



General Assembly

Distr.: Limited
31 March 2009

Original: English

**United Nations Commission
on International Trade Law
Working Group I (Procurement)
Sixteenth session
New York, 26-29 May 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 the preamble and articles 1-14 of chapter I (General provisions) of a revised text for the Model Law.

The Working Group's attention is drawn to draft articles 7 and 12, consideration of which was deferred to a later stage.

Draft articles 2, 4 (2), 10 (8) and 13 were revised pursuant to the Working Group's request at its fifteenth session. The revised text of these articles is therefore before the Working Group for the first time.

At its fifteenth session, the Working Group approved the remaining provisions of the proposed revised Model Law included in this addendum, either without change or as revised at that session.

The Secretariat's comments are included in the accompanying footnotes.



UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT¹

Preamble²

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement so as to promote the objectives of:

- (a) Maximizing economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;
- (d) Providing for the fair and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) Achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

This Law applies to all procurement by procuring entities.³

Article 2. Definitions⁴

For the purposes of this Law:

- (a) “Procurement” means the acquisition by any means of goods, construction or services (“subject matter of the procurement”);⁵

¹ The title change reflects the Working Group’s decision (A/CN.9/668, para. 270).

² The Working Group has approved the preamble (A/CN.9/668, para. 271).

³ The draft article has been revised pursuant to the Working Group’s instruction (A/CN.9/668, para. 17). It was agreed that the Guide would point out that States in situations of economic and financial crisis might exempt the application of the Model Law through legislative measures (which would themselves receive the scrutiny of the legislature) (A/CN.9/668, para. 63).

⁴ The draft article has been revised pursuant to the Working Group’s instructions (A/CN.9/668, paras. 272-274). The Working Group may wish to consider the introduction of a glossary of main terms in the Guide to Enactment, to complement article 2 of the text, and whether to present the definitions in alphabetical order.

⁵ The Working Group has approved this definition revised from the 1994 text (article 2 (a)) (A/CN.9/668, para. 273 (b)). It was agreed (A/CN.9/668, para. 273 (e)) that the Guide

(b) “Procuring entity” means:

(i) *Option I*

Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

Option II

Any department, agency, organ or other unit, or any subdivision thereof, of the (“Government” or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of “procuring entity”);⁶

(c) “Supplier or contractor” means, according to the context, any potential party or party to the procurement proceedings with the procuring entity;⁷

(d) “Procurement contract” means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;⁸

(e) “[Submission] security” means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in article [14 (1) (f)] and includes such arrangements as bank guarantees, surety bonds, standby letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract;⁹

(f) “Currency” includes monetary unit of account;¹⁰

(g) “Submission(s)” means tender(s), proposal(s), offer(s), quotation(s) and bid(s) referred to collectively or generically;¹¹

accompanying this definition would set out the substance of the definitions of the goods, construction and services, which were taken from the 1994 text (article 2 (c) to (e)). It was also agreed at that session that the Guide would explain that the words “by any means” in the subparagraph intended to indicate that procurement was carried out not only through acquisition by purchase but also by other means such as lease, and should not be read as referring to unlawful acts (A/CN.9/668, para. 273 (c)). The Working Group may wish to draw on equivalent terms in Article I.2 of the WTO Agreement on Government Procurement (1994, GPA) and the provisionally agreed text of the revised GPA Article II.2 (b): “purchase, lease and rental or hire purchase, with or without an option to buy”.

⁶ The Working Group has approved this definition taken from the 1994 text (article 2 (b)) (A/CN.9/668, paras. 272-274).

⁷ The Working Group has approved this definition, taken from the 1994 text (article 2 (f)) as amended by the Working Group at its fourteenth session (A/CN.9/668, paras. 272-274), replacing the phrase “the procurement proceedings” with “a procurement contract” (A/CN.9/664, para. 24).

⁸ The Working Group has approved this definition taken from the 1994 text (article 2 (g)) (A/CN.9/668, paras. 272-274).

⁹ The Working Group has approved this definition, which is based on article 2 (h) of the 1994 text and amended in the light of the proposed article 14 (A/CN.9/668, paras. 272-274).

¹⁰ The Working Group has approved this definition taken from the 1994 text (article 2 (i)) (A/CN.9/668, paras. 272-274).

