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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 competitive negotiations and single-source procurement.

* 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.



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 competitive negotiations and single-source procurement.]

...

A. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of competitive negotiations

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 (... competitive negotiations ...)

(4) A procuring entity may engage in competitive negotiations, in accordance with the provisions of article 50 of this Law, in the following circumstances:

(a) There is an urgent need for the subject matter of the procurement, and engaging in open tendering proceedings or any other competitive 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 competitive method of procurement because of the time involved in using those methods; or

(c) Where the procuring entity determines that the use of any other competitive method of procurement is not appropriate for the protection of essential security interests of the State.”

Proposed text for the Guide:

1. Paragraph (4) of this article sets out the conditions for use of competitive negotiations, a procurement method that may be used only in the exceptional circumstances set out in subparagraphs (a) to (c): urgency, catastrophic events and the protection of essential security interests of the enacting State. Such restrictions are necessary in the light of the very flexible procedures of the method itself. Those procedures do not provide the same levels of transparency, integrity and objectivity in the process as are present in other competitive procurement methods, and the method is therefore at greater risk of abuse and corruption.

2. Subparagraph (a) addresses situations of urgency not caused by the conduct of the procuring entity, and that do not arise out of foreseeable circumstances. Subparagraph (b) refers to urgency arising out of catastrophic events. Both subparagraphs refer to situations when the use of open tendering proceedings or any other competitive method of procurement is impractical because of the time involved in using those methods. The cases of urgency contemplated in both paragraphs are intended to be truly exceptional, and not merely cases of convenience: such as the need for urgent medical or other supplies after a natural disaster or the need to replace an item of equipment in regular use that has malfunctioned. The method is not available if the urgency is due to a lack of procurement planning or other action on the part of the procuring entity, and the extent of the procurement through this method must be directly derived from the urgency itself. In other words, if there is an urgent need for one item of equipment, and an anticipated need for several more of the same type, competitive negotiations can be used only for the item needed immediately.

3. Subparagraph (c) refers to the procurement for the protection of essential security interests of the State [cross refer to where the scope of this topic is discussed] where the procuring entity determines that the use of any other competitive method of procurement is not appropriate.

4. The provisions in subparagraphs (a) to (c) are without prejudice to the general principle contained in article 27 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method, and to have regard to the circumstances of the procurement. It is therefore to be understood that where an alternative to competitive negotiation, such as restricted tendering or request for quotations, is available, the procuring entity must select a method so as to ensure the greatest level of competition as is compatible with other circumstances of the procurement, such as the urgent need for the subject matter of the procurement.

5. In conformity with the same principle, subparagraph (b) dealing with cases of urgency owing to a catastrophic event, and subparagraph (c) dealing with procurement for the protection of essential security interests of the State, prevent the procuring entity from resorting to single-source procurement where competitive negotiations are available. In situations covered by these subparagraphs, the procuring entity is required first to consider the use of open tendering or any other competitive method of procurement. Where the procuring entity concludes that the use of other competitive methods is impractical, it must resort to competitive negotiations, not to single-source procurement, unless it concludes that there is extreme urgency or another distinct ground justifying the use of single-source procurement under paragraph (5) of this article (for example, the absence of a competitive base, exclusive rights involved, etc.). This is because competitive negotiations are inherently more competitive than single-source procurement and more rigorous safeguards are built in the provisions of the Model Law regulating procedures in competitive negotiations, making the latter more structured and transparent than single-source procurement. This method is therefore the preferred alternative to single-source procurement in situations of urgency and for the protection of the essential security interests of the State.

6. It follows from the above considerations that competitive negotiations should not be considered as an alternative to any other methods in the Model Law, other

than single-source procurement in the limited situations described in the preceding paragraph. For procurement of subject matter such as advisory services or complex technical items that may require interaction with suppliers, two-stage tendering, request for proposals with dialogue or with consecutive negotiations is available.

