



General Assembly

Distr.: Limited
27 November 2008

Original: English

**United Nations Commission
on International Trade Law
Working Group I (Procurement)
Fifteenth session
New York, 2-6 February 2009**

Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – a revised text of the Model Law

Note by the Secretariat

Addendum

This note sets out chapters III (Conditions for use and procedures of restricted tendering, two-envelope tendering, and request for quotations), IV (Conditions for use and procedures of two-stage tendering, request for proposals and competitive negotiation) and V (Conditions for use and procedures of electronic reverse auctions), of a revised text of the Model Law.

The Working Group may wish to consider whether its consideration of chapter IV should be conducted at this stage, for the reasons set out in document A/CN.9/WG.I/WP.66, paragraph 70.

The Secretariat's comments are set out in the accompanying footnotes.



CHAPTER III. CONDITIONS FOR USE AND PROCEDURES OF RESTRICTED TENDERING, TWO-ENVELOPE TENDERING, AND REQUEST FOR QUOTATIONS

Article 35. Restricted tendering

OPTION 1¹

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with this article, when:

(a) The subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

(2) (a) When the procuring entity engages in restricted tendering on the grounds referred to in paragraph 1 (a) of this article, it shall solicit tenders from all suppliers and contractors from whom the subject matter of the procurement is available;

(b) When the procuring entity engages in restricted tendering on the grounds referred to in paragraph 1 (b) of this article, it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(3) The procuring entity shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall not confer any rights on suppliers or contractors, including any right to have a tender evaluated.²

(4) The provisions of chapter II of this Law, except article [24], shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

¹ Based on the merged articles 20 and 47, with the consequential changes in the light of the proposed new definitions in article 2, updates of the cross-references and other changes as marked. Paragraph (1) is based on article 20 of the 1994 Model Law. Paragraphs (2)-(4) are based on article 47 of the 1994 Model Law.

² The second sentence was added in the light of the considerations raised in A/CN.9/WG.I/WP.66, para. 39. The Working Group may wish to consider the effect of this provision in conjunction with revised articles on remedies and enforcement in chapter VII of the revised Model Law.

OPTION 2³

- (1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with this article when the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.
- (2) The procuring entity shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.
- (3) The procuring entity shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall not confer any rights on suppliers or contractors, including any right to have a tender evaluated.
- (4) The provisions of chapter II of this Law, except article [24], shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

[Article 36. [Two-envelope tendering]⁴

- (1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of two-envelope tendering in accordance with this article in order to seek proposals as to various possible means of meeting its needs and obtain the most satisfactory solution.⁵
- (2) The procuring entity may seek proposals through open solicitation or in cases specified in article [35 (1)] through direct solicitation.⁶

³ The reasons for proposing option 2 are set out in document A/CN.9/WG.I/WP.66, paras. 38-40.

⁴ The proposed title of this draft article is new, reflecting the two-stage evaluation process. Its text, however, is closely based on article 42 and other relevant provisions of chapter IV of the 1994 Model Law, i.e. request for proposals procedure without negotiation for services procurement. The Working Group is invited to consider the extent to which this method of procurement is different from tendering (if it commences with a public advertisement) or restricted tendering (if it commences without such an advertisement), other than that the evaluation criteria could include the qualifications of service providers as per article 39(1) of the 1994 text. Article 42 of the 1994 Model Law requires the procuring entity to set a quality and technical threshold, which is essentially to set the responsiveness criteria, and then to compare the prices of the proposals in accordance with pre-determined evaluation criteria (including price), which the Working Group may consider equates the process with the evaluation and comparison of tenders under article 36 of the 1994 Model Law. The Working Group may therefore wish to consider whether this procedure is necessary other than for services procurement and, if so, whether the need for evaluation criteria as described above could be accommodated within other procurement methods.

⁵ Based on article 19 (1) (a) (i) of the 1994 Model Law.

⁶ Based on provisions of article 37 of the 1994 Model Law.