(h) “Solicitation” means request to suppliers or contractors to present submissions;¹²

(i) “Successful submission” means the submission ascertained by the procuring entity to be successful in accordance with the evaluation criteria set out in the solicitation documents pursuant to article [12] of this Law;¹³

(j) “Solicitation documents” means all documents for solicitation of submissions;¹⁴

(k) “Description(s)” means the description provided in accordance with article [11] of this Law;¹⁵

[(l) “Open solicitation” means solicitation in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published);]¹⁶

[(m) “Direct solicitation” means solicitation from [chosen/identified] supplier(s) or contractor(s);]¹⁷

(n) A “framework agreement procedure” is a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement;¹⁸

(o) A “framework agreement” is an agreement between the procuring entity and the selected supplier(s) or contractor(s) concluded upon completion of the first stage of the framework agreement procedure;¹⁹

(p) A “closed framework agreement” is a framework agreement to which no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party;²⁰

(q) An “open framework agreement” is a framework agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties;²¹

¹¹ New definition as approved by the Working Group (A/CN.9/668, paras. 272-274).

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ New definition as approved by the Working Group (A/CN.9/668, para. 273 (d)). This paragraph is based on articles 16 and 27 (d) of the 1994 text.

¹⁶ The Working Group has agreed to place this new definition in square brackets in article 2 for further consideration (A/CN.9/668, para. 273 (a)).

¹⁷ Ibid.

¹⁸ The Working Group has agreed to move this new definition from the proposed article 49 in A/CN.9/WG.I/WP.66/Add.4 to article 2 for further consideration (A/CN.9/668, para. 273 (f)).

¹⁹ Ibid.

²⁰ Ibid. The Working Group may also wish to consider whether, so as to avoid confusion in Chapter VI, this detailed definition might assist in interpreting the provisions of the Chapter. See, further, footnote 39 in A/CN.9/WG.I/WP.66/Add.4. If detailed definitions are to be retained in this article, the Working Group may wish to include, to provide balance, further definitions (such as of electronic reverse auctions).

²¹ Ibid.

(r) A “framework agreement procedure with second stage competition” is a framework agreement procedure in which certain terms and conditions of the procurement, which cannot be established with sufficient precision when the framework agreement is concluded, are to be established or refined through second stage competition;²²

(s) A “framework agreement procedure without second stage competition” is a framework agreement procedure without a second-stage competition to establish or refine the terms and conditions of the procurement;²³

[(t) A “material change in the description of the subject matter of the procurement or all other terms and conditions of the procurement” means any amendment that would make the submissions from any suppliers or contractors parties to the framework agreement non-responsive, that would render previously non-responsive submissions responsive, and that [could] [would]²⁴ change the status of suppliers or contractors with regard to their qualification.]²⁵

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]²⁶

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) Treaty or other form of agreement to which it is a party with one or more other States,

(b) Agreement entered into by this State with an intergovernmental international financing institution, or

(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

²² Ibid.

²³ Ibid.

²⁴ The Working Group may wish to consider whether “could” might be a more appropriate term than the previously appearing “would”, as elements of the qualification criteria are subjective (see proposed article 10).

²⁵ The Working Group has agreed to move this new definition from the proposed article 51 in A/CN.9/WG.I/WP.66/Add.4 to article 2, for further consideration (A/CN.9/668, para. 273 (f)) together with any proposals that might be submitted by delegates on the subject (A/CN.9/668, para. 237). It has also agreed that the substance of the deleted final words from the original draft in A/CN.9/WG.I/WP.66/Add.4 should be reflected in the Guide, as an explanation of the policy considerations underlying the definition (A/CN.9/668, paras. 236-237).

²⁶ The Working Group has approved this article reproducing article 3 of the 1994 text (A/CN.9/668, para. 20).

Article 4. Procurement regulations²⁷

(1) The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

(2) The procurement regulations shall include a code of conduct for officers or employees of procuring entities, addressing, inter alia, the prevention of conflicts of interest in public procurement and where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular public procurements, screening procedures and training requirements.²⁸

Article 5. Publication of legal texts²⁹

(1) Except as provided for in paragraph 2 of this article, the text of this Law, procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

(2) Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public and updated if need be.

