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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 a proposal for articles 13 bis-23 bis of chapter I (General provisions).

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



CHAPTER I. GENERAL PROVISIONS *(continued)*

Article 13 bis. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or submissions¹

- (1) The manner, place and deadline for presenting applications to pre-qualify shall be set out in the invitation to pre-qualify and the pre-qualification documents. The manner, place and deadline for presenting submissions shall be set out in the solicitation documents.
- (2) The deadlines for presenting applications to pre-qualify or submissions shall be expressed as a specific date and time and shall allow sufficient time for suppliers or contractors to prepare and present their applications or submissions, taking into account the reasonable needs of the procuring entity.
- (3) If the procuring entity issues a clarification or modification of the pre-qualification or solicitation documents, it shall, prior to the deadline for presenting applications to pre-qualify or submissions, extend the deadline if necessary or as required under article [14 (3)] of this Law, in order² to afford suppliers or contractors sufficient time to take the clarification or modification into account in their applications or submissions.³
- (4) The procuring entity may, in its absolute discretion, prior to the deadline for presenting applications to pre-qualify or submissions, extend the deadline if it is not possible for one or more suppliers or contractors to present their applications or submissions by the deadline owing to any circumstance beyond their control.
- (5) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the pre-qualification or solicitation documents.⁴

¹ The accompanying Guide text will state that: (i) the mechanism for presenting submissions must be reasonably accessible to suppliers; (ii) the procurement regulations will specify a minimum period for presenting submissions for each procurement method (reference in this regard may be made to the provisions of article XI.2 of the 1994 version, and article XI.3 of the 2006 version, of GPA, for open procedures that requires the period to be not less than 40 days); (iii) such a period must be sufficiently long in international and complex procurement to allow suppliers reasonable time to prepare their submissions; and (iv) failures in electronic presentation of submissions and the allocation of risks are to be addressed in procurement regulations or other appropriate forum (A/CN.9/690, para. 129).

² Amended further to introduction of new article 14 (3).

³ The accompanying Guide text will explain that this provision also intends to cover any new suppliers that may decide to join as a result of amendments made.

⁴ The accompanying Guide text will cross-refer to the provisions on material changes to those documents in article 14 (3).

Article 14. Clarifications and modifications of solicitation documents⁵

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting submissions. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely presentation of submissions and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for presenting submissions, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If as a result of a clarification or modification issued in accordance with this article, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate, the procuring entity shall cause the amended information to be published in the same manner and place in which the original information was published, and shall extend the deadline for presentation of submissions as provided for in article [13 bis (3)] of this Law.⁶

(4) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their submissions.

⁵ The accompanying Guide text will make it clear that any obligation of the procuring entity to debrief individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors are known to the procuring entity.

⁶ New paragraph inserted pursuant to A/CN.9/690, paras. 98 and 130.

Article 15. Tender securities⁷

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

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

(b) The solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity. In cases of domestic procurement, the solicitation documents may in addition stipulate that the tender security shall be issued by an issuer in this State;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an issuer in this State if the tender security and the issuer otherwise conform to requirements set out in the solicitation documents, unless:

(i) The acceptance by the procuring entity of such a tender security would be in violation of a law of this State; or

(ii) The procuring entity in cases of domestic procurement requires a tender security to be issued by an issuer in 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 tender 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 tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(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 tender security; any requirement that refers directly or indirectly to conduct by the supplier or contractor presenting the submission may relate only to:

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

⁷ The accompanying Guide text will refer to the use in some jurisdictions of alternatives to a tender security, such as a bid securing declaration that the procuring entity may, in appropriate cases, require all suppliers or contractors to sign in lieu of requiring them to furnish tender securities. Under this type of declaration, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for the contingencies that normally are secured by a tender security. Sanctions, however, should not include debarment since the latter should not be concerned with commercial failures. These alternatives aim at promoting more competition in procurement, by increasing participation in particular of small- and medium-sized enterprises that otherwise might be prevented from participation because of formalities and expenses involved in connection with presentation of a tender security.