(3) In case of open solicitation, the provisions of chapter II of this Law, except for [article 32 (2) and (3),] shall apply to the proceedings under this article, except to the extent that those provisions are derogated from in this article.⁷

(4) In case of direct solicitation, the provisions of chapter II of this Law, except for articles [24 and 32], and provisions of article [35 (2) and (3)] shall apply to the proceedings under this article, except to the extent that those provisions are derogated from in this article.⁸

(5) The procuring entity shall establish a threshold with respect to quality and technical aspects of the proposals in accordance with the evaluation criteria other than price as set out in the solicitation documents pursuant to article 12 of this Law and rate each proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the solicitation documents. The procuring entity shall then compare the prices of the proposals that have attained a rating at or above the threshold.⁹

(6) The successful proposal shall then be:

(a) The proposal with the lowest price; or

(b) The proposal with the best combined evaluation in terms of the criteria other than price referred to in paragraph (5) of this article and the price.^{10]}

Article 37. Request for quotations¹¹

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of a request for quotations in accordance with this article for the procurement of readily available [objects/items or services] that are not specially produced or provided to the particular [specifications or requirements] of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.¹²

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

(3) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the [objects/items or services] themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

⁷ Based on the thrust of chapter IV of the 1994 Model Law.

⁸ Ibid.

⁹ Based on article 42 (1) of the 1994 Model Law.

¹⁰ Based on article 42 (2) of the 1994 Model Law.

¹¹ Based on articles 21 and 50 of the 1994 Model Law with changes as marked.

¹² The terms in square brackets have been amended as compared with the 1994 text so as to allow for all types of standardized or common procurement that is not tailored by means of specifications or technical requirements.

(4) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(5) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity.¹³

[CHAPTER IV. CONDITIONS FOR USE AND PROCEDURES OF TWO-STAGE TENDERINGS, REQUEST FOR PROPOSALS AND COMPETITIVE NEGOTIATION [The Working Group may wish to consider whether to review this chapter at this stage of its review of the Model Law]¹⁴

Article 38. Conditions for use of two-stage tendering, request for proposals or competitive negotiation¹⁵

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of two-stage tendering, request for proposals, or competitive negotiation, in the following circumstances:

(a) It is not feasible for the procuring entity to formulate detailed specifications for the subject-matter of the procurement, or to identify its characteristics in accordance with article [11] and, in order to obtain the most satisfactory solution to its procurement needs,

(i) It seeks tenders, proposals or offers as to various possible means of meeting its needs; and¹⁶

(ii) Because of the technical character or nature of the subject-matter of the procurement, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes

¹³ Consequential change in the light of the proposed new article 19 and the proposed new definition of “successful submission” in article 2. The aim of the change is to standardize provisions of the Model Law on successful submissions, their acceptance by the procuring entity, a standstill period and entry into force of the procurement contract. The 1994 text of the Model Law is not consistent in this respect.

¹⁴ The Working Group may wish to conform the provisions of this chapter and those of the PFIPs instruments. See A/CN.9/WG.I/WP.66, paras. 21, 22 and 70. Accordingly, the Working Group may wish to defer its consideration of the draft revisions until that process has been considered and conducted.

¹⁵ Based on article 19 of the 1994 Model Law, with consequential changes in the light of the proposed revisions to the Model Law and the removal of the definitions of “goods, construction or services”.

¹⁶ “And” replaced “or.”

the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

[draft new sub-paragraph (c)]¹⁷

(c) In the case of procurement involving national defence or national security, where the procuring entity determines that the selected method is the most appropriate method of procurement; or

[old sub-paragraph (c) to be deleted]

“(c) When the procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or”

[old sub-paragraph (d) to be maintained]

(d) When tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to article [16 to 18 or 33 (3)], and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

[draft new paragraph (2)]¹⁸

(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval,) the procuring entity may engage in procurement by means of competitive negotiation also when there is an urgent need for the subject matter of the procurement, and engaging in tendering proceedings or other methods of procurement because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were owing to a catastrophic event, or otherwise neither foreseeable by the procuring entity nor the result of dilatory conduct on its part.

