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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 chapter II (Methods of procurement and their conditions for use. Solicitation and notices of the procurement) of the revised Model Law (chapter II comprising articles 24-29 quater) and for chapter III (Open tendering) of the revised Model Law, comprising articles 30-38.

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



## **CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE. SOLICITATION AND NOTICES OF THE PROCUREMENT**

### **SECTION I. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE**

#### **Article 24. Methods of procurement\***

- (1) The procuring entity may conduct procurement by means of:
  - (a) Open tendering;
  - (b) Restricted tendering;
  - (c) Request for quotations;
  - (d) Request for proposals without negotiation;
  - (e) Two-stage tendering;
  - (f) Request for proposals with dialogue;
  - (g) Request for proposals with consecutive negotiations;
  - (h) Competitive negotiation;
  - (i) Auction;
  - (j) Single-source procurement.
- (2) The procuring entity may engage in a framework agreement procedure in accordance with the provisions of chapter VII of this Law.

#### **Article 25. General rules applicable to the selection of a procurement method**

- (1) Except as otherwise provided for in articles [26 to 28] of this Law, a procuring entity shall conduct procurement by means of open tendering.
- (2) A procuring entity may use a method of procurement other than open tendering only in accordance with articles [26 to 28] of this Law, and shall select the other method of procurement to accommodate the circumstances of the procurement concerned, and shall seek to maximize competition to the extent practicable.
- (3) If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify the use of that method.<sup>1</sup>

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\* States may choose not to incorporate all these methods of procurement into their national legislation, though open tendering should always be provided for. On this question, see the Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/...).

<sup>1</sup> This paragraph was retained without square brackets pursuant to A/CN.9/690, para. 147.

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**Article 26. Conditions for use of methods of procurement under  
chapter IV of this Law (restricted tendering, request for  
quotations and request for proposals without negotiation)**

(1) The procuring entity may engage in procurement by means of restricted tendering in accordance with article [39] of this Law when:

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

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

(2) A procuring entity may engage in procurement by means of a request for quotations in accordance with article [40] of this Law for the procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations.

(3) The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article [41] of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposals.<sup>2</sup>

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<sup>2</sup> The Working Group's tentative view was that this procurement method should not be treated as appropriate only for procurement of advisory or consultancy services (A/CN.9/687, para. 128). As the multilateral development banks recommend its use only for such services, the Working Group may wish to note that it can be so limited in the Guide to Enactment, which can also note that a tendering-based method could be used for other procurement.

**Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)<sup>3</sup>**

(1) <sup>4</sup>A procuring entity may engage in procurement by means of two-stage tendering in accordance with article [42] of this Law where the procuring entity assesses that discussions with suppliers or contractors are needed to refine aspects of the description of the subject matter of the procurement and to formulate them with the precision required under article [10] of this Law and in order to allow the procuring entity to obtain the most satisfactory solution to its procurement needs.

(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval)),<sup>5</sup> a procuring entity may engage in procurement by means of request for proposals with dialogue in accordance with article [43] of this Law where:

(a) It is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement in accordance with article [10] of this Law, and the procuring entity assesses that dialogue with suppliers or contractors is needed to obtain the most satisfactory solution to its procurement needs;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

<sup>3</sup> The Working Group has confirmed its understanding that in principle all procurement methods under the Model Law were available for all types of procurement (A/CN.9/687, para. 128). It was suggested that the accompanying Guide text would explain that the conditions for use in this article could not entirely address the considerations raised by the selection of the procurement method, and indeed that it might not be appropriate for them to do so. The selection may in practice not be amenable to challenge, and the main issue should be to enable structured decision-making on the part of the procuring entity and to manage the risks that such decisions may entail. The Guide will provide detailed commentary addressing the issues in selecting between the methods listed in articles 26 and 27 and among the methods listed in article 27, from the perspective both of legislators and of procuring entities. In addition, the guidance will address the elements of that choice that could not be addressed in a legislative text and will draw on real-life examples (A/CN.9/687, paras. 121-127).

<sup>4</sup> It is the Secretariat's understanding that a higher-level approval for the use of a procurement method under chapter V was discussed at the Working Group's eighteenth session only in the context of provisions addressing the request for proposals with dialogue and competitive negotiations (A/CN.9/690, paras. 152-155). The opening phrase, like the one appearing in paragraph (2) of this article, was not therefore included in this paragraph that addresses two-stage tendering.