- (ii) Failure to sign the procurement contract if required by the procuring entity to do so; and
 - (iii) Failure to provide a required security for the performance of the contract after the successful 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 tender 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 tender 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 cancellation of the procurement;⁸
 - (d) The withdrawal of the submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

Article 16. Pre-qualification proceedings

- (1) The procuring entity may engage in pre-qualification proceedings with a view to identifying, prior to the solicitation, suppliers and contractors that are qualified. The provisions of article [9] of this Law shall apply to pre-qualification proceedings.
- (2) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to pre-qualify is to be published).⁹ Unless decided otherwise by the procuring entity in domestic procurement, the invitation to pre-qualify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

⁸ Reference to “termination of the procurement proceedings without the entry into force of a procurement contract” was replaced with a reference to “the cancellation of the procurement” as a result of the amendments made to article 17 (1) of this draft.

⁹ The accompanying Guide text to these and similar provisions throughout the Model Law will note that reference to the official gazette shall be interpreted according to the principle of the functional equivalence between paper- and non-paper means and media of information and thus may encompass any non-paper official gazette used in an enacting State or group of States, such as in the European Union. The Guide will cross-refer in this respect to the relevant discussion that will accompany article 5 on publication of legal texts.

- (3) The invitation to pre-qualify shall include the following information:
- (a) The name and address¹⁰ of the procuring entity;
 - (b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;
 - (c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [9] of this Law;
 - (d) A declaration to be made in accordance with article [8] of this Law;
 - (e) The means of obtaining the pre-qualification documents and the place where they may be obtained;
 - (f) The price, if any, charged by the procuring entity for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents;
 - (g) If the price is charged, the means of payment for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents, and the currency of payment;¹¹
 - (h) The language or languages in which the pre-qualification documents and, subsequent to pre-qualification, the solicitation documents are available;¹²
 - (i) The manner, place and deadline for presenting applications to pre-qualify and, if already known, the manner, place and deadline for presenting submissions, in conformity with article [13 bis] of this Law.
- (4) The procuring entity shall provide a set of pre-qualification documents to each supplier or contractor that requests them in accordance with the invitation to pre-qualify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the pre-qualification documents shall reflect only the cost of providing them to suppliers or contractors.¹³

¹⁰ The accompanying Guide text to this and other provisions where reference to “address” is found will explain that the term intends to refer to the physical registered location as well as any other pertinent contact details (telephone numbers, e-mail address, etc. as appropriate), and that this term should be interpreted so consistently notwithstanding whether reference is to the address of the procuring entity or the address of a supplier or contractor.

¹¹ Amended pursuant to A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency of payment in domestic procurement, if it would be unnecessary in the circumstances.

¹² Amended pursuant to A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, and will add that an indication of the language or languages may still be important in some multilingual countries.

¹³ The accompanying Guide text to this and similar provisions throughout the Model Law will make it clear that development costs (including consultancy fees and advertising costs) are not to be recovered through this provision and that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate).

- (5) The pre-qualification documents shall include the following information:
- (a) Instructions for preparing and presenting pre-qualification applications;
 - (b) Any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;
 - (c) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the pre-qualification proceedings, without the intervention of an intermediary;
 - (d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the pre-qualification proceedings and the place¹⁴ where these laws and regulations may be found;
 - (e) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of applications to pre-qualify and to the pre-qualification proceedings.
- (6) The procuring entity shall respond to any request by a supplier or contractor for clarification of the pre-qualification documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting applications to pre-qualify. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely presentation of its application to pre-qualify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity has provided the pre-qualification documents.
- (7) The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set out in the invitation to pre-qualify and in the pre-qualification documents.
- (8) Only suppliers or contractors that have been pre-qualified are entitled to participate further in the procurement proceedings.
- (9) The procuring entity shall promptly notify each supplier or contractor presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any member of the public, upon request, the names of all suppliers or contractors that have been pre-qualified.¹⁵
- (10) The procuring entity shall promptly communicate to each supplier or contractor that has not been pre-qualified the reasons therefor.