[old paragraph (2) to be deleted]

“(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval,) the procuring entity may engage in procurement by means of competitive negotiation also when

(a) There is an urgent need for the subject matter of the procurement, and engaging in tendering proceedings would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use other methods of procurement because of the time involved in using those methods.”

¹⁷ In the light of the proposed expansion of article 1. The Working Group may consider, however, that this formulation provides a ground for use of these procurement methods beyond those conferred by proposed article 7, and that accordingly, either article 7 should be revised to accommodate this formulation, or that this proposed paragraph be amended or deleted.

¹⁸ See A/CN.9/WG.I/WP.66, paras. 42-43.

Article 39. Two-stage tendering¹⁹

(1) The provisions of chapter II of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

(3) The procuring entity may, in the first stage, engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to article [16 to 18 or 33 (3)] concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of the descriptions of the subject matter of the procurement.²⁰ In formulating those descriptions,²¹ the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the subject matter of the procurement, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article [33 (4) (b)].

Article 40. Request for proposals²²

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.²³

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting

¹⁹ To be based on article 46 of the 1994 Model Law.

²⁰ The phrase “descriptions of the subject matter of the procurement” replaced the word “specifications” in the light of the proposed new definition in article 2.

²¹ Ibid.

²² To be revised and based on articles 43, 44 and 48 of the 1994 Model Law and conformed to the relevant provisions in the PFIPs instruments.

²³ The Working Group may wish to consider the juxtaposition of this and the following article and whether the order of the articles should be revised. In addition, and in the light of academic comment that a minimum of five participants may be necessary to ensure effective competition, whether the reference to three participants is sufficient.

a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.²⁴

(3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) The relative managerial and technical competence of the supplier or contractor;

(b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) The price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.²⁵

(4) A request for proposals issued by a procuring entity shall include at least the following information:²⁶

(a) The name and address of the procuring entity;

(b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;²⁷

(c) The criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal;²⁸ and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

²⁴ The Working Group is invited to consider the effect of this last statement in the light of the deletion of the exceptions from review. One of the exceptions in article 52 (2) of the 1994 Model Law (in subparagraph (e)) referred to a refusal by the procuring entity to respond to an expression of interest in participating in request for proposals proceedings pursuant to article 48 (2). Thus the intention of the drafters of the 1994 Model Law was to explicitly exclude these cases from review and liability on the part of the procuring entity. Similar considerations apply to the proposed new article 35 (3).

²⁵ To be deleted in the light of the proposed new article 12.

²⁶ In other provisions of the 1994 Model Law, provisions on the content of solicitation or equivalent documents are set out before requirements as regards evaluation criteria (see e.g., article 38 ad 39 of the 1994 Model Law). The point is moot however if paragraph (3) is deleted.

²⁷ To be amended in the light of the proposed new article 11.

²⁸ To be amended in the light of the proposed new article 12.

- (6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.²⁹
- (7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:
- (a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential;³⁰
 - (b) Subject to article [22],³¹ one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;³²
 - (c) The opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.
- (8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.
- (9) The procuring entity shall employ the following procedures in the evaluation of proposals:
- (a) Only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;³³
 - (b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;
 - (c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.
- (10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.³⁴

Article 41. Competitive negotiation³⁵

- (1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

²⁹ To be deleted in the light of the proposed new article 21.

³⁰ Ibid.

³¹ This is a reference to the article requiring a record of the procurement.

³² Ibid.

³³ To be revised in the light of the proposed new article 12 and how its provisions should apply in the context of negotiated procurement.

³⁴ To be revised in the light of the proposed new article 19.