<sup>5</sup> The opening phrase has been added pursuant to A/CN.9/690, para. 152. It will remain in the Model Law in round brackets (to indicate that it is optional for the enacting State). The accompanying Guide text will alert the enacting State that, in the light of the risks involved in the procurement method involving dialogue, the enacting State may require that recourse to such procurement method should be subject to approval by a higher-level authority. If it so decides, its national law should include the phrase without brackets.

(c) Where the procuring entity determines that the selected method is the most appropriate method of procurement for the protection of essential security interests of the State;<sup>6</sup> or

(d) When open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to article [17 (1)] of this Law<sup>7</sup> and when, in the judgement of the procuring entity, engaging in new open tendering proceedings or a procurement method under chapter IV of this Law would be unlikely to result in a procurement contract.<sup>8</sup>

(3) <sup>9</sup>A procuring entity may engage in procurement by means of request for proposals with consecutive negotiations in accordance with article [44] of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposals, and it assesses that consecutive negotiations with suppliers or contractors are needed in order to ensure that the financial terms and conditions of the procurement contract are acceptable to the procuring entity.

(4) A procuring entity may engage in competitive negotiations, in accordance with the provisions of article [45] of this Law, in the following circumstances:<sup>10</sup>

(a) There is an urgent need for the subject matter of the procurement, and engaging in open 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;

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open tendering proceedings or any other method of procurement because of the time involved in using those methods;<sup>11</sup> and

<sup>6</sup> Amended in order to align with the relevant wording in articles 22 (1) and 23 (4) (a) of the current draft.

<sup>7</sup> Amended pursuant to the amendments introduced in article 17 (1).

<sup>8</sup> The Working Group is invited to consider whether this last ground can also justify recourse to two-stage tendering. If so, the provisions of this subparagraph are also to be reflected under paragraph (1) of this article.

<sup>9</sup> It is the Secretariat's understanding that desirability of a higher-level approval for the use of a procurement method under chapter V was discussed at the Working Group's eighteenth session only in the context of provisions addressing the request for proposals with dialogue and competitive negotiations (A/CN.9/690, paras. 152-155). The opening phrase, like the one appearing in paragraph (2) of this article, was not therefore included in this paragraph that addresses request for proposals with consecutive negotiations.

<sup>10</sup> At its eighteenth session, the Working Group deferred consideration of suggestions to include a reference to a higher-level approval either in the text of the Model Law (in the chapeau of paragraph (4) or in subparagraph (c)) or in the Guide (A/CN.9/690, paras. 152 and 155).

<sup>11</sup> The accompanying Guide text will explain that the phrase excludes reference to single-source procurement.

(c) Where the procuring entity determines that the use of any other method of procurement is not appropriate for the protection of essential security interests of the State.<sup>12, 13</sup>

(5) A procuring entity may engage in single-source procurement in accordance with the provisions of article [46] of this Law in the following exceptional circumstances:

(a) The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;

(b) Owing to a catastrophic event, there is an extremely urgent need for the subject matter of the procurement, and engaging in any other method of procurement would be impractical because of the time involved in using those methods;<sup>14</sup>

(c) 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 reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(d) Where the procuring entity determines that the use of any other method of procurement is not appropriate for the protection of essential security interests of the State;<sup>15</sup> or

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<sup>12</sup> Amended in order to align with the relevant wording in articles 22 (1) and 23 (4) (a) of the current draft.

<sup>13</sup> The accompanying Guide will explain that the provisions in subparagraphs (a) to (c) are without prejudice to the general principle contained in article 25 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to competitive negotiation, such as restricted tendering or request for quotations, is appropriate, the procuring entity must select such an alternative procurement method that would ensure most competition in the circumstances of the given procurement without jeopardizing other not less important considerations, such as urgency of delivery of the subject matter of the procurement.

<sup>14</sup> Revised pursuant to the deliberations at the Working Group's eighteenth session (A/CN.9/690, para. 34). The accompanying Guide text will explain that this provision is without prejudice to the general principle contained in article 25 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to single-source procurement, such as competitive negotiation, restricted tendering or request for quotations, is appropriate, the procuring entity must select such an alternative procurement method that would ensure most competition in the circumstances of the given procurement without jeopardizing, however, other not less important considerations, such as urgency of delivery of subject matter of the procurement.