7. The unstructured nature of the procedures in competitive dialogue, as described in article 50 and explained in paragraphs [...] below mean managing the use of the method will be the key to ensuring its success in appropriate circumstances. The issues discussed regarding managerial techniques in the context of request for proposals with dialogue proceedings (see paragraphs [...] of the guidance to that procurement method) will apply to competitive negotiations, particularly given the heightened integrity risks that this method involves.¹

For a discussion of the changes in conditions for use from the 1994 text, see section A.4 below.

2. Solicitation

The relevant provision of the revised Model Law on solicitation:

“Article 33. Solicitation in ...competitive negotiations ... Requirement for an advance notice of the procurement

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

...

(5) Prior to direct solicitation in accordance with the provisions of paragraphs (1), (3) and (4) of this article, the procuring entity shall cause a notice of the procurement to be published in ... (the enacting State specifies the official gazette or other official publication in which the notice 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 in 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.

¹ The Working Group may wish to consider whether additional guidance, such as on ensuring effective negotiation skills and capacity on the part of procuring entities, the use of centralized oversight systems and other institutional support for competitive negotiations might be appropriate.

(6) The requirements of paragraph (5) shall not apply in the case of urgency as referred to in articles 29 (4) (b) and 29 (5) (b).”

Proposed text for the Guide:

8. Paragraph (3) regulates solicitation in competitive negotiations, and is coupled with the requirement of paragraph (5) of this article for an advance notice of the procurement. That notice must specify, in particular, that competitive negotiations will be used and must also provide a summary of the principal terms and conditions of the procurement contract envisaged. This is an essential public oversight measure. On the basis of the information published, any aggrieved supplier or contractor may challenge the use of competitive negotiations where a more transparent and regulated procurement method is available. This safeguard is particularly important in the context of this procurement method and of single-source procurement, both of which are considered exceptional and justified for use only in the very limited cases provided for in article 29 of the Model Law.

9. The procuring entity will not be required to publish such a notice, but may still choose to do so, when competitive negotiations are used in situations of urgency due to catastrophic events (article 29 (4) (b)). This exemption is set out in paragraph (6) of this article. In the other cases of urgency referred to in article 29 (4) (a), providing an advance notice of the procurement is the default rule. This is also the default rule when resort to competitive negotiations is made in procurement for the protection of essential security interests of the State referred to in article 29 (4) (c). The default rule is subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement (for the guidance on the relevant provisions of the Model Law on confidentiality and procurement involving classified information, see paragraphs ... above).

10. Additional guidance on both the use of advance notices under paragraphs (5) and (6) of article 33 and on the objective identification of suppliers to participate in the process is found in the guidance on restricted tendering. The issues raised there are also relevant in the context of competitive negotiations.

For a discussion of the changes as regards solicitation from the 1994 text, see section A.4 below.

3. Procedures

The relevant provision of the revised Model Law on procedures:

“Article 50. Competitive negotiations

(1) Paragraphs (3), (5) and (6) of article 33 of this Law shall apply to the procedure preceding the negotiations.

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

engaging in negotiations with the procuring entity relative to the procurement, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article 23 of this Law.

(3) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present, by a specified date, a best and final offer with respect to all aspects of their proposals.

(4) No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.

(5) The successful offer shall be the offer that best meets the needs of the procuring entity.”

Proposed text for the Guide:

11. The article addresses the procedures for competitive negotiations. Safeguards have been included aimed at ensuring transparency and the equal treatment of participants in procurement by means of this procurement method.

12. The article is relatively short in the light of the flexible nature of the method itself. However, it would be wrong to state that procedures of this procurement method remain largely unregulated in the Model Law. This procurement method, as any other, is subject to the general provisions and rules set out in chapters I and II of the Model Law, the procurement regulations and any other bodies of applicable law. For example, under the Model Law, the procuring entity will be required to maintain a detailed record of the procurement proceedings, including details of negotiations with each participating supplier or contractor, and to provide access by suppliers or contractors to the record, as provided by article 24. This requirement is an essential measure for this procurement method to ensure effective oversight, and to permit challenges by aggrieved suppliers.