³⁵ To be based on article 49 of the 1994 Model Law.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article [22], one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.³⁶

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.³⁷

CHAPTER V. CONDITIONS FOR USE AND PROCEDURES OF ELECTRONIC REVERSE AUCTIONS

Article 42. Conditions for use of electronic reverse auctions³⁸

(1) A procuring entity may engage in procurement by means of an electronic reverse auction, or may use an electronic reverse auction to determine the successful submission in other methods of procurement, as appropriate, in accordance with the provisions of this chapter and under the following conditions:

(a) Where it is feasible for the procuring entity to formulate detailed and precise descriptions³⁹ for the [goods, construction or services/subject-matter of the procurement];⁴⁰

³⁶ To be deleted in the light of the proposed new article 21.

³⁷ Definition of the successful proposal should be added for the purposes of the proposed amended article 19 and the relevant proposed new definition in article 2. See, also, footnote 33 above.

³⁸ The article is as amended at the Working Group's twelfth session (A/CN.9/640, paras. 56-57, and A/CN.9/WG.I/WP.59, para.3). Minor consequential changes were made in the light of the proposed revisions to the Model Law.

³⁹ The word "descriptions" replaced the word "specifications" in the light of the proposed new definition in articles 2 and 11.

⁴⁰ In the light of the proposed deletion of the definition of "goods, construction or services", the Working Group may wish to refer to the "subject-matter of the procurement", noting that electronic reverse auctions would then be available for all types of procurement, including construction and services procurement. The Guide to Enactment would discuss the types of procurement in which auctions would be suitable or appropriate, and the converse. The draft text before the Working Group at its 12th session (A/CN.9/WG.I/WP.55, para. 8) indicates that some enacting States might wish to exclude construction and services procurement. The Guide also notes that auctions are particularly suitable for standardized procurement in which simpler qualitative factors can be included in the mathematical formula and suppliers can realistically revise them during the auction, and indicates that there may be further guidance on the procurement of more complex items through auctions. The Working Group may wish to include guidance to assist enacting States in interpreting this provision, which effectively excludes auctions in more procurement using alternative methods, such as requests for proposals or

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

(c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.⁴¹

(2) The electronic reverse auction shall be based on:

(a) Price, where the procurement contract is to be awarded to the lowest price; or

(b) Prices and other criteria to be used by the procuring entity in determining the successful submission, specified in accordance with article [12] and as set out in the notice of the electronic reverse auction, where the procurement contract is to be awarded to the lowest evaluated submission.

(3) Where the procurement contract is awarded on the basis of the lowest evaluated submission, the electronic reverse auction shall be preceded by a full assessment of responsiveness and evaluation⁴² of initial submissions in accordance with the criteria to be used by the procuring entity in determining the successful submission and the relative weight of such criteria, as specified in accordance with article [12] and as set out in the notice of the electronic reverse auction. The invitation to the electronic reverse auction shall be accompanied by the outcome of the full assessment of responsiveness and evaluation of initial submissions in accordance with the provisions of article [45 (4)].⁴³

two-stage tendering, and to address procurement of more complex items where tenderers might have different costs bases or different knowledge about common costs, for which an auction might be appropriate in some well-developed systems.

⁴¹ The Guide to Enactment could also discuss these qualifications in the light of the proposed new evaluation criteria article 12, focussing on the exclusion of subjective qualitative criteria in auctions procedures, rather than quality criteria per se.

⁴² The previous formulation referred to an “evaluation” alone, which refers, in the context of the Model Law, to the competitive evaluation of tenders; the reference to responsiveness has therefore been added in to reflect proposed new article 11 (the Working Group may consider that further reference to that article should be made). Under article 44(2) below, which permits the number of tenderers participating in the auction to be limited, there will be a competitive evaluation leading to the possible exclusion of some tenders, and in other cases, the evaluation will be conducted without rejection of tenderers.

⁴³ Some commentators have noted that the flexibility conferred by allowing for both price-only and price and other criteria-based auctions renders the drafting of these provisions complex, and a simpler approach might be to include a separate procedure for price-based auctions, and to limit the procurement methods in which auctions may be used to those in which, for example, the description (including specifications) is set at the outset. The Working Group may wish to consider these comments.