<sup>15</sup> Amended in order to align with the relevant wording in articles 22 (1) and 23 (4) (a) of the current draft.

(e) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, where procurement from a particular supplier or contractor is necessary in order to implement a socio-economic policy of this State set out in the procurement regulations, provided that procurement from no other supplier or contractor is capable of promoting that policy.

### **Article 28. Conditions for use of an<sup>16</sup> auction**

(1) A procuring entity may engage in procurement by means of an auction in accordance with the provisions of chapter VI of this Law, under the following conditions:

(a) Where it is feasible for the procuring entity to formulate a detailed and precise description of the subject matter of the procurement;

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

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

(2) A procuring entity may use an auction as a phase preceding the award of the procurement contract in a procurement method as appropriate under the provisions of this Law. It may also use an auction for award of a procurement contract in a framework agreement procedure with second stage competition in accordance with the provisions of this Law.<sup>17</sup>

### **Article 29. Conditions for use of a framework agreement procedure<sup>18, 19</sup>**

(1) A procuring entity may engage in a framework agreement procedure in accordance with chapter VII of this Law where it determines that:

(a) The need for the subject matter of the procurement is expected to arise on a [repeated or indefinite]<sup>20</sup> basis during a given period of time; or

<sup>16</sup> References to “electronic reverse” auctions have been removed, pursuant to A/CN.9/690, para. 39(a). See, also, the definition of the auction in article 2, which makes express reference to the fact that the auctions are held online and that they are reverse auctions.

<sup>17</sup> The article was split into two parts since the conditions set out in paragraph (1) would make it impossible to use ERAs as a phase in procurement methods under the Model Law. The text in this paragraph was amended pursuant to A/CN.9/690, para. 42 (b). The accompanying Guide text will elaborate on the procurement methods in which it would be appropriate to hold the auctions and on the procurement methods in which it would be inappropriate to do so.

<sup>18</sup> For lack of time the Working Group was not able to consider at its eighteenth session the provisions of this and the following articles up to article 41, of the draft Model Law.

<sup>19</sup> The article has been moved from chapter VII.

<sup>20</sup> One of the issues deferred by the Working Group was a proposal presented at the fifteenth session to reconsider the inclusion and extent of conditions for use of framework agreements (A/CN.9/668, paras. 227-229). The alternatives in square brackets were provided by participants

(b) By virtue of the nature of the subject matter of the procurement, the need for it may arise on an urgent basis during a given period of time.<sup>21</sup>

(2) The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify the recourse to a framework agreement procedure and the type of framework agreement selected.<sup>22</sup>

## SECTION II. SOLICITATION AND NOTICES OF THE PROCUREMENT

### **Article 29 bis. Solicitation in open tendering, two-stage tendering and in procurement by means of an auction**

(1) An invitation to tender in open tendering or two-stage tendering and an invitation to the auction under article [47] of this Law shall be published in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published).

(2) The invitation 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.<sup>23</sup>

(3) The provisions of this article shall not apply where the procuring entity engages in pre-qualification proceedings in accordance with article [16] of this Law.

(4) The procuring entity shall not be required to publish the invitation in accordance with paragraph (2) of this article in domestic procurement and in procurement proceedings where the procuring entity decides, in view of the low

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at the session to the Secretariat, for further consideration by the Working Group, with the comment that the term “indefinite” indicates unknown timing and/or unknown quantities. The informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, recommended that the Guide to Enactment should explain that a procuring entity should offer estimates of future quantities in the solicitation documents, in part to guide prospective vendors as to the government’s likely requirements. The Guide to Enactment should also explain why the Model Law refers to indefinite quantities, e.g. because it is possible that an item may be ordered only once.

<sup>21</sup> At the Working Group’s fifteenth session, it was suggested that an additional open-ended subparagraph (c) could be included reading “Other grounds and circumstances that justify recourse to a framework agreement procedure”, which would allow the procuring entity to have recourse to framework agreement procedures subject to the justification of its decision in the record of the procurement proceedings (A/CN.9/668, para. 228). The informal drafting party, July 2009, recommended that the Guide to Enactment should give examples of what these circumstances might be. The Working Group is invited to consider whether such additional open-ended subparagraph should be included in the text of the article.

