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Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement*

Note by the Secretariat

Addendum

This addendum sets out a proposal for the Guide text to accompany the related provisions of chapters II and V of the UNCITRAL Model Law on Public Procurement on request for proposals with dialogue.

* This document was submitted less than ten weeks before the opening of the session because of the need to complete inter-session informal consultations on the relevant provisions of the draft revised Guide to Enactment.

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

Part II. Article-by-article commentary

[For ease of reference, this addendum consolidates the proposed article-by-article commentary to various provisions of the Model Law regulating request for proposals with dialogue.]

…

Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals with dialogue

1. Conditions for use

The relevant provision of the revised Model Law on conditions for use:

"Article 29. Conditions for use of methods of procurement under chapter V of this Law (… request for proposals with dialogue …)

(2) (Subject to approval by the [name of the organ designated by the enacting State to issue the approval]), a procuring entity may engage in procurement by means of request for proposals with dialogue in accordance with article 48 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,[1] and the procuring entity assesses that dialogue with suppliers or contractors is needed to obtain the most satisfactory solution to its procurement needs;

(b) 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;

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[1] The Working Group may wish to correct an inaccuracy in this condition for use identified during expert consultations on the draft guidance to this procurement method. Article 10 (1) does not require any particular level of detail in the description of the subject matter of the procurement that is to be included in the solicitation documents, and article 10 (4) sets out the requirements for "any description" without qualification. Thus it would always be possible to fulfil the requirements of article 10. An alternative formulation could be to refer to a "complete description" in paragraph 2 (a) of article 29, and to amend article 10 (1) and (4) to require a complete description that complies with the minimum requirements set out in article 10 (4) to be set out in the solicitation documents.

(c) 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; or

(d) Open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity pursuant to article 18 (1) of this Law and where, 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."

Proposed text for the Guide:

1. Paragraph (2) provides conditions for use of the procurement method called request for proposals with dialogue, a procedure that is designed for the procurement of relatively complex goods, construction and services. As with all procurement methods under the Model Law, the use of this method is not intended exclusively for any type of procurement (be it procurement of goods, construction or services). Also in common with all procurement methods under the Model Law, the procuring entity will be able to choose this procurement method when the conditions for use are satisfied, and when it assesses that the method is best suited to the given circumstances. Article 27 (setting out general principles for the choice of procurement methods, guidance to which is found at …), paragraph (2) of this article setting out conditions for use of this procurement method, and the distinct procedural features of this procurement method (as set out in article 48) will guide the procuring entity in taking its decision in this regard.

2. The procedure itself involves two stages. At the first stage, the procuring entity issues a solicitation setting out a description of its needs expressed as terms of reference to guide suppliers in drafting their proposals. The needs can be expressed in functional, performance or output terms but are required to include minimum technical requirements. The second stage of the procedure is designed to enable suppliers and contractors to understand, through dialogue with the procuring entity, the needs of the procuring entity as outlined in its request for proposals. Upon conclusion of the dialogue, the suppliers and contractors make best and final offers ("BAFOs") to meet those needs. BAFOs may be similar in some respects while significantly different in others, in particular as regards proposed technical solutions. The method therefore gives the procuring entity the opportunity of comparing different technical solutions to and alternatives and options for its needs. By comparison with two-stage tendering (which is a procedurally similar but substantively different method), it is not intended that the procedure will involve the procuring entity in setting out a full technical description of the subject matter of the procurement.

3. Methods based on this type of dialogue have proved to be beneficial to the procuring entity in procurement of complex works and services where the opportunity cost of not engaging in negotiations with the supply side is high, while the economic gains of engaging in the process are evident. They are appropriate for example in the procurement of architectural or construction works, where there are many possible solutions to the procuring entity's needs and in which the personal skill and expertise of the supplier or contractor can be evaluated only through negotiations. The complexity need not be at the technical level: in infrastructure projects, for example there may be different locations and types of construction as

the main variables. The method has enabled the procuring entity in such situations to identify and obtain the best solution to its procurement needs.

4. Since the dialogue normally involves complex and time-consuming procedures, the method should be utilized only when its benefits are appropriate, and not for simple items that are usually procured through procurement methods not involving interaction with suppliers. The procurement method is, for example, not intended to apply to cases where negotiations are required because of urgency or because there is an insufficient competitive base (in such cases, the use of competitive negotiations or single-source procurement is authorized under the revised Model Law). It does not address the type of negotiations that seek only technical improvements and/or price reductions, as are envisaged in request for proposals with consecutive negotiations. Nor it is intended to apply in situations in which two-stage tendering proceedings should be used in accordance with paragraph (1) of this article — i.e. when the procuring entity needs to refine its procurement needs and envisages formulating a single set of terms and conditions (including specifications) for the procurement, against which tenders can be presented.