Article 43. Procedures for soliciting participation in procurement involving the use of electronic reverse auctions⁴⁴

(1) Where an electronic reverse auction is to be used as a procurement method, the procuring entity shall cause a notice of the electronic reverse auction to be published in accordance with procedures of article [24] of this Law.

(2) Notwithstanding paragraph (1) of this article, in domestic solicitation under article [7 (2) (c)] of this Law, the procuring entity shall not be required to employ the procedures set out in articles 14 (1) (c), 24 (2), 25 (h) and (i), and 27 (j), (k) and (s), of this Law.⁴⁵

(3) Where an electronic reverse auction is to be used in other methods of procurement as appropriate, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings that an electronic reverse auction will be held.

Article 44. Contents of the notice of the electronic reverse auction⁴⁶

(1) The notice of the electronic reverse auction shall include, at a minimum, the following:

(a) Information referred to in article [25 (a), (d) and (e), and article 27 (d), (f), (h) to (j) and (t) to (y);]

(b) The criteria to be used by the procuring entity in determining the successful submission, including any criteria other than price to be used, the relative weights of all criteria, the mathematical formula to be used in the evaluation procedure and indication of any criteria that cannot be varied during the auction;⁴⁷

(c) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;

(d) The manner and, if already determined, deadline by which the suppliers and contractors shall register to participate in the auction;

(e) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;

⁴⁴ The article is as presented in documents A/CN.9/WG.I/WP.59, para. 5, and A/CN.9/WG.I/WP.61, para. 17, further to the Working Group's considerations of the subject at its twelfth and thirteenth sessions (A/CN.9/640, paras. 62-89). Minor consequential changes were made in the light of the proposed revisions to the Model Law.

⁴⁵ This paragraph was added to reflect exceptions in cases of domestic procurement. It is similar to article 23 of the Model Law.

⁴⁶ The article is as presented in documents A/CN.9/WG.I/WP.59, para. 5, and A/CN.9/WG.I/WP.61, para. 17, further to the Working Group's considerations of the subject at its twelfth and thirteenth sessions (A/CN.9/640, paras. 62-89). Minor consequential changes were made in the light of the proposed revisions to the Model Law.

⁴⁷ Minor amendments to this paragraph have been made to reflect the provisions of draft article 12.

(f) Whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage); and

(g) The rules for the conduct of the electronic reverse auction, including the information that will be made available to the bidders in the course of the auction and the conditions under which the bidders will be able to bid.

(2) 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. In such case, the notice of the electronic reverse auction shall state such a number and, where the maximum is imposed, the criteria and procedure that will be followed in selecting the maximum number of suppliers or contractors.⁴⁸

(3) The procuring entity may decide that the electronic reverse auction shall be preceded by prequalification. In such case, the notice of the electronic reverse auction shall contain invitation to prequalify and include information referred to in article [15 (3).]

(4) The procuring entity may decide that the electronic reverse auction shall be preceded by an assessment as to whether the submissions are responsive. In such case, the notice of the electronic reverse auction shall contain invitation to present initial submissions and include information referred to in articles [25 (f) to (j) and 27 (a), (k) to (s) and (z)] and information on procedures to be used in such assessment.

(5) Where a full evaluation of initial submissions (in addition to an assessment of responsiveness) is required in accordance with the provisions of article [42 (3),] the notice of the electronic reverse auctions shall contain invitation to present initial submissions and shall include information referred to in articles [25 (f) to (j) and 27 (a), (k) to (s) and (z)] and information on procedures to be used in such evaluation.

Article 45. Invitation to participate in the electronic reverse auction⁴⁹

(1) Except as provided for in paragraphs (2) to (4) of this article, the notice of the electronic reverse auction shall serve as an invitation to participate in the auction and shall be complete in all respects, including as regards information specified in paragraph (5) of this article.