Article 6. Information on planned procurement activities³⁰

Procuring entities may publish information regarding planned procurement activities for forthcoming months or years. Such publication does not constitute a solicitation and does not obligate the procuring entity to issue solicitations for the procurement opportunities identified.

²⁷ The Working Group has approved this article, which is based on article 4 of the 1994 text, with the revisions to new paragraph (2) (A/CN.9/668, paras. 26-27).

²⁸ It was agreed by the Working Group that the paragraph should be supplemented by provisions in the Guide reproducing article 8 (5) of the United Nations Convention against Corruption (UNCAC), and discussing implementation issues (A/CN.9/668, paras. 28-29).

²⁹ The Working Group has approved this article, which is based on article 5 of the 1994 text (A/CN.9/668, para. 32).

³⁰ The Working Group has approved the draft article as revised (A/CN.9/668, paras. 37-38), and has agreed that the Guide should explain the benefits of such publication for strategic and operational planning, and should emphasize that effective pre-advertisement of forthcoming procurement should not facilitate collusion (A/CN.9/668, para. 37).

Article 7. Rules concerning methods, techniques and procedures for procurement and type of solicitation^{31, 32}

(1) Except as otherwise provided by this Law, a procuring entity shall conduct procurement by means of tendering proceedings.³³

(2) A procuring entity may use a method of procurement other than tendering only in accordance with paragraphs (3) to (5) and (7) of this article, and shall choose the most competitive³⁴ method, technique and procedure appropriate in the circumstances of the given procurement.³⁵

(3) Where it is feasible to provide detailed description of the subject matter of the procurement and establish the evaluation criteria in quantifiable or monetary terms, but where the use of tendering proceedings would not be appropriate for reasons of economic efficiency [economy and efficiency] [economy or efficiency],³⁶ a procuring entity may use a method of procurement referred to in chapter III of this law, provided that the conditions for the use of the method concerned, as specified in the relevant provisions of Chapter III, are satisfied.³⁷

(4) Where it is not feasible for the procuring entity to formulate detailed description of the subject matter of the procurement and/or establish the evaluation criteria in quantifiable or monetary terms, [or in other instances listed in article 37 of this Law,]³⁸ a procuring entity may use a method of procurement referred to in

³¹ The Working Group has deferred the consideration of this revised article (A/CN.9/668, para. 70).

³² The title was changed to reflect the revisions to paragraph (2) of the draft article as approved by the Working Group (A/CN.9/668, paras. 44-45).

³³ The Working Group has approved the paragraph, which is based on provisions of article 18 (1) of the 1994 text (A/CN.9/668, para. 40).

³⁴ The Working Group may wish to consider how the Guide should explain the notion of “competitive”, and the extent to which it can be facilitated even without fully “open” procedures.

³⁵ The Working Group has approved the revised paragraph, which is based on provisions of article 18 of the 1994 text (A/CN.9/668, paras. 44-45). The intended meaning of the phrase “appropriate in the circumstances of the given procurement” is to be explained in the Guide (A/CN.9/668, paras. 42-43).

³⁶ The Working Group may wish to consider the extent to which the reference to “economic efficiency” in this article should be aligned with similar references elsewhere in the text (which were previously not consistent in the use of terminology, such as proposed articles 20, 34 and 48 (2)). See also the commentary to those proposed articles.

³⁷ The Working Group has approved the revised paragraph, which is based on article 18 of the 1994 text (A/CN.9/668, paras. 46-48).

³⁸ The wording in square brackets was included for consideration by the Working Group together with chapter IV, in the light of the additional conditions for use listed in the proposed article 37 (itself based on article 19 of the 1994 text). These additional conditions are not covered by cases listed in the opening phrase to this subparagraph: “Where it is not feasible for the procuring entity to formulate detailed description of the subject matter of the procurement and/or establish the evaluation criteria in quantifiable or monetary terms.” The additional conditions listed in article 37 refer to such situations as urgency, the failure of tendering proceedings, and national security and national defence considerations.

chapter IV of this Law, provided that the conditions for the use of that method, as specified in the relevant provisions of that chapter are satisfied.³⁹

(5) A procuring entity may use electronic reverse auction as a [stand-alone] method of procurement or in conjunction with other methods of procurement [as appropriate] in accordance with the provisions of chapter V of this Law, provided that the conditions for the use of electronic reverse auctions in that Chapter are satisfied.⁴⁰