5. Paragraph (2) (a) of the article sets out the condition for what is expected to be the main use of request for proposals with dialogue: that the procuring entity cannot formulate a complete description of the subject matter of the procurement at the outset of the procedure, and it will need to engage in several phases of dialogue with suppliers or contractors capable of delivering the subject matter of the procurement in order to come to acceptable solutions to satisfy its needs. In practice, the procuring entity must be able to describe its broad needs at the outset of the procurement at the level of functional (or performance or output) requirements. This requirement reflects the fact that inadequate planning is likely to mean that the procurement will be unsuccessful; it is also needed so as to provide the minimum technical requirements that article 48 calls for and to allow the effective participation of suppliers or contractors.

6. Similarly to the situation envisaged in sub-paragraph 2 (a), the situation described in subparagraph (b) refers to procurement in which a tailor-made solution is needed (for example, an information technology system for the archiving of legal records, which may need particular features such as long-term accessibility), and where technical excellence is an issue. The third condition, in subparagraph (c), refers to procurement for the protection of essential security interests of the State. This condition would usually cover the security and defence sectors where the need may involve the procurement of highly complex subject matter and/or conditions for supply, at the same time requiring measures for the protection of classified information.

7. The last condition for use of this method, in subparagraph (d), is the same as one of the conditions for use of two-stage tendering — open tendering was engaged in but it failed. In such situations the procuring entity must analyse the reasons for the failure of open tendering. Where it concludes that using open tendering again or using any of the procurement methods under chapter IV of this Law would not be successful, it may also conclude that it faces difficulties in formulating sufficiently precise terms and conditions of the procurement at the outset of the procurement. The reasons for the earlier failure should guide the procuring entity in selecting between two-stage tendering under paragraph (1) (b) of this article and request for

proposals with dialogue under paragraph (2) (d) of this article. In order to use request for proposals with dialogue proceedings, the procuring entity would have to conclude that formulating a complete single set of terms and conditions of the procurement would not be possible or would not be appropriate, and therefore dialogue with suppliers or contractors is necessary for the procurement to succeed.

8. Enacting States should be aware of the practice accumulated with the use of procurement methods involving dialogue of the type envisaged in the request for proposals with dialogue of the Model Law, in particular their benefits, difficulties and risks. It is evident that the method presupposes significant discretion in decision-making on the part of the procuring entity, which must therefore possess sufficient knowledge and skills in the use of negotiating tools to match those of their counterparts in dialogue, or otherwise it will be placed in a disadvantaged bargaining position during the dialogue. Although the supply side of the market, not the procuring entity, makes proposals to meet the procuring entity's needs, suppliers should not take a lead in defining those needs.

9. The Model Law regulates this procurement method in considerable detail to mitigate the risks and difficulties that it can involve where used inappropriately or without the degree of care and capacity required to use it effectively. The conditions in paragraph (2) may mitigate concerns over the inappropriate use of this procurement method, by effectively preventing its use to procure items that should be procured through tendering or other, less flexible, methods of procurement.

10. Apart from imposing exhaustive conditions for use of this procurement method, the revised Model Law refers to the possibility of requiring external approval for the use of this procurement method. If an enacting State decides to provide for ex ante approval by a designated authority for such use, it must enact the opening phrase put in parenthesis in the chapeau provisions of paragraph (2). [It is an exceptional measure since the decision of UNCITRAL has been not to require, as a general rule, in the revised Model Law a high-level approval for resort to any procurement method (for the guidance on this point, see paragraphs … above).] The exception was made in this case to signal to enacting States that higher measures of control over resort to this procurement method may be justifiable in the light of the particular features of this procurement method that make it at risk of abusive behaviour, which may be difficult to mitigate in some enacting States.

11. If the provisions are enacted, it will be for the enacting State to designate an approving authority and its prerogatives in the procurement proceedings, in particular whether these prerogatives will end with granting to the procuring entity the approval to use this procurement method or also extend to some form of supervision on the way proceedings are handled. As a matter of good practice, the approving authority in exercise of its functions should be independent from the procuring entity and should have authority to bar the use of the method if the appropriate institutional framework, capacity and integrity within the procuring entity are not available or where the method is intended for use where it is not justified (for example, to avoid appropriate preparation for the procurement and shift responsibility of defining procurement needs to the supply side).