¹⁴ The accompanying Guide text will explain that the place refers not to the physical location but rather to an official publication, portal, etc. where authoritative texts of laws and regulations of the enacting State are made available to the public and systematically maintained.

¹⁵ The accompanying Guide text will cross-refer to the article on confidentiality that contains exceptions to the public disclosure.

Article 17. Cancellation of the procurement¹⁶

(1) The procuring entity may cancel the procurement at any time prior to the acceptance of the successful submission and, after the successful submission was accepted, in the circumstances referred to in article [20 (8)] of this Law.¹⁷ The procuring entity shall not open any tenders or proposals after taking a decision to cancel the procurement.

(2) The decision of the procuring entity to cancel the procurement and reasons for the decision shall be included in the record of the procurement proceedings and¹⁸ promptly communicated to any supplier or contractor that presented a submission. The procuring entity shall in addition promptly publish a notice of the cancellation of the procurement in the same manner and place in which the original information regarding the procurement proceedings was published, and return any tenders or proposals that remain unopened at the time of the decision to the suppliers or contractors that presented them.

(3) Unless the cancellation of the procurement was a consequence of irresponsible or dilatory conduct on the part of the procuring entity, the procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have presented submissions.¹⁹

Article 18. Rejection of abnormally low submissions

(1) The procuring entity may reject a submission if the procuring entity has determined that the price in combination with other constituent elements of the submission is abnormally low in relation to the subject matter of the procurement and raises concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

(a) The procuring entity has requested in writing from the supplier or contractor details of the submission that gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;

¹⁶ The accompanying Guide text will explain that the purpose of the article is to draw the right balance between the discretion of the procuring entity to cancel the procurement at any stage of the procurement process covered by the Model Law and the need to accord appropriate protection to the market against irresponsible acts by the procuring entities, such as the abuse of discretion to cancel procurements to investigate market conditions. It will also state that, although the article does not address issues of damages and other remedies, it has implications for the review provisions in chapter VIII of the Model Law.

¹⁷ Amended pursuant to A/CN.9/690, para. 133.

¹⁸ The reference to the record of procurement proceedings was retained without square brackets pursuant to A/CN.9/690, para. 134.

¹⁹ The accompanying Guide text will explain that the opening phrase also covers unforeseeable events and that liability will arise in exceptional circumstances. It will also explain that the procuring entity may face liability for cancelling the procurement under other branches of law and that, although suppliers or contractors present their submissions at their own risk, and bear the related expenses, cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened.

(b) The procuring entity has taken account of any information provided by the supplier or contractor following this request, and the information included in the submission, but continues, on the basis of all such information, to hold concerns; and

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

(2) The decision of the procuring entity to reject a submission in accordance with this article and reasons for the decision shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.²⁰

Article 19. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest²¹

(1) A procuring entity shall exclude a supplier or contractor from the procurement proceedings if:

(a) The supplier or contractor offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, so as to influence an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings; or

²⁰ The reference to the record of procurement proceedings was retained without square brackets pursuant to A/CN.9/690, para. 135.

²¹ The accompanying Guide text will explain that the provisions of the article are subject to other branches of law of an enacting State where the issues of anti-corruption are regulated and are also without prejudice to any other sanctions, such as debarment, that may be applied to the supplier or contractor. The Guide in this context will cross-refer to article 3 of the Model Law and any available international standards against corrupt practices, in which context the Guide will explain that such standards may evolve, and will encourage enacting States to consider the relevant standards applicable at the time of enactment of the Model Law. The Guide will also emphasize that the article was intended to be consistent with those international standards and to outlaw any corrupt practices regardless of their form and how they were defined (A/CN.9/690, para. 136). While emphasizing the need to cross-refer to other branches of law in order to avoid unnecessary confusion, inconsistencies and incorrect perceptions about anti-corruption policies of an enacting State, the Guide will caution that such cross-referencing should not inadvertently convey the erroneous meaning that a criminal conviction would be a pre-requisite for exclusion of the supplier or contractor under this article. The Guide will also address: (i) applicable standards (e.g. consultants involved in drafting the solicitation documents should be prohibited from participating in the procurement proceedings where those documents are used); (ii) difficulties with establishing the fact of corruption as opposed to a bribe as the former might consist of a chain of actions over time rather than a single action; (iii) that combining provisions on conflicts of interest (which refer to a situation) and corruption (which is a wrongdoing) may lead to confusion, and should be avoided; and (iv) how the situation of a subsidiary would be treated.