13. To the extent that the procuring entity complies with all the applicable rules, and that the negotiations are conducted on a concurrent basis and so as to ensure equal treatment of the suppliers, the procuring entity may organize and conduct the negotiations as it sees fit. The rules that are set out in the present article are intended to confer this freedom upon the procuring entity, while attempting to foster competition in the proceedings and objectivity in the selection and evaluation process.

14. Paragraph (1) cross-refers to the relevant provisions of article 33 on solicitation in competitive negotiations, one of which requires providing an advance notice of the procurement, except in cases of urgency. (For the guidance to the relevant provisions of article 33, see paragraphs ... above.)

15. Paragraph (2), regulating communication of information during negotiations, is subject to the rules on confidentiality contained in article 23 of the Model Law. The provisions are similar to the provisions addressing request for proposals with dialogue contained in article 48 (10). The guidance to article 48 (10) is therefore relevant in the context of this paragraph (see paragraphs ... above).

16. Paragraph (3) provides that the procuring entity should, at the end of the negotiations, request suppliers or contractors to submit best and final

offers (BAFOs),² on the basis of which the successful offer is to be selected. BAFOs are defined as best and final with respect to all aspects of each supplier's proposal. (Thus, as in request for dialogue procedures (guidance to which is found in [...]), no single set of terms and conditions of the procurement against which final submissions are evaluated is issued in this procurement method.) BAFOs are to be presented by a date specified by the procuring entity in its request for BAFOs. To ensure that all participating suppliers are on an equal footing as regards receiving information about termination of negotiations and available time to prepare their BAFO, it is good practice to issue the request in writing and to communicate it simultaneously to all participating suppliers. The provisions are similar to those of article 48 (11). The guidance to article 48 (11) (see paragraphs ... above) is therefore relevant in the context of this paragraph.

17. UNCITRAL considers the BAFO stage essential since it provides for the equal treatment of participating suppliers. It puts an end to the negotiations and freezes all the specifications and the contract terms offered by suppliers and contractors. In addition, requiring requests for BAFOs to be issued to all suppliers remaining in the negotiations, leaves an audit trail as regards all actual offers that were before the procuring entity and that it should have considered in making the selection in accordance with paragraph (5) of this article. Without that stage, excess discretion is given to the procuring entity to decide with which supplier or contractor to conclude the contract, with no transparency and verifiable traces in the process that would allow effective challenge.

18. Paragraph (4) prohibits negotiations after BAFOs were submitted, so as to conform the competitive negotiations procedure with equivalent stages in other procurement methods and to ensure the equal treatment of suppliers. It draws on similar provisions in article 48 (12). The guidance to article 48 (12) (see paragraphs ... above) is therefore relevant in the context of this paragraph. UNCITRAL considers it best practice to prevent the procuring entity from negotiating further after BAFOs have been presented, and to prevent multiple requests for "BAFOs" and this stance is taken consistently throughout the Model Law where the BAFOs stage is envisaged.

19. The enacting State may impose additional requirements in the context of this procurement method by requiring in the procurement regulations that the procuring entity take steps such as: establishing basic rules and procedures relating to the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; preparing various documents to serve as the basis for the negotiations, including documents setting out the desired technical characteristics of the goods or construction to be procured, or a description of the nature of services to be procured, and the desired contractual terms and conditions; and requesting the suppliers or contractors with which it negotiates to itemize their prices so as to assist the procuring entity in comparing what is being offered by one supplier or contractor during the negotiations with offers from the other suppliers or contractors. (For more detailed guidance on such comparisons, including risk

² The Working Group may wish to note that this term will be the subject of description in the glossary of terms to be included in the Guide, explaining (among other things) that there can be only one round of BAFOs.

mitigation, see the discussion on evaluation in request for proposals with dialogue proceedings.)

For a discussion of the changes in procedures from the 1994 text, see section A.4 immediately below.