12. Article 48 contains detailed rules regulating the procedures for this procurement method, which are designed to include safeguards against possible abuses or improper use of this method and robust controls. Nonetheless, they also

preserve the necessary flexibility and discretion on the part of the procuring entity in the use of the method, without which the benefits of the procedure disappear. The provisions have been aligned with the UNCITRAL instruments on privately financed infrastructure projects (see paragraphs … below).[2]

13. The safeguards in particular aim at: (a) transparency by requiring proper notification of all concerned about the essential decisions taken in the beginning, during and at the end of the procurement proceedings, at the same time preserving confidentiality of commercially sensitive information as required under article 23; (b) objectivity, certainty and predictability in the process, in particular by requiring that all methods of limiting or reducing a number of participants in the procurement proceedings are made known from the outset of the procurement, and also by regulating the extent of permissible modifications to the terms and conditions of the procurement and by prohibiting post-BAFOs negotiations; (c) promoting effective competition through the same mechanism; (d) enhancing participation and ensuring the equitable treatment of suppliers and contractors by requiring that the dialogue be held on a concurrent basis and be conducted by the same representatives of the procuring entity, by regulating communication of information from the procuring entity to the participating suppliers or contractors during the dialogue stage and by setting rules for the stages following the completion of the dialogue; and (d) accountability by requiring comprehensive record-keeping in supplementing provisions of article 24.

14. Some other measures aim at enhancing participation of suppliers in procurement by this method. For example, inherent in the method is the fact that participating suppliers or contractors will invest significant time and resources in their participation. Participation will be discouraged if there is no reasonable chance of winning the contract to be awarded at the end of the procurement process. The procedures for the method therefore set out a process that enables the procuring entity to limit the number of participants to an appropriate number.

15. Similarly, suppliers or contractors will not be willing to participate if their proposals, which have a commercial value, are subsequently turned into a description available to all potential participants. The procedures for the method, as explained above, provide safeguards since they do not envisage the issue of a complete set of terms and conditions of the procurement against which proposals can be presented at any stage of this procurement method (by contrast with the position in two-stage tendering). A single set of minimum requirements and an ordered list of evaluation criteria are made available at the outset of the procurement, which cannot be varied during the proceedings. During the dialogue process, the procuring entity evaluates proposals of various suppliers or contractors against those requirements and criteria. Suppliers or contractors may have several chances to refine their original and subsequent proposals in order to adjust them to the needs of the procuring entity as clarified during the dialogue. The final stage in this procurement method — the selection of the successful proposal after completion of the dialogue phase — involves the evaluation of BAFOs that contain

[2] The UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and the UNCITRAL Legislative Guide on the same subject, available as of the date of this report at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

the final proposal from each supplier or contractor and the terms and conditions of their respective offers.

16. The dialogue is to be conducted "concurrently". This term is used in the text to stress that all suppliers and contractors are entitled to an equal opportunity to participate in the dialogue, and there are no consecutive discussions. The term also seeks to avoid the impression that the dialogue is to be conducted at precisely the same time with all suppliers or contractors, which would presuppose that different procurement officials or negotiating committees composed of different procurement officials are engaged in dialogue. Such a stance has been considered undesirable as it may lead to the unequal treatment of suppliers and contractors. For guidance on the conduct of the dialogue, see paragraphs […] below.

17. Enacting States should recognize that regulatory and procedural safeguards alone will not be sufficient. They must be supported by an appropriate institutional framework, measures of good governance, high standards of administration and high-skilled procurement personnel. The experience of the multilateral development banks has indicated that putting in place the institutional frameworks and safeguards that are a prerequisite for the use of this method have proved to be among the most difficult reforms to implement.

18. As an example of a supporting measure that can mitigate the higher risks of corruption and abuse than in other less flexible procedures inherent in the dialogue format in this procedure, is the use of independent "probity officers" who can observe the conduct of dialogue. Such observation can prevent the disclosure of commercially sensitive information, such as price, to competitors, and the provision of important information to favoured suppliers only. The enacting State may wish to encourage procuring entities to take such practical steps as part of the managerial tools necessary for the effective use of this procurement method.