<sup>22</sup> This paragraph was retained without square brackets pursuant to the Working Group’s decision on similar provisions in other articles of the draft revised Model Law.

<sup>23</sup> The accompanying Guide text will explain that international advertisement is on the increase to promote regional trade and cross-border protests. It will cross-refer to paragraph (4) of the article that permits an exemption from the requirement in paragraph (2).



value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions.<sup>24</sup>

**Article 29 ter. Solicitation and notices of the procurement in  
restricted tendering, competitive negotiations and  
single-source procurement**

(1) (a) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in article [26 (1) (a)] of this Law,<sup>25</sup> it shall solicit tenders from all suppliers and contractors from whom the subject matter of the procurement is available;<sup>26</sup>

(b) When the procuring entity engages in procurement by means of restricted tendering on the grounds specified in article [26 (1) (b)] of this Law, it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner, and it shall select a sufficient number of suppliers or contractors to ensure effective competition.<sup>27</sup>

<sup>24</sup> This paragraph is based on article 23 of the 1994 Model Law. It has been included pursuant to A/CN.9/690, paras. 118-120. The accompanying Guide text will stress that foreign suppliers should be allowed to participate in low-value procurement if they so chose, but (following the 1994 Model Law approach) the procuring entity would not be required to publish the invitation in a newspaper of wide international circulation in a language customarily used in international trade. The Guide will also explain what is meant by low-value procurement, to prevent enacting States from setting the threshold high to exclude the bulk of its procurement from requirement of international publication. Although the threshold for the low-value procurement will not be the same, and it will be impossible to set out a single threshold, for all enacting States, the Guide should promote a common understanding what low value is meant to involve. The accompanying Guide text will further explain that the low value consideration should be taken into account alongside an anticipated lack of a cross-border interest in participating in the procurement concerned (i.e. even if the procuring entity publicized the procurement internationally, no international participation would result in the absence of interest on the part of foreign suppliers or contractors, and thus such publication would involve additional cost (in particular, translation costs if applicable)). The Guide may cross-refer to other provisions of the Guide that address other exemptions in the case of the domestic procurement that may be applicable also to the low-value procurement, such as exemption from the requirement to indicate in the solicitation documents information about currency and languages, which is usually pertinent in the context of the international procurement.

<sup>25</sup> The accompanying Guide text will provide examples of the exceptional cases in which these grounds will apply (A/CN.9/687, paras. 159-160).

<sup>26</sup> The accompanying Guide text will elaborate on the implications of this provision on the procuring entity if it receives requests from suppliers or contractors to allow them to tender in response to the notice of the procurement published in accordance with paragraph (5) of this article. The Secretariat's understanding is that such suppliers will have to be allowed to tender unless they are disqualified (if pre-qualification took place) or do not comply with the terms of the notice of the procurement (e.g. the declaration made pursuant to article 8 of the Law).

<sup>27</sup> The provisions of paragraph (1) of this article are based on article 39 (2) of A/CN.9/WG.I/WP.73/Add.4.

(2) Where the procuring entity engages in procurement by means of request for quotations in accordance with article [26 (2)] of this Law, it shall request quotations from as many suppliers or contractors as practicable, but from at least three.<sup>28</sup>

(3) Where the procuring entity engages in procurement by means of competitive negotiations in accordance with article [27 (4)] of this Law, it shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.<sup>29</sup>

(4) Where the procuring entity engages in single-source procurement in accordance with article [27 (5)] of this Law, it shall solicit a proposal or price quotation from a single supplier or contractor.<sup>30</sup>

(5) <sup>31</sup>Prior to direct solicitation in accordance with the provisions of paragraphs (1), (3) and (4) of this article, the procuring entity shall publish a notice of the procurement in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published). The notice shall contain at a minimum the following information:

(a) The name and address 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) A declaration pursuant to article [8] of this Law; and

(d) The method of procurement to be used.

(6) The requirements of paragraph (5) shall not apply in the case of urgency as referred to in articles [27 (4) (b) and 27 (5) (b)]. The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify an exemption from the requirement of publication of the notice of the procurement under paragraph (5) of this article.<sup>32</sup>

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<sup>28</sup> The provisions of this paragraph are based on the first sentence of article 40 (1) of A/CN.9/WG.I/WP.73/Add.4.