(b) The supplier or contractor has an unfair competitive advantage or a conflict of interest in violation of applicable standards.²²

(2) Any decision of the procuring entity to exclude a supplier or contractor from the procurement proceedings under this article and the reasons therefor shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.²³

Article 20. Acceptance of the successful submission and entry into force of the procurement contract

(1) The procuring entity shall accept the successful submission unless:

(a) The procurement is cancelled in accordance with article [17 (1)] of this Law; or

(b) The supplier or contractor presenting the successful submission is disqualified in accordance with article [9] of this Law; or

(c) The supplier or contractor presenting the successful submission is excluded from the procurement proceedings on the grounds specified in article [19] of this Law; or

(d) The submission found successful at the end of evaluation is rejected as abnormally low under article [18] of this Law.²⁴

(2) The procuring entity shall promptly notify each supplier or contractor that presented submissions²⁵ of its decision to accept the successful submission at the end of the standstill period. The notice shall contain, at a minimum, the following information:

(a) The name and address of the supplier or contractor presenting the successful submission;

(b) [The contract price]²⁶ or, where the successful submission was ascertained on the basis of price and other criteria, [the contract price]²⁷ and a

²² The accompanying Guide text will explain the reference to standards and stress that those standards evolve over time. The Guide will also address issues of unjustified rejection and the need for the establishment of a process including a dialogue between the procuring entity and an affected supplier or contractor to discuss potential conflicts of interest, drawing on the provisions of article 18 regulating procedures for investigating abnormally low submissions.

²³ The reference to the record of procurement proceedings was retained without square brackets pursuant to A/CN.9/690, para. 137.

²⁴ Cross-references to articles 18 and 19 were added. The paragraph was also aligned with article 51 of the current draft.

²⁵ The phrase “that presented submissions” replaced the phrase “whose submission was examined” as more accurate especially in the procurement where no separate examination of submissions may take place, e.g. in auctions (see chapter VI of the current draft).

²⁶ See the footnote to the same term in article 21 below.

²⁷ Ibid.

summary of other characteristics and relative advantages of the successful submission;²⁸ and

(c) The duration of the standstill period as set out in the solicitation documents, which shall be at least ... working days (the enacting State specifies the period of time)²⁹ and shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors whose submissions were examined.

(3) Paragraph (2) of this article shall not apply to awards of procurement contracts:

(a) Under a framework agreement procedure without second stage competition;³⁰

(b) Where the contract price is less than ... (the enacting State specifies a threshold);³¹ or

(c) Where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period.³² The decision of the procuring entity that such urgent considerations exist and the reasons

²⁸ The accompanying Guide text will cross-refer to the discussion in the Guide on debriefing of unsuccessful suppliers or contractors. The Guide text on debriefing will explain reasons for addressing the issues of debriefing only in the Guide but not in the Model Law, in particular that debriefing procedures vary significantly not only from jurisdiction to jurisdiction but also from procurement to procurement, and that provisions on debriefing are not easily enforceable (A/CN.9/687, para. 93).

²⁹ Amended pursuant to A/CN.9/690, paras. 87 and 138. The Guide will explain the considerations that should be taken into account in establishing the minimum duration of the standstill period in the Law, including the impact that the duration of the standstill period would have on overall objectives of the revised Model Law as regards transparency, accountability, efficiency and equitable treatment of suppliers or contractors. Although the impact of a lengthy standstill period on the costs would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate, the Guide will note that the period should be sufficiently long to enable any challenge to the proceedings to be filed. The Guide would also draw attention of the enacting State that the period of time of a short duration should be established in working days; in other cases, it may be established in calendar days (A/CN.9/690, para. 87).