19. Because of the inherent features and the associated risks of this procurement method, some multilateral development banks may have a general difficulty with authorizing the use of this procurement method in projects financed by them, in particular for quantifiable (or non-intellectual) types of services and intellectual services that might be more appropriately procured through consecutive rather than concurrent negotiations. Ex ante approval by a designated authority [and establishing a threshold] for resort to this procurement method may accommodate concerns of multilateral development banks that resort to this procurement method may occur in improper circumstances and in the absence of the adequate enabling framework and capacities on the side of the procuring entity.[3]

2. Solicitation

[Please see in the guidance on RfP without negotiation.]

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[3] The Working Group decided that detailed commentary in the Guide addressing the issues in selecting among the methods of chapter V would be necessary, from the perspective both of legislators and of procuring entities, and that the guidance should address the elements of that selection that could not be addressed in a legislative text and should draw on real-life examples. If the Working Group considers that the above discussion is insufficient, it is requested to provide further guidance to assist the Secretariat in expanding it. Further discussion may also be appropriate in the guidance to articles 26 and 27.

3. Procedures

The relevant provision of the revised Model Law on procedures:

[Article 48. Request for proposals with dialogue

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Proposed text for the Guide:

20. The article regulates request for proposals with dialogue procedures. The steps involved in this procedure are: (a) an optional request for expressions of interest, which does not confer any rights on suppliers or contractors, including any right to have their proposals evaluated by the procuring entity. In this sense, it resembles an advance notice of possible future procurement referred to in article 6 (2) (for the guidance to article 6, see paragraphs … above); (b) pre-qualification or pre-selection when it is expected that more than the optimum number of qualified candidates would express interest in participating; if neither pre-qualification or pre-selection is involved, open or direct solicitation as regulated by article 34; (c) issue of the request for proposals to those responding to the open or direct solicitation or to those pre-qualified or pre-selected, as the case may be; (d) concurrent dialogue, which as a general rule is held in several rounds or phases; (e) completion of the dialogue stage with a request for BAFOs; and (f) award. The article regulates these procedural steps in the listed chronology, except for an optional request for expressions of interest, which, as stated, is covered by provisions of article 6.

21. Paragraph (1), by cross-referring to article 34, reiterates the default rule contained in article 34 (1) of the Model Law that an invitation to participate in the request for proposals with dialogue proceedings must as a general rule be publicized as widely as possible to ensure wide participation and competition (unless the solicitation has been preceded by pre-qualification or pre-selection, both of which procedures also include a substantive requirement for wide publicity). The solicitation options are at the choice of the procuring entity in the light of the circumstances of the given procurement and subject to the requirements of article 34. (For the guidance to article 34, see paragraphs … above.) Relevant exceptions to the open solicitation rule are provided for in article 34, such as there being a limited supply base or the procurement involving classified information.

22. When open solicitation without pre-qualification or pre-selection is involved, an invitation to participate in the request for proposals with dialogue is issued, which must contain the minimum information listed in paragraph (2). This minimum information is designed to assist suppliers or contractors to determine whether they are interested and eligible to participate in the procurement proceedings and, if so, how they can participate. The information specified is similar to that required for an invitation to tender (article 36). The procuring entity may omit information about the currency of payment and about languages, referred to in subparagraphs (j) and (k), in domestic procurement, if it would be unnecessary in the circumstances; however, an indication of the language or languages may still be important in some multilingual countries in the context of domestic procurement.

23. Paragraph (2) lists the required minimum information and does not preclude the procuring entity from including additional information that it considers appropriate. The procuring entity should take into account however that it is the usual practice to keep the invitation brief and include the most essential information about procurement; that information is also most relevant to the initial stage of the procurement proceedings. All other information about the procurement, including further detail of the information contained in the invitation, is included in the request for proposals (see paragraph (5) of this article). This approach helps to avoid repetitions, possible inconsistencies and confusion in the content of the documents issued by the procuring entity to suppliers or contractors. It is in particular advisable in this procurement method since some information may become available or be refined later in the procurement proceedings (to the extent permitted by paragraph (9) of the article).

24. Paragraph (3) regulates pre-selection proceedings, as an option for the procuring entity to limit a number of suppliers or contractors from which to request proposals. The provisions have been aligned generally with the provisions on pre-selection found in the UNCITRAL instruments on privately financed infrastructure projects. Pre-selection proceedings allow the procuring entity to specify from the outset of the procurement that only a certain number of best qualified suppliers or contractors will be admitted to the next stage of the procurement proceedings. This tool is available as an option where it is expected that many qualified candidates will express interest in participating in the procurement proceedings. The Model Law provides for this possibility only in this procurement method: it is considered justifiable in the light of the significant time and cost that would be involved in examining and evaluating a large number of proposals. It is therefore an exception to the general rule of open participation as described in […] above.