⁴⁸ If the Working Group decides to include provisions on mandatory pre-qualification in some procedures in the Model Law, and to provide for a specified procedure otherwise to limit numbers participating in some procurement methods, it might wish to consider whether consistency between those procedures and procedures to limit the numbers participating in an auction procedure would be required. In addition, the Working Group may wish to consider whether the flexibility to eliminate some tenderers would render these provisions inconsistent with the general rules of some procurement methods in which there is no possibility of such exclusion and in which an auction might be a phase.

⁴⁹ Ibid.

(2) Where a limitation on the number of suppliers or contractors to be invited to the auction has been imposed in accordance with article [44 (2),] the procuring entity shall send the invitation to participate in the auction individually and simultaneously to each supplier or contractor selected corresponding to the number, and in accordance with the criteria and procedure, specified in the notice of the electronic reverse auction.

(3) Where the auction has been preceded by prequalification of suppliers or contractors in accordance with articles [15 and 44 (3),] the procuring entity shall send the invitation to participate in the auction individually and simultaneously to each supplier or contractor prequalified [or preselected] in accordance with article [15] of this Law.

(4) Where the auction has been preceded by the assessment of responsiveness or full evaluation of initial submissions in accordance with articles [26, 28 to 31, 32 (1), 33 (1) and (2) and 44 (4) and (5),] the procuring entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor except for those whose submission has been rejected in accordance with article [33 (3).] The procuring entity shall notify each supplier or contractor concerned on the outcome of the assessment of responsiveness or the full evaluation, as the case may be, of its respective initial submission.

(5) Unless already provided in the notice of the electronic reverse auction, the invitation to participate in the auction shall set out:

(a) The deadline by which the invited suppliers and contractors shall register to participate in the auction;

(b) The date and time of the opening of the auction;

(c) The requirements for registration and identification of bidders at the opening of the auction;

(d) Information concerning individual connection to the electronic equipment being used; and

(e) All other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction.

(6) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction in accordance with this article is sufficient to guarantee effective competition.

Article 46. Registration to participate in the electronic reverse auction and timing of holding of the auction⁵⁰

(1) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.

(2) If the number of suppliers or contractors registered to participate in the auction is in the opinion of the procuring entity insufficient to ensure effective competition,

⁵⁰ The article is as presented in documents A/CN.9/WG.I/WP.59, para. 5, further to the Working Group's consideration of the subject at its twelfth session (A/CN.9/640, paras. 62-89).

the procuring entity may cancel the electronic reverse auction. The fact of the cancellation of the auction shall be promptly communicated individually to each registered supplier or contractor.

(3) The auction shall not take place before expiry of adequate time after the notice of the electronic reverse auction has been issued or, where invitations to participate in the auction are sent, from the date of sending the invitations to all suppliers or contractors concerned. This time shall be sufficiently long to allow suppliers or contractors to prepare for the auction.

Article 47. Requirements during the auction⁵¹

(1) During an electronic reverse auction:

(a) All bidders shall have an equal and continuous opportunity to present their submissions;

(b) There shall be automatic evaluation of all submissions in accordance with the criteria and other relevant information included in the notice of the electronic reverse auction;

(c) Each bidder must instantaneously and on a continuous basis during the auction receive sufficient information allowing it to determine a standing of its submission vis-à-vis other submissions;⁵²

(d) 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.

(2) The procuring entity shall not disclose the identity of any bidder during the auction.

(3) The auction shall be closed in accordance with the criteria specified in the notice of the electronic reverse auction.⁵³

(4) The procuring entity shall suspend or terminate the electronic reverse auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the electronic reverse auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.

⁵¹ The article is as presented in documents A/CN.9/WG.I/WP.59, para. 5, and A/CN.9/WG.I/WP.61, para. 17, further to the Working Group's consideration of the subject at its twelfth and thirteenth sessions (A/CN.9/640, paras. 62-89).