³⁰ Amended to align with the respective definition in article 2.

³¹ The accompanying Guide text will draw the attention of an enacting State to the thresholds found in other provisions of the Model Law referring to low-value procurement, such as those justifying an exemption from the requirement of public notice of the procurement contract award (article 21 (2) of the current draft), an exemption from the requirement of international solicitation (article 29 bis (4) of the current draft) and recourse to request for quotations proceedings (article 26 (2) of the current draft). The threshold in this provision may be aligned with them. The Working Group's attention is drawn in this regard to the provisions of article 26 (2) of the current draft where it is envisaged that the threshold amount will be set out in the procurement regulations rather than in the Model Law itself. The Working Group may wish to decide that the same approach should be followed in this provision and in article 21 (2) of the current draft, in particular in the light of the fluctuating value of currencies (inflation, etc.).

³² In the light of the similar provisions found in chapter VIII in the context of the suspension of the procurement proceedings (article 65), the Guide will elaborate on the appropriate considerations, which may differ, to justify an exemption under this provision and under article 65.

for the decision shall be included in the record of the procurement proceedings³³ [and shall be conclusive with respect to all levels of review under chapter VIII of this Law except for judicial review].³⁴

(4) Upon expiry of the standstill period, or where there is none, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission, unless a competent court or ... (the enacting State designates the relevant organ) orders otherwise.

(5) Unless a written procurement contract and/or approval by a higher authority is/are required, a procurement contract in accordance with the terms and conditions of the successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in effect.

(6) Where the solicitation documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:

(a) The procuring entity and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity. Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(7) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of submissions specified in the solicitation documents or the period of effectiveness of the tender security required under article [15] of this Law.

(8) If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract as required, or fails to provide any required security for the performance of the contract, the procuring entity may either cancel the procurement, or may decide to select a successful submission, in accordance with the criteria and procedures set out in this Law and in the solicitation

³³ The reference to the record of procurement proceedings was retained without square brackets pursuant to A/CN.9/690, para 138.

³⁴ The Working Group is invited to reconsider this provision in the light of the broad powers given to the administrative review body under chapter VIII of the Model Law. It may wish to note that similar provisions are to be considered in the context of article 65 of the current draft.

documents, from among the remaining submissions still in effect.³⁵ In the latter case, the provisions of this article shall apply mutatis mutandis to such submission.

(9) Notices under this article are dispatched when they are promptly and properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by any reliable means specified in accordance with article [7] of this Law.

(10) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given promptly to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract [and the contract price].³⁶

Article 21. Public notice of awards of procurement contract and framework agreement

(1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name(s) of the supplier(s) or contractor(s) to whom the procurement contract or the framework agreement was awarded [and the contract price].³⁷

(2) Paragraph (1) is not applicable to awards where the contract price is less than ... (the enacting State specifies a threshold).³⁸ The procuring entity shall publish a cumulative notice of such awards from time to time but at least once a year.

(3) The procurement regulations shall³⁹ provide for the manner of publication of the notices required by this article.

Article 22. Confidentiality

(1) In its communications with suppliers or contractors or the public, the procuring entity shall not disclose any information [if its non-disclosure is necessary

³⁵ The provisions have been revised to align them with the similar wording appearing in article 37 (7) of the current draft.

³⁶ See the footnote to the same term in article 21 below.

³⁷ Reference to the contract price was inserted as a result of the intersessional consultations and in the light of provisions in articles 20 (2) (b) and (10) and 23 (3) of the current draft. The Working Group may wish to recall in this context that the arguments against disclosing the winning price were put forward to the Working Group in the context of ERAs (to prevent collusion in subsequent ERAs, in particular). If the Working Group finds these arguments still persuasive, then restrictions on the public disclosure of the winning price should be consistently imposed in articles 20 (2) (b) and (10) and 23 (3).

³⁸ See the relevant footnote to the provisions of article 20 (3) (b) of the current draft. The accompanying Guide text will note that there is no exemption applicable to the conclusion of a framework agreement.