25. The number of suppliers or contractors to be admitted to the next stage of the procurement proceedings may also, in fact, be limited as a result of pre-qualification. The latter, however, cannot be used under the Model Law with certainty that it will limit the participation to a pre-determined maximum number of participants because it merely excludes unqualified suppliers whose qualifications can only be estimated in advance. If all suppliers or contractors applying for pre-qualification will turn out to be qualified, they must be admitted to the next stage of the procurement proceedings.

26. Pre-selection is held in accordance with the rules applicable to pre-qualification proceedings. The provisions of article 17 therefore apply to pre-selection, to the extent that they are not derogated from in paragraph (3) (to reflect the nature and purpose of pre-selection proceedings). For example, to ensure transparency and the equitable treatment of suppliers and contractors, paragraph (3) requires the procuring entity from the outset of the procurement to specify that the pre-selection proceedings will be used, the maximum number of pre-selected suppliers or contractors from which proposals will be requested, the manner in which the selection of that number of suppliers or contractors will be carried out and criteria that will be used for ranking suppliers or contractors, which should constitute qualification criteria and should be objective and non-discriminatory.

27. The maximum number of suppliers to be pre-selected must be established by the procuring entity in the light of the circumstances of the given procurement to ensure effective competition. When possible, the minimum should be at least three. If the procuring entity decides to regulate the number of suppliers or contractors to be admitted to the dialogue (see paragraph (5) (g) of the article), the maximum number of suppliers or contractors from which proposals will be requested should be established taking into account the minimum and maximum numbers of suppliers or contractors intended to be admitted to the dialogue phase as will be specified in the request for proposals under paragraph (5) (g) of this article. It is recommended that the maximum number of suppliers or contractors from which proposals will be requested should be higher than the maximum to be admitted to the dialogue phase, in order to allow the procuring entity to select from a bigger pool the most suitable candidates for the dialogue phase. To enable effective challenge, the provisions require promptly notifying suppliers or contractors of the results of the pre-selection and providing to those that have not been pre-selected reasons therefor.

28. Paragraph (4) specifies the group of suppliers or contractors to which the request for proposals is to be issued. Depending on the circumstances of the given procurement, this group could constitute the entire group of suppliers or contractors that respond to the invitation; or, if pre-qualification or pre-selection was involved, to only those that were pre-qualified or pre-selected; in the case of direct solicitation, the group would comprise of only those that are directly invited. The provisions also contain a standard clause in the Model Law that the price that may be charged for the request for proposals may reflect only the cost of providing the request for proposals to the suppliers or contractors concerned.

29. Paragraph (5) contains a list of the minimum information that should be included in the request for proposals in order to assist the suppliers or contractors in preparing their proposals [and to enable the procuring entity to compare the proposals on an equal basis].[4] The list is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 38) and contents of request for proposals in the request for proposals without negotiation proceedings (article 46 (4)). The differences reflect the procedural specifics of this procurement method.

30. The procuring entity may omit information about the currency of payment referred to in subparagraph (c), in domestic procurement, if it would be unnecessary in the circumstances. This information as well as related information about the proposal price may also be irrelevant in procurement of non-quantifiable advisory services where the cost is not a significant evaluation criterion and therefore initial proposals often need not contain financial aspects or price. Instead, in the context of evaluation criteria referred to in subparagraph (h), the emphasis in this type of procurement will be placed on the service-provider's experience for the specific assignment, the quality of the understanding of the assignment under consideration and of the methodology proposed, the qualifications of the key staff proposed, transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the description of the assignment, and when applicable, the extent of participation by nationals among key staff in the performance of the services.

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[4] The Working Group may wish to consider the accuracy of the statement put in square brackets in the context of this procurement method.

31. The inclusion of such criteria as evaluation criteria does not preclude specifying a particular level required as qualification criteria under article 9 and paragraph (2) (e) of this article. Whereas by virtue of article 9 the procuring entity has the authority not to evaluate or pursue the proposals of unqualified suppliers or contractors, by specifying the same criteria as the evaluation criteria, the procuring entity will be able to weigh, for example, the required experience of one service provider against experience of others. On the basis of such comparison, it might feel more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the proposal.[5]

32. While the primary focus of dialogue typically may be on technical aspects or legal or other supporting issues, the subject matter of the procurement and market conditions may allow and even encourage the procuring entity to use price as an aspect of dialogue. In addition, in some cases, it is not possible to separate price and non-price criteria. Thus a preliminary price may be required to be provided in the initial proposals. The price is always included in the BAFOs.

