (i.e., pass/fail criteria; see article 34 (2) of the Model Law). The article requires all non-price criteria to be evaluated prior to the auction as part of the full evaluation of initial submissions, and that the results of such evaluation should be communicated in the relevant part individually and simultaneously to each supplier or contractor concerned, along with a mathematical formula that will be used during the auction for determination of the successful submission. This formula must allow each supplier or contractor concerned to determine its status vis-à-vis other suppliers prior and at any stage during the auction. These requirements intend to ensure that all criteria are transparently and objectively evaluated (through pre-disclosure of evaluation procedures, the mathematical formula and the results of evaluation of initial submissions), and that no manipulation and subjectivity (such as through a points system) can be introduced in determining the successful submission. The procuring entity should treat initial submissions received as if they were tenders or any other submissions under the Model Law, in that confidentiality and integrity should be preserved.⁹

⁹ The Working Group has previously expressed the point of view that current article 45 of the Model Law should apply to all procurement methods, and appropriate reference or cross reference should be included.

(17) The enacting States and procuring entities should be aware however of the potential dangers of allowing non-price criteria to be used in determining the successful submission. Apart from concerns common for all procurement methods and techniques (see paragraphs ... of this Guide for the relevant discussion), the enacting State should be aware of concerns arising in the specific context of electronic reverse auctions, such as: **[further detail to be added at a future session, addressing such matters variations in submissions in quality that are so significant that the auction effectively ceases to be based on a common specification, the greater the number of variable criteria, the more difficult it is for both procuring entity and suppliers to understand how varying one element will impact on the overall ranking, how to address quality criteria that are evaluation criteria (that is, not responsiveness criteria that are pass/fail) that are evaluated prior to the auction, and the need to avoid auctions in which price is auctioned separately from quality items, which have been seen to be abused in practice].**

(18) Whether price only or other award criteria are factored into procurement by electronic reverse auctions is to be decided by an enacting State in accordance with the prevailing circumstances on the ground, including its level of experience with electronic reverse auctions, and in which sector of the economy the use of electronic reverse auctions is envisaged. It is recommended that enacting States lacking experience with the use of electronic reverse auctions should introduce their use in a staged fashion as experience with the technique evolves; that is, to commence by allowing simple auctions, where price only is to be used in determining the successful submission, and subsequently, if appropriate, to proceed to the use of more complex auctions, where award criteria include non-price criteria. The latter type of auctions would require an advanced level of expertise and experience on the part of procuring entities, such as the capacity properly to factor any non-price criteria to a mathematical formula so as to avoid introducing subjectivity into the evaluation process. Such experience and expertise in the procuring entity would be necessary even if the procuring entity outsources the conduct of the auction to private third-party service providers, because the procuring entity must still be able to supervise activities of such third-party providers properly.

(19) In order to derive maximum benefits from an electronic reverse auction, both procuring entities and suppliers need to realise the benefits from it and receive support necessary to give them confidence in the process. Therefore, if the enacting State decides to introduce this procurement technique, it should be ready to invest sufficient resources in awareness and training programs to show in as short timeframe as possible that the upcoming change is profitable and sustainable for all concerned. Otherwise, a marketplace where procurement was previously handled successfully through other procurement techniques may be abandoned, and the government investment in electronic reverse auction system may fail. Procuring entities will need to learn new job skills and undergo orientation in the electronic reverse auction and understand all its benefits and potential problems and risks. Suppliers and contractors, especially small and medium enterprises, will need to be aware and understand the changes involved in doing business with the

government through an electronic reverse auction and what impacts these changes will have on their businesses. The public at large should understand benefits of introducing the new procurement technique and be confident that it will contribute to achieving the government objectives in procurement. The awareness and training program can be delivered through various channels and means, many of which may already be in place, such as regular briefings, newsletters, case studies, regular advice, help desk, easy-to-follow and readily accessible guides, simulated auctions, induction and orientation courses. The awareness and training program should include collection and analysis of feedback from all concerned, which in turn should lead to necessary adjustments in the electronic reverse auction processes.

(20) The provisions of the Model Law should not be interpreted as implying that electronic reverse auctions will be appropriate and should always be used even if all conditions of article [22 bis] are met. Enacting States may wish to specify in regulations further conditions for the use of electronic reverse auctions, such as consolidating purchases to amortize costs of setting up the system for holding the auctions, including costs of third-party software and service providers.”

B. Procedures in the pre-auction and auction stages: draft articles 51 bis to septies (A/CN.9/WG.1/WP.59, para. 5)

Proposed draft text for the revised Model Law¹⁰

17. At its thirteenth session, when considering draft articles 51 bis to septies, Procedures in the pre-auction and auction stages, the Working Group made suggestions to the proposed Model Law text, as follows:

(a) To replace paragraph (2) of draft article 51 bis with the following text:

“(2) Where an electronic reverse auction is to be used in [other] procurement methods envisaged in this Law, the procuring entity shall include a notice that an electronic reverse auction will be held when first soliciting the participation of suppliers or contractors in the procurement proceedings in accordance with the relevant provisions of this Law;”

(b) To replace the first sentence of paragraph (2) of draft article 51 ter with the following text:

“The procuring entity may decide to impose a minimum and/or maximum on the number of suppliers or contractors to be invited to the auction on the condition that the procuring entity has satisfied itself that in doing so it would ensure that effective competition and fairness are maintained;”¹¹

¹⁰ The Working Group agreed that these suggestions were preliminary, and further suggestions would be made when the Working Group next considered the text.

¹¹ The Working Group also agreed to consider whether this notion should be a general obligation that applies to all procurement under the Model Law at a future session, and whether it should be set out in the text of the Model Law, or discussed in the Guide to Enactment, for all such procurement (including procurement using electronic reverse auctions).

(c) To replace the first sentence of paragraph (4) of draft article 51 ter with the following text:

“The procuring entity may decide that the electronic reverse auction shall be preceded by an assessment as to whether the submissions are responsive;”

(d) To delete the words “to the greatest possible extent” from paragraph (6) of draft article 51 quater;

(e) To replace paragraph 1(d) of draft article 51 sexies with the following text:

“There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in paragraphs 1 (a) and (c) above;”

(f) To delete the words “may” and “must” from paragraph (4) of draft article 51 sexies; and

(g) To refer to “submissions” and not “submission” in paragraph 1 (b) of draft article 51 septies.

Proposed Guide to Enactment text

18. The Working Group recalled at its twelfth and thirteenth sessions that it would consider the Guide to Enactment text to accompany draft articles 51 bis to 51 septies at a future session. It also observed at its thirteenth session that if an electronic reverse auction were cancelled for the reasons set out in paragraph 1 of draft article 51 septies, that the anonymity of the auction might be compromised, and therefore that the Guide should include commentary to encourage procuring entities to seek to avoid holding a second auction in the same procurement proceedings if the anonymity were considered to be at risk of compromise.