<sup>29</sup> The provisions of this paragraph are based on the first sentence of article 45 (1) of A/CN.9/WG.I/WP.73/Add.5.

<sup>30</sup> The provisions of this paragraph are based on the first sentence of article 46 of A/CN.9/WG.I/WP.73/Add.5.

<sup>31</sup> The Working Group, at its seventeenth session, decided that the requirement of publishing the notice of procurement should not apply to request for quotations proceedings (A/CN.9/687, para. 171). No cross-reference to paragraph (2) of this article is therefore made in this paragraph. The accompanying Guide text would need to set out reasons for this exemption.

<sup>32</sup> The last sentence was retained without square brackets pursuant to the Working Group's decision on similar provisions in other articles of the draft revised Model Law.

### **Article 29 quater. Solicitation in request for proposals proceedings**

(1) An invitation to participate in the request for proposals proceedings shall be published in accordance with article [29 bis (1) and (2)], except where:

(a) The procuring entity engages in pre-qualification proceedings in accordance with article [16] of this Law or in pre-selection proceedings in accordance with article [43] of this Law; or

(b) The procuring entity engages in direct solicitation under the conditions set out in paragraph (2) of this article; or

(c) The procuring entity decides not to publish the invitation in accordance with article [29 bis (2)] of this Law under the conditions set out in article [29 bis (4)] of this Law.

(2) The procuring entity may engage in direct solicitation in request for proposals proceedings if:

(a) The subject matter to be procured is available only from a limited number of suppliers or contractors, provided that the procuring entity solicits proposals from all those suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter to be procured, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) The procurement involves classified information, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.<sup>33</sup>

(3) The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify recourse to direct solicitation in request for proposals proceedings.<sup>34</sup>

(4) The procuring entity shall publish a notice of the procurement in accordance with the requirements set out in article [29 ter (5)] where it engages in direct solicitation in request for proposals proceedings.

<sup>33</sup> Based on provisions of article 37 (3) of the 1994 Model Law and A/64/17, para. 265.

<sup>34</sup> This paragraph was retained without square brackets pursuant to the Working Group's decision on similar provisions in other articles of the draft revised Model Law.

## **CHAPTER III. OPEN TENDERING**

### **SECTION I. SOLICITATION OF TENDERS**

#### **Article 30. Procedures for soliciting tenders**

The procuring entity shall solicit tenders by issuing an invitation to tender in accordance with the provisions of article [29 bis] of this Law.

#### **Article 31. Contents of invitation to tender**

The invitation to tender shall include the following information:

- (a) The name and address of the procuring entity;
- (b) A summary of the principal required terms and conditions of the procurement contract 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, and any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, in conformity with article [9] of this Law;
- (d) A declaration pursuant to article [8] of this Law;
- (e) The means of obtaining the solicitation documents and the place where they may be obtained;
- (f) The price, if any, charged by the procuring entity for the solicitation documents;
- (g) If a price is charged for the solicitation documents, the means and currency of payment;<sup>35</sup>
- (h) The language or languages in which the solicitation documents are available;<sup>36</sup>
- (i) The manner, place and deadline for presenting tenders.

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<sup>35</sup> 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.

<sup>36</sup> 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.

## Article 32. Provision of solicitation documents

The procuring entity shall provide the solicitation documents to each supplier or contractor that responds to the invitation to tender in accordance with the procedures and requirements specified therein. If pre-qualification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been pre-qualified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors.<sup>37</sup>

## Article 33. Contents of solicitation documents

The solicitation documents shall include<sup>38</sup> the following information:

- (a) Instructions for preparing tenders;
- (b) The criteria and procedures, in conformity with the provisions of article [9] of this Law, that will be applied in the ascertainment of the qualifications of suppliers or contractors and in any further demonstration of qualifications pursuant to article [37 (6)] of this Law;
- (c) The requirements as to documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;
- (d) The description of the subject matter of the procurement, in conformity with article [10] of this Law; the quantity of the goods;<sup>39</sup> services to be performed; the location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;<sup>40</sup>
- (e) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;<sup>41</sup>
- (f) If alternatives to the characteristics of the subject matter of the procurement, contractual terms and conditions or other requirements set out in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated;

<sup>37</sup> 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).