33. Paragraph (5) (g) is applicable in situations when the procuring entity, in the light of the circumstances of the given procurement, decides that a minimum and/or maximum number of suppliers or contractors with whom to engage in dialogue should be established. Those limits should aim at reaching the optimum number of participants, taking into account that in practice holding concurrent negotiations with many suppliers has proved to be very cumbersome and unworkable, and may discourage participation. The provisions refer to a desirable minimum of three participants. They are supplemented by provisions of paragraphs (6) (b) and (7).

34. Paragraph (5) (h) refers to the criteria and procedures for evaluating the proposals in accordance with article 11 that in particular sets out exceptions to default requirements as regards assigning the relative weights to all evaluation criteria, to accommodate the specific features of this procurement method. These features may make it impossible for the procuring entity to determine from the outset of the procurement the relative weights of all evaluation criteria. It is therefore permitted under article 11 to list the relevant criteria in the descending order of importance. Where sub-criteria are also known in advance, they should be specified as well and assigned relative weight if possible; if not, they should also be listed in the descending order of importance. It is recognized that different procurements might require different levels of flexibility as regards specification of evaluation criteria and procedures in this procurement method. However, providing a true picture of the evaluation criteria and procedure from the outset of the procurement proceedings is important as a general transparency measure.[6]

35. In the context of paragraph (5) (m) requiring the procuring entity to specify in the request for proposals any other requirements relating to the proceedings, it may be beneficial to include the timetable envisaged for the procedure. The proceedings by means of this procurement method are usually time- and resource-consuming on both sides — the procuring entity and suppliers or contractors. An estimated

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[5] The Working Group may wish to consider whether this point is relevant in other procurement methods, and whether it should be discussed in the context of qualification generally.

[6] The Working Group may wish to consider whether this point is relevant in other procurement methods, and whether it should be discussed in the context of evaluation generally.

timetable of the proceedings in the request for proposals encourages better procurement planning and makes the process more predictable, in particular as regards the maximum period of time during which suppliers or contractors should be expected to commit their time and resources. It also gives both sides a better idea as regards the timing of various stages and which resources (personnel, experts, documents, designs, etc) would be relevant, and should be made available, at which stage.

36. After the provision of the request for proposals to the relevant suppliers or contractors, sufficient time should be allowed for suppliers or contractors to prepare and submit their proposals. The relevant timeframe is to be specified in the request for proposals and may be adjusted if need be, in accordance with the requirements of article 14.

37. Paragraph (6) regulates the examination (assessment of responsiveness) of proposals. All proposals are to be assessed against the established minimum examination criteria notified to suppliers or contractors in the invitation to the procurement and/or request for proposals. The number of suppliers or contractors to be admitted to the next stage of the procurement proceedings — dialogue — may fall as a result of the rejection of non-responsive proposals, i.e. those that do not meet the established minimum criteria. As in the case with pre-qualification proceedings (see paragraph [25] above), examination procedures cannot be used for the purpose of limiting the number of suppliers or contractor to be admitted to the next stage of the procurement proceedings. If all suppliers or contractors presenting proposals turn out to be responsive, they all must be admitted to the dialogue unless the procuring entity reserved the right to invite only a limited number. As stated in the context of paragraph (5) (g) (see paragraph [33] above), such a right can be reserved in the request for proposals. In this case, if the number of responsive proposals exceeds the established maximum, the procuring entity will select the maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals. The Model Law itself does not regulate this procedure and criteria, which may vary from procurement to procurement. A certain level of subjectivity in the selection cannot be excluded in this procurement method. The risk of abusive practices should be mitigated by the requirement to specify the applicable selection procedure and criteria in the request for proposals, and to provide prompt notification of the results of the examination procedure, including reasons for rejection when applicable. These requirements should allow the aggrieved suppliers effectively to challenge the procuring entity's decisions. Managerial techniques to oversee the procedure can also support these regulatory tools.