(6)⁴¹ (a) Without prejudice to article 24 of this Law, a procuring entity using a method of procurement other than tendering in accordance with paragraphs (3) to (5) of this article shall use open solicitation unless:⁴²

(i) The conditions for the use of direct solicitation specified in articles [34, 36, 39 and 40] are present; or

(ii) Direct solicitation is the only means of ensuring confidentiality or is required by reason of the national interest;

provided that in using direct solicitation, the procuring entity solicits submissions from a sufficient number of suppliers or contractors to ensure effective competition;

(b) Where direct solicitation is used to ensure confidentiality, and where the procuring entity determines therefore that the procedures set out in articles 6, 15 (9) as regards public disclosure, 20, 22 (2), 24, or [... the provisions on public disclosure in chapter VII. Review are to be added] of this Law should not apply, it shall include in the record of the procurement required under article 22 of this Law, a statement of the grounds and circumstances on which it relied to justify its determination;⁴³

(c) Open solicitation shall include the publication of the invitation to present submissions in accordance with article 24 (2), except:⁴⁴

(i) Where the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article [9 (1)]; or

(ii) The procuring entity determines, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions, in which case it shall include in the record of the procurement required under article [22] of this Law, a

³⁹ The Working Group has approved the paragraph, which is based on articles 18 and 19 (1) (a) of the 1994 text (A/CN.9/668, para. 49).

⁴⁰ The Working Group has approved the paragraph (A/CN.9/668, para. 50).

⁴¹ The Working Group has deferred the consideration of the revised paragraph, which was presented as paragraph (7) in the previous version (A/CN.9/668, paras. 66-67). It was noted that the provisions of the paragraph were based on a number of repetitive provisions of the 1994 text, contained in articles 17, 23, 24 and 37. The Working Group may wish to consider whether the revised order of presentation of the article assists the reader in following its provisions.

⁴² The subparagraph is as revised by the Working Group (A/CN.9/668, para. 66 (a) and (b)).

⁴³ The subparagraph is as provisionally approved by the Working Group, with all cross-references retained and updated (A/CN.9/668, para. 66 (e)).

⁴⁴ The subparagraph is as revised by the Working Group (A/CN.9/668, para. 66 (f)). However, the Working Group may wish to consider whether the current drafting indicates that article 24 (1) might not apply, and if so to delete the cross-reference.

statement of the grounds and circumstances on which it relied to justify its determination. The enacting State shall establish in the procurement regulations a value threshold for the purposes of invoking the exception referred to in this paragraph.⁴⁵

(7)⁴⁶ (a) A procuring entity may engage in single-source procurement in the following exceptional circumstances:

(i) The goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, such that no reasonable alternative or substitute exists, and the use of a competitive⁴⁷ procurement method would therefore not be possible;⁴⁸

(ii) There is an urgent need for the subject matter of the procurement, and engaging in tendering proceedings or any other method 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 neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;⁴⁹

(iii) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the

⁴⁵ The subparagraph is as revised by the Working Group (A/CN.9/668, para. 66 (g)).

⁴⁶ The Working Group has approved the revised paragraph (presented as paragraph (6) of draft article 7) (A/CN.9/668, paras. 51-64). It was based on article 22 of the 1994 text, the provisions of which were to be retained in full except for its paragraph (1) (e), which was to be deleted (A/CN.9/668, para. 58). The decisions made in connection with related provisions (A/CN.9/668, para. 66 (b)), and the addition of new provisions in the paragraph, necessitated splitting the provisions in subparagraphs (a), (b) and (c). It was agreed that the Guide accompanying the paragraph would highlight that some jurisdictions might require procuring entities to obtain a prior approval from a higher-level authority before engaging in single-source procurement (A/CN.9/668, para. 53).

⁴⁷ As to the notion of “competitive”, see footnote 34 above.

⁴⁸ The Working Group has approved the subparagraph, which is based on article 22 (1) (a) of the 1994 text (A/CN.9/668, para. 55). It was agreed that the Guide accompanying the subparagraph would provide sufficient explanations about the intended scope of the provisions and specific examples.