<sup>38</sup> A/CN.9/687, para. 133.

<sup>39</sup> The accompanying Guide text will explain that in some cases this may refer to an estimated quantity, with cross-references to the relevant provisions in the chapter on framework agreements.

<sup>40</sup> A/CN.9/687, para. 136.

<sup>41</sup> The accompanying Guide text will explain the meaning of the term “contract form” in this provision as distinct from contract form requirements found in subparagraph (x) of this article.

(g) If suppliers or contractors are permitted to present tenders for only a portion of the subject matter of the procurement, a description of the portion or portions for which tenders may be presented;

(h) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(i) The currency or currencies in which the tender price is to be formulated and expressed;<sup>42</sup>

(j) The language or languages, in conformity with article [13] of this Law, in which tenders are to be prepared;<sup>43</sup>

(k) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors presenting tenders in accordance with article [15] of this Law, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and material bonds;

(l) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security, a statement to that effect;

(m) The manner, place and deadline for presenting tenders, in conformity with article [13 bis] of this Law;<sup>44</sup>

(n) The means by which, pursuant to article [14] of this Law, suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(o) The period of time during which tenders shall be in effect, in conformity with article [35] of this Law;

(p) The manner, place, date and time for the opening of tenders, in conformity with article [36] of this Law;<sup>45</sup>

(q) The criteria and procedure for the examination of tenders against the description of the subject matter of the procurement;

(r) The criteria and procedure for evaluation of tenders in accordance with article [11] of this Law;

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<sup>42</sup> 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 in domestic procurement, if it would be unnecessary in the circumstances.

<sup>43</sup> 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.

<sup>44</sup> A/CN.9/687, para. 139.

<sup>45</sup> A/CN.9/687, para. 139.

(s) The currency that will be used for the purpose of evaluating tenders pursuant to article [37 (5)] of this Law and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;<sup>46</sup>

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place<sup>47</sup> where these laws and regulations may be found;

(u) 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 procurement proceedings, without the intervention of an intermediary;

(v) [deleted]<sup>48</sup>

(w) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(x) Any formalities that will be required once a successful tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article [20] of this Law, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(y) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of tenders and to other aspects of the procurement proceedings.<sup>49</sup>

<sup>46</sup> 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 in domestic procurement, if it would be unnecessary in the circumstances.

<sup>47</sup> Reference to the place was added by the Secretariat further to the suggestions of experts. The accompanying Guide text will explain that the place refers not to the physical location but rather 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.

<sup>48</sup> Reference to any commitments outside the procurement contract was deleted in this article and elsewhere in the current draft where it was found, pursuant to A/CN.9/690, para. 39 (h).

<sup>49</sup> In the context of the discussion at the Working Group's seventeenth session of correction of arithmetical errors (draft article 37 (1)), a query was raised as to whether it might be useful to require the solicitation documents to specify the manner in which arithmetical errors would be corrected (A/CN.9/687, para. 151). The Working Group may wish therefore consider whether the article should be amended to provide for such a requirement.

## SECTION II. PRESENTATION OF TENDERS

### Article 34. Presentation of tenders

*[The old paras. 1 to 4 were deleted in the light of the newly proposed article 13 bis.]*

(1) Tenders shall be presented in the manner, at the place and by the deadline specified in the solicitation documents.

(2) (a) A tender shall be presented in writing, and signed, and:

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

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

(b) The procuring entity shall provide to the supplier or contractor a receipt showing the date and time when its tender was received;<sup>50</sup>

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

(3) A tender received by the procuring entity after the deadline for presenting tenders shall not be opened and shall be returned unopened to the supplier or contractor that presented it.

### Article 35. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security;<sup>51</sup>

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

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<sup>50</sup> The accompanying Guide text will discuss the nature of the receipt to be provided, and will state that the certification of receipt provided by the procuring entity would be conclusive (A/CN.9/668, para. 173).

<sup>51</sup> The accompanying Guide text will explain that in such case the effectiveness of the tender of the supplier or contractor will terminate upon the expiry of the original period of effectiveness specified in the solicitation documents (A/CN.9/687, para. 143).



(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for presenting tenders.