38. In accordance with paragraph (7), the number of suppliers of contractors invited to the dialogue in any event must be sufficient to ensure effective competition. The desirable minimum of three suppliers or contractors mentioned in paragraph (5) (g) is reiterated in this paragraph. The procuring entity will not however be precluded from continuing with the procurement proceedings if only one or two responsive proposals are presented. The reason for allowing the procuring entity to continue with the procurement in such case is that, even if there is a sufficient number of responsive proposals, the procuring entity has no means of ensuring that the competitive base remains until the end of the dialogue phase: suppliers or contractors are not prevented from withdrawing at any time from the

dialogue. [This issue can be addressed to some extent in the requirement to provide a tender security in accordance with article 16 (for the guidance to article 16, see paragraphs … above).][7]

39. Paragraph (8) sets out two requirements for the format of dialogue: that it should be held on a concurrent basis and that the same representatives of the procuring entity should be involved to ensure consistent results. The reference to "representatives" of the procuring entity is in plural in these provisions since the use of committees comprising of several people is considered to be good practice, especially in the fight against corruption. This requirement does not prevent the procuring entity from holding dialogue with only one supplier or contractor, as explained above. Dialogue may involve several rounds or phases. By the end of each round or phase, the needs of the procuring entity are refined and participating suppliers or contractors are given a chance to modify their proposals in the light of those refined needs and the questions and comments put forward by the negotiating committee during dialogue.

40. The reference in subsequent paragraphs of this article to "suppliers or contractors remaining in the procurement proceedings" indicates that the group of suppliers or contractors entering the dialogue at the first phase may decline throughout the dialogue process. Some suppliers or contractors may decide not to participate further in dialogue, or they may be excluded from further negotiations by the procuring entity on the grounds permitted under the Model Law or other provisions of applicable law of the enacting State. Unlike some systems with similar procurement methods, the Model Law does not give an unconditional right to the procuring entity to terminate competitive dialogue with a supplier or contractor, for example, only because in the view of the procuring entity that supplier or contractor would not have a realistic chance of being awarded the contract. The dialogue phase involves constant modification of solutions and it would be unfair to eliminate any supplier only because at some stage of dialogue a solution appeared not acceptable to the procuring entity. Although terminating the dialogue with such a supplier might allow both sides to avoid wasting time and resources (which could turn out to be significant in this type of procurement), and might consequently reduce the risk of reduced competition in future procurements, UNCITRAL has proceeded on the basis that the risks to objectivity, transparency and equal treatment significantly outweigh the benefits.

41. On the other hand, the procuring entity should not be prohibited from terminating dialogue with suppliers or contractors on the grounds specified in the Model Law or through other provisions of applicable law of the enacting State. Some provisions in the Model Law would require the procuring entity to exclude suppliers or contractors from the procurement proceedings. For example, they must be excluded on the basis of article 20 (inducement, unfair competitive advantage or conflicts of interest), or if they are no longer qualified (for example in the case of bankruptcy), or if they materially deviate during the dialogue phase from the minimum responsive requirements or other key elements that were identified as non-negotiable at the outset of the procurement. In such cases, the possibility of a

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[7] The Working Group is invited to consider the accuracy of the statement put in square brackets, in particular the likelihood of obtaining a tender security against largely undefined terms and conditions of the procurement.

meaningful challenge under chapter VIII by aggrieved suppliers or contractors is ensured since the procuring entity will be obligated to notify promptly suppliers or contractors of the procuring entity's decision to terminate the dialogue and to provide grounds for that decision. It may be useful to provide suppliers or contractors at the outset of the procurement proceedings with information about the grounds on which the procuring entity will be required under law to exclude them from the procurement.

42. Paragraph (9) imposes limits on the extent of modification of the terms and conditions of the procurement as set out at the outset of the procurement proceedings. Unlike article 15 that regulates modification of the solicitation documents before the submissions/proposals are presented, paragraph (9) deals with restriction on modification of any aspect of the request for proposals after the initial proposals have been presented. The possibility of making such modifications is inherent in this procurement method; not allowing sufficient flexibility to the procuring entity in this respect will defeat the purpose of the procedure. The need for modifications may be justified in the light of dialogue but also in the light of circumstances not related to dialogue (such as administrative measures).