⁴⁹ The Working Group has approved the revised subparagraph, which is based on article 22 (1) (b) of the 1994 text (A/CN.9/668, para. 56). It was agreed that the Guide would (a) explain that single-source procurement was possible only if competitive negotiations were precluded for reasons of urgency (if there were only one supplier or contractor, single-source procurement would be available under subparagraph (a) irrespective of that urgency) and (b) stress that the justification extends only to the urgent need, and not to the subject matter of the procurement, so as to avoid open-ended procurement justified on the basis of an initial urgent need (see footnote 26 in A/CN.9/WG.I/WP.66/Add.1).

reasonableness of the price and the unsuitability of alternatives to the goods or services in question;⁵⁰

(iv) In the case of procurement for reasons of national defence or national security, where the procuring entity determines that the use of any other method of procurement is not appropriate;⁵¹

(v) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment,⁵² a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 12 (4) (a), provided that procurement from no other supplier or contractor is capable of promoting that policy;⁵³

(b) The procuring entity shall cause a notice of the single-source procurement 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 submission evaluated;⁵⁴

(c) The procedure set out in paragraph (6) (b) of this article and articles [6,]⁵⁵ 20, 22 (2) or [...]*the provisions on public disclosure in chapter VII. Review are to be added*] of this Law shall not apply to single-source procurement where considerations of confidentiality are involved or by reason of the national interest or in the case of urgency referred to in subparagraph (a) (ii) of this paragraph. The procuring entity shall include in the record of the procurement required under article [22] of this Law, a statement of the grounds and circumstances on which it relied to justify its determination.⁵⁶

(8) The procuring entity shall include in the record required under article [22] a statement of the grounds and circumstances on which it relied to justify the use of any procurement method other than tendering or the use of direct solicitation, in accordance with paragraphs (2) to (7) of this article.⁵⁷

⁵⁰ The Working Group has approved the revised subparagraph, which is based on article 22 (1) (d) of the 1994 text (A/CN.9/668, para. 57). It was agreed that the Guide would explain that the use of single-source procurement for subsequent purchases should be exceptional, and that the preferable option for a series of purchases would be a framework agreement. If there were none, single-source procurement for a subsequent purchase should be limited both in size and in time (ibid.).

⁵¹ This new subparagraph implements a request of the Working Group (A/CN.9/668, para. 59), and that the Guide would explain that “national defence or national security” could equally apply to regional defence or security issues (ibid.).

⁵² The Working Group may wish to consider whether an “opportunity to comment” would include review of the decision and whether this reference is necessary.

⁵³ The Working Group has decided to include the wording of article 22 (2) of the 1994 text (A/CN.9/668, para. 61).

⁵⁴ This new paragraph implements a request of the Working Group (A/CN.9/668, para. 66 (b)). The Working Group may wish to consider whether the final sentence is consistent with the ambit of the review provisions (Chapter VII).

⁵⁵ The Working Group may wish to consider cross-refer to article 6.

⁵⁶ See first part of footnote 53, above.

⁵⁷ The Working Group has approved the paragraph (A/CN.9/668, para. 69).

Article 8. Communications in procurement⁵⁸

(1) Any document, notification, decision and other information generated in the course of a procurement and communicated as required by this Law, including in connection with review proceedings under chapter [VII] or in the course of a meeting, or forming part of the record of procurement proceedings under article [22], shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(2) Communication of information between suppliers or contractors and the procuring entity referred to in articles [14 (1) (d),⁵⁹ 15 (6) and (9),⁶⁰ 19 (4),⁶¹ 30 (2) (a),⁶² 32 (1),⁶³ ...,⁶⁴ and in the case of direct solicitation in accordance with article 7 (6) (a),⁶⁵] may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, [the sender gives the recipient a] [confirmation of the communication] [is given to the recipient of the communication] in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

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

(a) Any requirement of form;

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

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

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

(4) [The means referred to in the preceding paragraph shall be] [The procuring entity shall use means of communication that are] readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. [The means to be used to hold] [In addition, the procuring entity shall hold] any meeting

⁵⁸ The Working Group has approved the draft article, which is based on article 5 bis as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 17-25), subject to updating the cross-references (A/CN.9/668, para. 71).

⁵⁹ Corresponds to the previous reference to article 32 (1) (d).

⁶⁰ Corresponds to the previous reference to article 7 (4) and (6).