4. Points regarding competitive negotiations 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

20. Competitive negotiations is the title of a procurement method that draws its main features from the method of the same name in the 1994 Model Law. The conditions for use of competitive negotiations in the 1994 Model Law (article 19) have been substantially revised. Competitive negotiations may now be used only in the exceptional circumstances set out in subparagraphs (a) to (c): urgency, catastrophic events and the protection of essential security interests of the enacting State. For further guidance on the use of the method in these circumstances, and related considerations, see paragraphs [...] of the guidance to the method itself.

21. The revised Model Law, unlike the 1994 text, does not require an approval by a designated organ for resort to competitive negotiations. This approach reflects the decision of UNCITRAL, as a general rule, that the Model Law should not require the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (for the guidance on this point, see paragraphs ... above).

Solicitation

22. Paragraph (3) of article 33 regulates solicitation in competitive negotiations. It draws on the provisions of article 49 (1) of the 1994 Model Law [detail of differences to be added at a later date].

Procedures

23. Article 50 addresses the procedures for competitive negotiations and draws largely on article 49 of the 1994 Model Law. The main change is the introduction of an express prohibition of post-BAFO negotiations in paragraph (4) [detail of other differences to be added at a later date].

B. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of single-source procurement

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 (...single-source procurement)

(5) A procuring entity may engage in single-source procurement in accordance with the provisions of article 51 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;

(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; or

(e) Subject to approval by the [name of the organ designated by the enacting State 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, provided that procurement from no other supplier or contractor is capable of promoting that policy.”

Proposed text for the Guide:

1. Paragraph (5) sets out the conditions for use of single-source procurement. The first, in subparagraph (a), refers to objectively justifiable reasons for resort to single-source procurement: the existence of only one supplier or contractor capable of providing the subject matter, either because that supplier or contractor has exclusive rights with respect to the subject matter of the procurement or for other

reasons that confirm the exclusivity. The rules concerning the description of the subject matter of the procurement contained in article 10 of the Model Law prohibit the procuring entity from formulating the description of the subject matter of the procurement in a way that artificially limits the market concerned to a single source. Where the risk or practices of formulating such narrow descriptions exist, the use of functional descriptions (performance/output specifications) should be encouraged.³ The enacting State should in addition ensure, through appropriate authorities, the regular monitoring of the practice of its procurement entities with the use of the ground referred to in subparagraph (a) as justification for resort to single-source procurement since its improper use may encourage monopolies and corruption, whether inadvertently or intentionally. Enacting the requirement for an advance public notice of single-source procurement (contained in article 33 (5) of the Model Law) should be considered an essential safeguard against the negative effects of relying on the ground set out in subparagraph (a) on transparency and accountability in procurement practices.

2. The conditions in subparagraph (b), referring to extreme urgency owing to a catastrophic event, overlap to some extent with the condition for use of the competitive negotiations in the case of urgency owing to a catastrophic event (paragraph (4) (b) of this article). The difference is in the level of urgency: to justify resort to single-source procurement, the urgency must be so extreme that holding negotiations with more than one supplier would be impractical. For example, following a catastrophic event, there may be immediate needs for clean water and medical supplies; a need for semi-permanent shelter may arise out of the same catastrophe but is normally not so urgent. As is the case in competitive negotiations, the need to link the extent of the procurement with the extreme urgency will limit the amount that can be procured using this method.

3. Subparagraph (c) refers to the need for standardization or compatibility with existing goods, equipment, technology or services as the justification for resort to single-source procurement. The use of single-source procurement in such situations must be exceptional: otherwise needs may be cited that are in reality due to poor procurement planning on the part of the procuring entity. Procurement in such situations should therefore also be limited both in size and in time.

4. Subparagraph (d) justifies recourse to single-source procurement for the protection of essential security interests of the State. This provision addresses, in particular, procurement involving classified information where the procuring entity concludes that the information concerned will be insufficiently protected if any other method of procurement, including another exceptional method of procurement such as competitive negotiations, is used.