43. At the same time, the negative consequences of unfettered discretion may significantly outweigh the benefits in terms of flexibility. The provisions of paragraph (9) seek to achieve the required balance by preventing the procuring entity from making changes to those terms and conditions of the procurement that are considered to be so essential for the advertised procurement that their modification would have to lead to the new procurement. They are the subject matter of the procurement, qualification and evaluation criteria, the minimum requirements established pursuant to paragraph (2) (f) of this article and any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that the procuring entity explicitly excludes from the dialogue at the outset of the procurement (i.e. non-negotiable requirements). The provisions would not prevent suppliers or contractors from making changes in their proposals as a result of the dialogue; however, deviation from the essential requirements of the procurement (such as the subject matter of the procurement, the minimum or non-negotiable requirements) may become a ground for the exclusion from the procurement of the supplier or contractor proposing such unacceptable deviations.

44. Paragraph (10) provides an essential measure to achieve equal treatment of suppliers and contractors in the communication of information from the procuring entity to suppliers or contractors during the dialogue phase. It subjects any such communication to the provisions of article 23 on confidentiality, some of which are specifically designed for chapter V procurement methods. Concerns over confidentiality are particularly relevant in this procurement method in the light of the format and comprehensive scope of the dialogue. The general rule is that no information pertinent to any particular supplier or its proposal should be disclosed to any other participating supplier without consent of the former. Further exceptions are listed in article 23 (3) (disclosure is required by law, or ordered by competent authorities, or permitted in the solicitation documents). (For the guidance to article 23, see paragraphs … above.)

45. Achieving equal treatment of all participants during the dialogue requires implementing a number of practical measures. The Model Law refers only to the

most essential ones, such as those in paragraph (10), and the requirement that negotiations be held on a concurrent basis by the same representatives of the procuring entity (paragraph (8) as explained in paragraph [39] above). Other measures, such as ensuring that the same topic is considered with the participants concurrently for the same amount of time, should be thought through by committees when preparing for the dialogue phase. Enacting States may wish to provide for other practical measures in the procurement regulations.

46. Upon completion of the dialogue stage, all the remaining participants must be given an equal chance to present BAFOs, which are defined as best and final with respect to each supplier's proposal. This definition highlights one of the main distinct features of this procurement method — the absence of any complete single set of terms and conditions of the procurement beyond the minimum technical requirements against which final submissions are evaluated. Paragraphs (11) and (12) regulate the BAFOs stage. The safeguards contained in these paragraphs intend to maximize competition and transparency. The request for BAFOs must specify the manner, place and deadline for presenting them. No negotiation with suppliers or contractors is possible after BAFOs have been presented and no subsequent call for further BAFOs can be made. Thus the BAFO stage puts an end to the dialogue stage and freezes all the specifications and contract terms offered by suppliers and contractors so as to restrict an undesirable situation in which the procuring entity uses the offer made by one supplier or contractor to pressure another supplier or contractor, in particular as regards the price offered. Otherwise, in anticipation of such pressure, suppliers or contractors may be led to raise the prices offered, and there is a risk to the integrity of the marketplace.

47. Paragraph (13) deals with the award of the procurement contract under this procurement method. It is to be awarded to the successful offer, which is determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals. The reference to the criteria and procedure for evaluating the proposals as set out in the request for proposals in this provision reiterates the prohibition of modification of those criteria and procedures during the dialogue stage, found in paragraph (9) of the article as explained in paragraphs [42 and 43] above.

48. The procuring entity will be required to maintain a comprehensive written record of the procurement proceedings, including a record of the dialogue with each supplier or contractor, and to give access to the relevant parts of the record to the suppliers or contractors concerned, in accordance with article 24. This is an essential measure in this procurement method to ensure effective oversight, including audit, and possible challenges by aggrieved suppliers or contractors.

4. Points regarding request for proposals with dialogue proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law

Conditions for use

49. Paragraph (2) of article 29 provides conditions for use of a new procurement method, request for proposals with dialogue, that combines the features of articles 43 (selection procedures with simultaneous negotiations for procurement of services) and 48 (request for proposals) of the 1994 Model Law. These

two procurement methods in the 1994 text have many similarities and can be used for procurement of services. Request for proposals with dialogue retains the main feature of those 1994 procurement methods — the use of interaction with suppliers, which is held concurrently with a group of suppliers or contractors (as opposed to consecutive negotiations as envisaged under paragraph (3) of this article and article 49 of the Model Law; for the guidance on those provisions, see paragraphs … below). In order to avoid confusion over terminology and the choice of procurement methods in those States that enacted their procurement legislation on the basis of the 1994 Model Law, the revised Model Law uses a distinct term to identify this new procurement method.

[Detail with respect to solicitation and procedures will be added at a later stage.]