⁶¹ Corresponds to the previous reference to article 36 (1), and the Working Group may wish to amend or remove it, depending on the finalization of the Working Group's revisions to the proposed article 19. The issue is whether or not a procurement contract can enter into force on the basis of, for example, a telephone call, followed by written confirmation. See, also, article 19 (9) below (drawing on article 36 (4) of the 1994 text) regarding the meaning of dispatch.

⁶² Corresponds to the previous reference to the same article.

⁶³ Corresponds to the previous reference to article 34 (1).

⁶⁴ The missing reference is to the previous article 44 (b) to (f) (selection procedure with consecutive negotiation). It will be updated in the light of the revisions to chapter IV.

⁶⁵ Corresponds to the previous reference to articles 37 (3) and 47 (1) of the 1994 text.

of suppliers or contractors [using means that] [shall in addition] ensure that suppliers or contractors can fully and contemporaneously participate in the meeting.

(5) [The procuring entity shall put in place appropriate] [Appropriate] measures [shall be put in place] to secure the authenticity, integrity and confidentiality of information concerned.⁶⁶

Article 9. Participation by suppliers or contractors⁶⁷

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

Article 10. Qualifications of suppliers and contractors⁶⁸

(1) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

(2) Suppliers or contractors must meet such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

- (i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, ethical standards, and reputation, and the personnel, to perform the procurement contract;
- (ii) That they have legal capacity to enter into the procurement contract;
- (iii) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their

⁶⁶ Various provisions in this article were drafted in the passive voice, and the Working Group may wish to consider the alternatives in square brackets, which are drafted in the active voice, to make it clear that the obligations concerned are those of the procuring entity.

⁶⁷ The Working Group has approved the draft article, which reproduces article 8 of the 1994 text (A/CN.9/668, para. 72).

⁶⁸ The Working Group has approved the revised draft article, which is based on article 6 of the 1994 text, subject to updating the cross-references as appropriate (A/CN.9/668, paras. 75-76 and 109).

business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;

(v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.

(3) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (2).

(4) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this Law.

(5) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents.

(6) Subject to article 9 (1), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality, or that is not objectively justifiable.

(7) Notwithstanding paragraph (6) of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission to demonstrate its qualifications in procurement proceedings. In doing so, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

(8) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false;

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor

was inaccurate or incomplete in a non-material respect. The supplier or contractor may, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;

(d) The procuring entity may require a supplier or contractor that has been prequalified in accordance with article 15 of this Law to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.⁶⁹

Article 11. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement⁷⁰

(1) The procuring entity shall set out in the solicitation documents the description of the subject matter of the procurement that it will use in [the examination of submissions] [assessing whether a submission is responsive].⁷¹ Where thresholds are set by the procuring entity for identifying non-responsive submissions, the procuring entity shall also set out the thresholds and the manner in which they are to be applied in the [examination] [assessment] in the solicitation documents.⁷²

(2) No description of the subject matter of a procurement that creates an obstacle to the participation of suppliers or contractors in the procurement proceedings, including any obstacle based on nationality, shall be included or used in the prequalification documents, if any, or in the solicitation documents.

(3) The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology.

⁶⁹ This subparagraph was added to reflect the preference expressed at the Working Group's fifteenth session for removing the content of the subparagraph from the last paragraph of article 15 and merging it with paragraph (8) of article 10 (A/CN.9/668, para. 109).

⁷⁰ The Working Group has approved the revised draft article, which is based on article 16 of the 1994 text (A/CN.9/668, paras. 78-80). It was agreed that the Guide to Enactment accompanying the article would draw the attention of enacting States to practices in some jurisdictions, proved to be useful, to require including in the solicitation documents the reference source for technical terms used (such as the European Common Procurement Vocabulary).

⁷¹ The Working Group may recall that the term "examination" is considered to refer to the ascertainment of responsiveness of tenders (see para. 41 (f) of A/CN.9/WG.I/WP.68/Add.1, referring to article 34 of the 1994 text), and may wish therefore to consider whether to use this generic term, or to use a descriptive phrase, and whether to include a definition or cross reference to article 32 (2) (a), which contains a definition of responsiveness. Further explanation in the Guide would be provided, as appropriate.

⁷² The provisions are new, and are based on model legislative provision 11 (d) of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (the PFIP provisions).