5. Subparagraph (e) has been included in order to permit the use of single-source procurement in cases of serious economic emergency in which such procurement would avert serious harm. A case of this type may be, for example, where an enterprise employing most of the labour force in a particular region or city is threatened with closure unless it obtains a procurement contract. This subparagraph contains safeguards to ensure that it does not give rise to more than a very

³ The Working Group may wish to consider the extent to which this point is of general application and its interaction with the main distinguishing features of tendering as compared with request-for-proposals-based procurement methods, as set out in the guidance to articles 26 and 27.

exceptional use of single-source procurement. It should be interpreted in very restrictive terms, not to allow the use of single-source procurement for such extrinsic considerations, for example, as transfer of technology, shadow-pricing or counter trade.⁴

6. The decision to use single-source procurement in the economic emergency type of circumstance referred to in the provisions would and should ordinarily be taken at the highest levels of Government. The subparagraph therefore requires the procuring entity to receive the prior approval of an organ designated by the enacting State for resort to single-source procurement in such situations. In addition, the subparagraph requires a public notice of the anticipated single-source procurement in the economic emergency type of circumstance and adequate opportunity to comment. Although this stage is not regulated in detail in the Model Law, to make the opportunity to comment meaningful, the procuring entity should allow sufficient time to elapse between the notice and the start of the procurement proceedings. The procuring entity may receive comments from any member of the public and should be expected to provide explanations. The enacting States may wish to regulate further aspects of these provisions in the procurement regulations, in particular, whose comments should specifically be sought (for example, of local communities) and the purpose or the effect of comments, especially negative, if received.

7. Other than in situations referred to in subparagraph (e), the revised Model Law does not require approval by a designated organ for resort to the use of single-source procurement. This approach is in conformity with the decision of UNCITRAL not to require, as a general rule, in the revised Model Law the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (for guidance on this point, see paragraphs ... above). This stance has also been applied as regards procuring entity's decision to resort to single-source procurement. UNCITRAL has however recognized that, some enacting States may require procuring entities to obtain a prior approval from a higher-level authority for use of such an exceptional measure as single-source procurement. While not discouraging such practices in the context of this particular procurement method in order to prevent corruption and arbitrary decisions on the side of the procuring entities, UNCITRAL acknowledges that this safeguard may be illusory: there can be elevated risks of corruption involving the approval chain where resort to single-source procurement is sought in improper cases. At the same time, there can be an unjustifiable waste of time and costs where permission for use of single-source procurement is sought for perfectly appropriate circumstances.

8. In view of the non-competitive character of single-source procurement, this method is considered under the Model Law the method of last resort after all other alternatives had been exhausted. The provisions of paragraph (5) should therefore be implemented without prejudice to the general principle contained in article 27 (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 restricted tendering, request for quotations or competitive negotiation, is appropriate, the procuring entity must select the procurement method that would ensure most competition in

⁴ The text in this paragraph is taken from the 1994 Guide. The Working Group is invited to reconsider it, in particular in the light of article 11 of the draft revised Model Law.

the circumstances of the given procurement without jeopardizing, however, other no less important considerations, such as the level of urgency of delivery of the subject matter of the procurement. It is recognized that, except for situations described in subparagraphs (a), (d) and (e), in other situations referred to in paragraph (5) the procuring entity may avoid the use of single-source procurement by using alternative methods or tools or through proper procurement planning. For example, in situations of extreme urgency due to a catastrophic event where negotiations with more than one supplier would be impractical (subparagraph (b)), the procuring entity may consider using procurement methods not involving negotiations, such as request for quotations for procurement of off-the-shelf items. A closed framework agreement without second-stage competition may also effectively address situations of extreme urgency, where it concluded in advance against a background of an identified and probable need occurring on a periodic basis or within a given time frame. With a better procurement planning, framework agreements may also be a viable alternative to single-source procurement in situations referred to in subparagraph (c) (the need for additional supplies from the same source for reasons of standardization and compatibility).

For a discussion of the changes in conditions for use from the 1994 text, see section B.4 below.

2. Solicitation

The relevant provision of the revised Model Law on solicitation:

“Article 33. Solicitation in ... single-source procurement. Requirement for an advance notice of the procurement

(4) Where the procuring entity engages in single-source procurement in accordance with article 29 (5) of this Law, it shall solicit a proposal or price quotation from a single supplier or contractor.