⁵² The Working Group may wish to consider the extent of the information that this provision would require to be disclosed in addition to the formula and the results of the initial evaluation, such as information regarding all bids during the auction including their quality scores, and whether this information might facilitate collusion. An alternative formulation could be to enable the bidder to see information regarding its bid and either the leading bid or by how much the bid needs to improve to become the leader.

⁵³ The Guide to Enactment could address certain types of auction that are not currently envisaged in these provisions, and the reasons that they might not be appropriate, including auctions in which the lowest-ranking bidder is eliminated at the end of each round.

[draft new text for consideration]

Article 48. Requirements after the auction⁵⁴

(1) The submission ascertained at the closure of the auction to be the lowest price or the lowest evaluated submission, as applicable, shall be the successful submission.⁵⁵

(2) Whether or not it has engaged in prequalification proceedings pursuant to article [15], the procuring entity may require the bidder presenting the submission that has been found at the closure of the auction to be the successful submission to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article [10]. If the bidder fails to do so, the procuring entity shall reject that submission. Unless the procuring entity decided, in accordance with article [16 (1)], to reject all remaining submissions, it shall select the submission that at the closure of the auction was the next lowest price or next lowest evaluated submission, provided that the bidder that presented that submission can demonstrate its qualifications if required to do so.

(3) Where it has not assessed responsiveness of initial submissions prior to the auction, the procuring entity shall assess after the auction the responsiveness of the submission that at the closure of the auction has been found to be the successful submission. The procuring entity shall reject the submission if that submission is found to be unresponsive. Unless the procuring entity decided, in accordance with article [16 (1)], to reject all remaining submissions, it shall select the submission that at the closure of the auction was the next lowest price or next lowest evaluated submission, provided that this submission is found to be responsive.

(4) The procuring entity may engage in procedures described in article [17] if the submission that at the closure of the auction has been found to be the successful submission gives rise to concerns as to the ability of the bidder that presented that submission to perform the procurement contract. If the procuring entity rejects the submission on the grounds specified in article [17], it shall select the submission that at the closure of the auction was the next lowest price or next lowest evaluated submission, subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining submissions.

⁵⁴ Consequential changes are proposed to this article in the light of the proposed new article 19.

⁵⁵ Certain commentators have indicated that procedures in which the auction is followed by a traditional tender from the last remaining two bidders could provide good value for money. The Guide to Enactment could explain that the requirement for the auction phase to be the final phase that determines the winning bid excludes these types of auction.

[draft text previously before the Working Group]⁵⁶

Article 51 septies. Award of the procurement contract on the basis of the results of the electronic reverse auction

(1) The procurement contract shall be awarded to the bidder that, at the closure of the auction, presented the submission with the lowest price or the lowest evaluated submission, as applicable, unless such submission is rejected in accordance with articles 12, 12 bis, 15 and [36 (...)]. In such case, the procuring entity may:

(a) Award the procurement contract to the bidder that, at the closure of the auction, presented the submission with the next lowest price or next lowest evaluated submission, as applicable; or

(b) Reject all remaining submissions in accordance with article 12 (1) of this Law; or

(c) Hold another auction under the same procurement proceedings; or

(d) Announce new procurement proceedings; or

(e) Cancel the procurement.

(2) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor presenting the submission that has been found to be the successful submission to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 6.

(3) Where it has not assessed responsiveness of initial submissions prior to the auction, the procuring entity shall assess after the auction the responsiveness of the submission that has been found to be the successful submission.

(4) The procuring entity may engage in procedures described in article 12 bis if the submission that has been found to be the successful submission gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract.

(5) Notice of acceptance of the submission shall be given promptly to the bidder that presented the submission that the procuring entity is prepared to accept.

(6) The name and address of the bidder with whom the procurement contract is entered into and the contract price shall be promptly communicated to other bidders.]

⁵⁶ The article is as presented in documents A/CN.9/WG.I/WP.59, para. 5, and A/CN.9/WG.I/WP.61, para. 17, further to the Working Group's considerations of the subject at its twelfth and thirteenth sessions (A/CN.9/640, paras. 62-89).