(4) To the extent practicable, any description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical and quality characteristics or the performance characteristics of that subject matter.⁷³ There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as “or equivalent” are included.⁷⁴

(5) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the subject matter of the procurement shall be used, where available, in formulating any description of the subject matter of the procurement to be included in the prequalification documents, if any, or in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement and the contract to be entered into as a result of the procurement proceedings, and in formulating other relevant aspects of the prequalification documents, if any, or solicitation documents.

Article 12. Rules concerning evaluation criteria [the evaluation of submissions]⁷⁵

(1) [In [examining,]⁷⁶ evaluating and comparing submissions and determining the successful submission] [In order to determine the successful submission] (the evaluation procedure), the procuring entity shall:

(a) Use only [evaluation] criteria [(the “evaluation criteria”)]⁷⁷ that relate to the subject matter of the procurement [and have been set out in the solicitation documents];

(b) [Use only those [evaluation] criteria that have been set out in the solicitation documents; and

(c) Apply [them] [the [evaluation] criteria] in the manner that has been disclosed in the solicitation documents.

⁷³ The Guide would explain that the caveat introducing this paragraph is included to allow technical or input-based specifications where appropriate.

⁷⁴ The wording of the second sentence has been aligned with article VI (3) of the GPA, pursuant to the decision of the Working Group (A/CN.9/668, para. 79).

⁷⁵ The Working Group has requested the Secretariat to restructure and revise the draft article and deferred the consideration of the revised article to a later date (A/CN.9/668, paras. 85 and 87). The draft article is based on articles 27 (e), 34 (4), 38 (m), 39 and 48 (3) of the 1994 text and model legislative provision 11 (d) of the PFIP Provisions. The Working Group may consider that extensive discussion in the Guide to support the article will be critical.

⁷⁶ See footnote 70, above. The Working Group may recall that the term “examination” is considered to refer to the ascertainment of responsiveness of tenders (see para. 41 (f) of A/CN.9/WG.I/WP.68/Add.1), and may wish therefore to remove it to the preceding article.

⁷⁷ The Working Group may wish to consider whether a definition is necessary or useful, and where it should be located, if so.

(2) Any non-price [evaluation] criteria shall, to the extent practicable, be objective and [quantifiable] [quantified]. All [evaluation] criteria shall be given a relative weight in the evaluation procedure, [and/or], wherever practicable, shall be expressed in monetary terms.⁷⁸

(3) The [evaluation] criteria may concern consider only:⁷⁹

(a) The price, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article;

(b) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the functional characteristics of goods or construction, the terms of payment and of guarantees in respect of the subject matter of the procurement, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article;

(c) Where the procurement is conducted in accordance with article ... [two-envelope tendering] or with chapter IV, and where relevant, the qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article.

(4) If authorized by the procurement regulations (and subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity in the evaluation procedure may in addition:⁸⁰

(a) [In determining the lowest evaluated tender]⁸¹ Consider the effect that acceptance of a submission would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic development potential offered by submissions, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand this subparagraph by including additional criteria)];

⁷⁸ The paragraph is based on article 34 (4) (b) (ii) of the 1994 text. The Working Group may wish to consider whether the qualification “wherever practicable” is correctly located, whether there is a substantive difference between expression in monetary terms and “quantified”, whether “quantifiable” and “given a relative weight” express the same or different requirements, and whether the provisions are sufficient to prevent any change to the weighting.

⁷⁹ The paragraph is based on article 34 (4) (c) (i) and (ii), article 39 (1) (a)-(c), and article 48 (3), of the 1994 text. The Working Group may wish to consider whether there could be additions to the list (such as aesthetic or environmental criteria), which would be subject to the requirements of paragraph (2), ensuring they are objective, quantifiable and weighted wherever practicable.

⁸⁰ The paragraph is based on the provisions of article 34 (4) (c) (iii) and (iv) and (d) repeated in article 39 (1) (d) and (e) and (2), of the 1994 text.

⁸¹ The Working Group may recall that article 34 (4) (c) of the 1994 text permitted these factors to be taken into account only where the evaluation would be on the basis of lowest evaluated tender (and not lowest price tender), and may wish to include the same restriction here.

(b) Grant a margin of preference for the benefit of submissions for construction by domestic contractors, for the benefit of submissions for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings;⁸²

(c) [In determining the lowest evaluated tender]⁸³ Take into account national defence and security considerations.