³⁹ Amended pursuant to A/CN.9/690, para. 139. The accompanying Guide text will suggest minimum standards for publication of this type of information.

for the protection of essential security interests of the State⁴⁰ or] if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition,⁴¹ unless disclosure of that information is ordered by the competent court or ... (the enacting State designates the relevant organ) and in such case, subject to the conditions of such an order.

(2) Other than when providing or publishing information pursuant to⁴² articles [20 (2) and (10), 21, 23 and 36] of this Law, the procuring entity shall treat applications to pre-qualify and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors or to any other person not authorized to have access to this type of information.⁴³

(3) Any discussions, communications,⁴⁴ negotiations and dialogue between the procuring entity and a supplier or contractor pursuant to articles [42 (3) and 43 to 46] of this Law shall be confidential. Unless required by law or ordered by the competent court or ... (the enacting State designates the relevant organ) or permitted in the solicitation documents, no party to any discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications,⁴⁵ negotiations or dialogue without the consent of the other party.

(4) In procurement involving classified information, the procuring entity may decide or may be required to:

- (a) Withhold classified information from public disclosure;
- (b) Impose on suppliers or contractors requirements aimed at protecting classified information; and
- (c) Demand that suppliers or contractors ensure compliance with requirements aimed at protecting classified information by their subcontractors.

⁴⁰ The phrase in square brackets replaces the earlier references to “essential national security or essential national defence” and to the “public interest”. Both were found problematic in the Working Group (A/CN.9/690, paras. 140 and 141) as well as during the intersessional consultations. The current wording draws on the wording found in article XXIII.1 of the 1994 version of the GPA and article III.1 of the 2006 version of the GPA. The accompanying Guide text will explain that the essential security interests of the State could relate “to procurement indispensable for national security or for national defence purposes” and “relating to the procurement of arms, ammunition, or war materials” (the GPA wording) but not only (e.g. in the health sector, procurement involving medical research experiment or procurement of vaccines during pandemics). Cross-reference in this regard will be made to the discussion in the Guide applicable to the classified information (see the accompanying footnote to the definition of “procurement involving classified information” in article 2).

⁴¹ The accompanying Guide text will explain that the phrase “to impede fair competition” should be interpreted as encompassing the risks of hampering competition not only in the procurement proceedings in question but also in subsequent procurements (A/CN.9/668, para. 131).

⁴² Amended pursuant to A/CN.9/690, para. 142.

⁴³ The Guide will explain the ambit of this reference as referring to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized to have access to information in question under applicable provisions of law of the enacting State.

⁴⁴ Amended pursuant to A/CN.9/690, para. 142.

⁴⁵ Ibid.

Article 23. Documentary record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings that includes the following information:

(a) A brief description of the subject matter of the procurement;

(b) The names and addresses of suppliers or contractors that presented submissions, and the name(s) and address(es) of the supplier(s) or contractor(s) with whom the procurement contract is entered into and [the contract price]⁴⁶ (in the case of a framework agreement procedure, in addition the name(s) and address(es) of the supplier(s) or contractor(s) with whom the framework agreement is concluded);

(c) A statement of the reasons and circumstances relied upon by the procuring entity for the decision as regards means of communication and any requirement of form;

(d) In the procurement proceedings in which the procuring entity, in accordance with article [8] of this Law, limits participation of suppliers or contractors, a statement of the reasons and circumstances relied upon by the procuring entity for imposing the limitation;

(e) If the procuring entity uses a method of procurement other than open tendering, a statement of the reasons and circumstances relied upon by the procuring entity for the use of such other method;

(f) [deleted]⁴⁷

(g) In the case of procurement by means of an auction or involving an auction as a phase preceding the award of the procurement contract, a statement of the reasons and circumstances relied upon by the procuring entity for the use of the auction, information about the date and time of the opening and closing of the auction, and the reasons and circumstances on which the procuring entity relied to justify any rejection of bids presented during the auction;

(h) If the procurement is cancelled pursuant to article [17 (1)] of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision to cancel the procurement;

(i) [deleted]⁴⁸

⁴⁶ To be considered with reference to the footnote to the term “contract price” in article 21 above, for which purpose it should be read together with paragraph (2) of this article.