### **SECTION III. EVALUATION OF TENDERS**

#### **Article 36. Opening of tenders**

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for presenting tenders.<sup>52</sup> They shall be opened at the place and in accordance with the manner and procedures specified in the solicitation documents.<sup>53</sup>

(2) All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders.<sup>54</sup>

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have presented tenders but that are not present or represented at the opening of tenders, and included immediately in the record of the tendering proceedings required by article [23].<sup>55</sup>

#### **Article 37. Examination and evaluation of tenders**

(1) (a) The procuring entity may ask a supplier or contractor for clarifications of its tender in order to assist in the examination and evaluation of tenders;

(b) The procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give

<sup>52</sup> The words “or at the deadline specified in any extension of the deadline” were deleted in the light of the definition of the solicitation documents as incorporating any amendments thereto: any extension of the deadline originally set out in the solicitation documents will be considered the amendments to the originally issued solicitation documents.

<sup>53</sup> The accompanying Guide text will explain risks of departing from the requirements of the Model Law that tenders must be opened at the time specified in the solicitation documents as the deadline for presenting tenders, and practical considerations that should be taken into account in implementing that requirement (A/CN.9/687, para. 150).

<sup>54</sup> The accompanying Guide text will highlight that the place, manner and procedures for the opening of tenders established by the procuring entity should allow for the presence of suppliers or contractors (A/CN.9/668, para. 178). The Guide will also elaborate on “deemed” present or “virtual” presence of suppliers or contractors at the opening of tenders.

<sup>55</sup> The accompanying Guide text will explain that any late tenders would be returned unopened, and their (late) submission would be noted in the record.

prompt notice of any such correction to the supplier or contractor that presented the tender;<sup>56</sup>

(c) No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.<sup>57</sup>

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article [10] of this Law;

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.

(3) The procuring entity shall reject a tender:

(a) If the supplier or contractor that presented the tender is not qualified;

(b) If the supplier or contractor that presented the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) If the tender is not responsive;

(d) In the circumstances referred to in article [18 or 19] of this Law.

(4) (a) The procuring entity shall evaluate the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set out in the solicitation documents. No criterion shall be used that has not been set out in the solicitation documents;

(b) The successful tender shall be:

(i) Where price is the only award criterion, the tender with the lowest tender price;<sup>58</sup> or

(ii) Where there are price and other award criteria, the most advantageous tender<sup>59</sup> ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with article [11] of this Law.

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<sup>56</sup> The accompanying Guide text will explain the rules and principles applicable to the correction by the procuring entity of arithmetical errors.

<sup>57</sup> The paragraph was redrafted to make the requirement of subparagraph (c) applicable to both subparagraphs (a) and (b). In the 1994 text, this requirement was found only in subparagraph (a), raising questions on the extent of the permissible corrections of arithmetical errors under subparagraph (b). The Secretariat's understanding is that under both subparagraphs (a) and (b), no change can be made in a matter of substance of the tender.

<sup>58</sup> A/CN.9/687, para. 153.

<sup>59</sup> A/CN.9/687, paras. 153 and 155. The Guide will elaborate on evolution of procurement practices since 1994 that justified the replacement of the term the "lowest evaluated tender" used in this context in the 1994 Model Law.

(5) When tender prices are expressed in two or more currencies, for the purpose of evaluating and comparing tenders the tender prices of all tenders shall be converted to the currency specified in the solicitation documents according to the rate specified in those documents, pursuant to article [33 (s)] of this Law.<sup>60</sup>

(6) Whether or not it has engaged in pre-qualification proceedings pursuant to article [16] of this Law, the procuring entity may require the supplier or contractor presenting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate its qualifications again, in accordance with the criteria and procedures conforming to the provisions of article [9] of this Law. The criteria and procedures to be used for such further demonstration shall be set out in the solicitation documents. Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.

(7) If the supplier or contractor presenting the successful tender is requested to demonstrate its qualifications again in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders still in effect, subject to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)] of this Law.

(8) Information relating to the examination, clarification and evaluation of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination or evaluation of tenders or in the decision on which tender should be accepted, except as provided in articles [20, 22, 23 and 36 (3)] of this Law.<sup>61</sup>

### **Article 38. Prohibition of negotiations with suppliers or contractors**

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender presented by the supplier or contractor.

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<sup>60</sup> A/CN.9/687, para. 157.

<sup>61</sup> The Working Group may wish to consider the need for this provision in the light of article 22.