(5) The procuring entity shall set out in the solicitation documents:⁸⁴

(a) All [evaluation] criteria established pursuant to this article, including any margin of preference; and

(b) Where any criteria other than price are to be used in the evaluation procedure, the relative weight to be accorded to each [evaluation] criterion (including the price) and the manner in which the criteria are to be applied in the evaluation procedure.

[(6) The evaluation procedure shall be conducted by applying the [evaluation] criteria in the manner set out in the solicitation documents, to determine the successful submission, as follows:⁸⁵

(a) The lowest price tender, or the [best] [lowest]⁸⁶ evaluated tender, for proceedings conducted under Chapter II, and articles [35 and 39] of this Law;

(b) The proposal with the lowest price, or the proposal with the best combined evaluation in terms of the criteria other than price and the price⁸⁷ for proceedings conducted under article [36] of this Law;

(c) The lowest-priced quotation meeting the needs of the procuring entity,⁸⁸ for proceedings conducted under article [37] of this Law;

(d) The proposal best meeting the needs of the procuring entity,⁸⁹ for proceedings conducted under article [40] of this Law; or

⁸² The Working Group may wish to consider whether a margin of preference can only be an alternative to the inclusion of socio-economic factors, and not an additional criterion.

⁸³ See footnote 80, above.

⁸⁴ The paragraph is based on the provisions of article 27 (e) repeated in article 38 (m), of the 1994 text. The Working Group may consider that article 27 (Contents of solicitation documents) could alternatively contain this provision.

⁸⁵ The Working Group may wish to consider the need for and location of these provisions.

⁸⁶ See section II.B of A/CN.9/WG.I/WP.68 for a discussion of these terms.

⁸⁷ The Working Group may wish to consider the extent to which these notions are substantively different from the assessments conducted in tendering proceedings, and whether there may be any benefit in retaining wording that is familiar to users of the Model Law even if so, or whether consistency and simplification would justify aligning the terms used in both procurement methods.

⁸⁸ The Working Group may wish to consider whether this basis for identifying the successful tender is sufficiently objective, and the extent to which it differs in reality from the lowest price tender.

⁸⁹ The Working Group may wish to consider whether this basis for identifying the successful tender is sufficiently objective, and the extent to which it differs in reality from the lowest evaluated tender.

(e) The best and final offer, for proceedings conducted under article [41] of this Law.]

Article 13. Rules concerning the language of documents⁹⁰

(1) The prequalification documents, if any, and solicitation documents shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where the procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law).

(2) Applications to prequalify, if any, and submissions may be formulated and presented in any language in which the prequalification documents, if any, and solicitation documents have been issued or in any other language that the procuring entity specifies in the prequalification documents, if any, and solicitation documents, respectively.

Article 14. Submission securities⁹¹

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a submission security:

(a) The requirement shall apply to all such suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the submission security and the confirmer, if any, of the submission security, as well as the form and terms of the submission security, must be acceptable to the procuring entity;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a submission security shall not be rejected by the procuring entity on the grounds that the submission security was not issued by an issuer in this State if the submission security and the issuer otherwise conform to requirements set forth in the solicitation documents (, unless the acceptance by the procuring entity of such a submission security would be in violation of a law of this State);

(d) Prior to presenting a submission, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a submission security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the submission security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

⁹⁰ The Working Group has agreed to merge proposed articles 13 and 29 into one article, to deal with the language of all relevant documents together (A/CN.9/668, para. 169). Accordingly the revised article 13 in this draft consolidates provisions of articles 17 and 29 of the 1994 text.

⁹¹ The Working Group has approved the draft article, which is based on article 32 of the 1994 text (A/CN.9/668, para. 91).

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required submission security; any requirement that refers directly or indirectly to conduct by the supplier or contractor presenting the submission shall not relate to conduct other than:

(i) Withdrawal or modification of the submission after the deadline for presenting of submissions, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign the procurement contract if required by the procuring entity to do so;

(iii) Failure to provide a required security for the performance of the contract after the submission has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the submission security, and shall promptly return, or procure the return of, the security document, after whichever of the following that occurs earliest:

(a) The expiry of the submission security;

(b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) The termination of the procurement proceedings without the entry into force of a procurement contract;

(d) The withdrawal of the submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.