⁴⁷ The deleted wording corresponds to articles 11 (1) (j) and 41 (2) of the 1994 Model Law. In the current draft, the procuring entity is required to include in the record the reasons and circumstances relied upon by the procuring entity for the use of any procurement method other than open tendering (article 25 (3) of the current draft). The Working Group has not so far discussed the need to justify in addition the reasons and circumstances relied upon by the procuring entity for the use of the specific procurement method under chapter V. The Secretariat’s understanding is that no such additional justification for the selection of a procurement method among those under chapter V would be needed.

⁴⁸ The text reading “If the procurement proceedings did not result in a procurement contract, a statement to that effect and of the reasons therefore” was deleted since the preceding subparagraph encompasses it in the light of the amendments made in article 17 (1).

(j) If the procurement proceedings resulted in the award of a procurement contract in accordance with article [20 (8)] of this Law, a statement to that effect and of the reasons therefor;

(k) A summary of any requests for clarification of the pre-qualification documents, if any, or solicitation documents, the responses thereto, as well as a summary of any modification of those documents;

(l) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented applications to pre-qualify, if any, or submissions;

(m) [The price],⁴⁹ or the basis for determining the price, and a summary of the other principal terms and conditions of each submission and of the procurement contract, where these are known to the procuring entity (in the case of a framework agreement procedure, in addition a summary of the principal terms and conditions of the framework agreement);

(n) A summary of the evaluation⁵⁰ of submissions, including the application of any margin of preference pursuant to article [11 (4) (b)] of this Law;

(o) If any socio-economic factors were considered in the procurement proceedings, information about such factors and the manner in which they were applied;

(p) If the submission is rejected pursuant to article [18] of this Law or the supplier or contractor is excluded from the procurement proceedings pursuant to article [19] of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;

(q) If no standstill period was applied, a statement of the reasons and circumstances relied upon by the procuring entity for non-application of a standstill period in accordance with article [20 (3)] of this Law;

(r) In the case of review in conjunction with the procurement proceedings under chapter VIII of this Law, a summary of the complaint and of the review proceedings and the decision⁵¹ taken at each level of the review;

(s) In procurement involving classified information, a statement of the reasons and circumstances relied upon by the procuring entity for measures and requirements taken for the protection of the classified information, including any exemptions from the provisions of this Law calling for public disclosure;

⁴⁹ To be considered with reference to the footnote to the term “contract price” in article 21 above, for which purpose it should be read together with paragraph (3) of this article.

⁵⁰ Amended pursuant to A/CN.9/690, para. 18.

⁵¹ Amended pursuant to A/CN.9/690, para. 75.

(t) Other information required to be included in the record in accordance with the provisions of this Law or the procurement regulations.⁵²

(2) The portion of the record referred to in subparagraphs (a) to (f)⁵³ of paragraph (1) of this article shall, on request, be made available to any person after the successful submission has been accepted⁵⁴ or the procurement has been cancelled.^{55, 56}

(3) Except as disclosed pursuant to article [36 (3)] of this Law, the portion of the record referred to in subparagraphs (g) to (p)⁵⁷ of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that presented submissions⁵⁸ after the decision on acceptance of the successful submission or on cancellation of the procurement has become known to them.^{59,60} Disclosure of the portion of the record referred to in subparagraphs (k) to (n)⁶¹ may be ordered at an

⁵² The Secretariat included a “catch-all” provision in the end of the list, which should ensure that all significant decisions in the course of the procurement proceedings and reasons therefor would have to be put on the record. The accompanying Guide text will refer to the decisions to be recorded pursuant to the relevant provisions of the Model Law, such as those related to the choice of direct solicitation when the choice between open and direct solicitations exists, or the decision and reasons for limiting participation in the auctions and open framework agreements on the ground of technological constraints. In addition, it will also refer to information that may be required to be included in the record under the procurement regulations. See, in this regard, the issues raised in A/CN.9/WG.I/WP.68/Add.1, section H, as regards some information not listed in the 1994 Model Law which may be worth adding in the record.

⁵³ See the footnote to the term “contract price” in article 21 above.

⁵⁴ Amended pursuant to A/CN.9/690, para. 143.

⁵⁵ The phrase “the procurement has been cancelled” replaced the wording in the previous drafts “after procurement proceedings have been terminated without resulting in a procurement contract (in the case of a framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement)”, in the light of the amendments made in article 17 (1) of the current draft.

⁵⁶ The accompanying Guide text will elaborate that this provision is without prejudice to paragraph (4) of this article that sets out in subparagraph (a) grounds that would allow the procuring entity exempt information from public disclosure and in subparagraph (b) information that cannot be publicly disclosed.

⁵⁷ See the footnote to the term “contract price” in article 21 above.

⁵⁸ The phrase “or applied for pre-qualification” was deleted here, to align the wording with the wording in article 20 (2) of the current draft that limits the pool of suppliers to those that presented submissions. The Secretariat’s understanding is that suppliers disqualified as a result of pre-qualification should not have access to information relevant to examination and evaluation of submissions. The reasons for their disqualification will be communicated to them in accordance with article 16 (10) and this should give them sufficient grounds for challenge under chapter VIII of the Model Law.

⁵⁹ The phrase “after the decision about acceptance of the successful submission has become known to them” replaced the earlier wording “after the successful submission has been accepted”, to allow effective review under article 20 (2) and the relevant provisions of chapter VIII of the Model Law.

⁶⁰ Reference to “decision about cancellation of the procurement” replaced the wording in the previous drafts “after procurement proceedings have been terminated without resulting in a procurement contract (in the case of a framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement)”, in the light of the amendments made in article 17 (1) of this draft.

⁶¹ See the footnote to the term “contract price” in article 21 above.

earlier stage only by a competent court or ... (the enacting State designates the relevant organ).⁶²

(4) Except when ordered to do so by a competent court or ... (the enacting State designates the relevant organ), and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information from the record of the procurement proceedings [if its non-disclosure is necessary for the protection of essential security interests of the State or]⁶³ if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition;

(b) Information relating to the examination and evaluation⁶⁴ of submissions, and submission prices, other than the summary referred to in subparagraph (n) of paragraph (1) of this article.

(5) The procurement entity shall record, file and preserve all documents relating to the procurement proceedings, according to procurement regulations or other provisions of law.⁶⁵

Article 23 bis. Code of conduct

A code of conduct for officers or employees of procuring entities shall be enacted. It shall address, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements. The code of conduct so enacted shall be promptly made accessible to the public and systematically maintained.⁶⁶

⁶² Amended pursuant to A/CN.9/690, para. 143.

⁶³ Amended pursuant to the amendments made to article 22 (1) of the current draft. The accompanying Guide text will cross-refer to the relevant discussion in the Guide in connection with the respective provisions in article 22.

⁶⁴ Amended pursuant to A/CN.9/690, para. 18.

⁶⁵ The accompanying Guide text will explain that the provisions intend to reflect a requirement in the United Nations Convention against Corruption that States parties must “take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents” (article 9 (3)). The Guide will also explain the need for preservation of documents, and cross-refer to any applicable rules on documentary records and archiving. If the enacting State considers that applicable internal rules and guidance should also be stored with the documents for a particular procurement, it could include those items in the regulations.

⁶⁶ The amended wording has been agreed upon during the intersessional consultations. The accompanying Guide text will cross-refer to article 5 (1) of this Law that addresses publicity of legal texts, and to other law that includes relevant codes of conduct (A/CN.9/690, para. 144). In this regard, it will also address the concerns raised by the concept of the “revolving door” (i.e. that public officials seek or are offered employment in the private sector by entities or individuals — potential participants in procurement proceedings) and so note that codes of conduct indirectly establish boundaries for the behaviour of private sector entities or individuals with public officials (A/CN.9/690, para. 145).