(5) Prior to direct solicitation in accordance with the provisions of paragraphs (1), (3) and (4) of this article, the procuring entity shall cause a notice of the procurement to be published in ... (the enacting State specifies the official gazette or other official publication in which the notice 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 in 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 29 (4) (b) and 29 (5) (b).”

Proposed text for the Guide:

9. Paragraph (4) regulates solicitation in single-source procurement and is coupled with the requirement in paragraph (5) of this article for an advance notice of the procurement. That notice must specify in particular that single-source procurement will be used and must also provide a summary of the principal required terms and conditions of the envisaged procurement contract. This is an essential public oversight measure. On the basis of the information published, any aggrieved supplier or contractor may challenge the use of single-source procurement where a competitive method of procurement appropriate in the circumstances of the given procurement is available. This safeguard is particularly important in the context of this procurement method, which is considered exceptional and justified for use only in the very limited cases provided for in article 29 (5) of the Model Law.

10. The procuring entity will not be required to publish such a notice, but may still choose to do so, when single-source procurement is used in situations of extreme urgency owing to a catastrophic event (article 29 (5) (b)). This exemption is set out in paragraph (6) of this article. In the other cases justifying resort to single-source procurement, providing an advance notice of the procurement is the default rule, subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of the essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement. This situation may arise in particular when resort to single-source procurement is made in procurement for the protection of essential security interests of the State under article 29 (5) (d). (For the guidance on the relevant provisions of the Model Law on confidentiality and procurement involving classified information, see paragraphs ... above).

11. Additional guidance on both the use of advance notices under paragraphs (5) and (6) of article 33 and on the objective identification of suppliers to participate in the process is found in the guidance on Restricted tendering. The issues raised there are also relevant in the context of single-source procurement.

For a discussion of the changes as regards solicitation from the 1994 text, see section B.4 below.

3. Procedures

The relevant provision of the revised Model Law on procedures:

“Article 51. Single-source procurement

Paragraphs (4) to (6) of article 33 of this Law shall apply to the procedure preceding the solicitation of a proposal or price quotation from a single supplier or contractor. The procuring entity shall engage in negotiations with the supplier or contractor from which a proposal or price quotation is solicited unless such negotiations are not feasible in the circumstances of the procurement concerned.”

Proposed text for the Guide:

12. The article sets out relatively simple procedures for single-source procurement procedures. The simplicity reflects the very flexible nature of single-source procurement, which involves a sole supplier or contractor, thus making the procedure essentially a contract negotiation (and which therefore falls outside the general scope of the Model Law). Issues of competition and equal treatment of suppliers or contractors in the procurement proceedings, although important at the stage when the decision on the resort to this procurement method is made, do not arise during the procurement proceedings.

13. The provisions cross-refer to the requirement of an advance notice of the procurement and an exemption thereto in article 33. They also contain the requirement of engaging in negotiations, unless to do so is not feasible. It has been introduced in the light of the utility for the procuring entity to negotiate and request, when feasible and necessary, market data or costs clarifications, in order to avoid unreasonably priced proposals or quotations.

14. The provisions of chapter I are generally applicable to single-source procurement, including the obligation to cancel the procurement in situations described in article 20 (for example, when the sole supplier must be excluded from further participation in the procurement proceedings on the ground of inducement, unfair competitive advantage or conflicts of interest). In addition, a number of provisions of the Model Law aimed at transparency in the procurement proceedings will be applicable, such as article 22 on publication of notices of procurement contract awards, article 24 on keeping the comprehensive record of the procurement proceedings, including justifications for resort to single-source procurement, and article 33 on an advance notice of the procurement. The procedures of single-source procurement should not therefore be regarded as largely unregulated in the Model Law because of the short provisions in article 51. They must be implemented taking into account all applicable provisions of the Model Law as well as those of procurement regulations and other applicable provisions of law of the enacting State.

For a discussion of the changes in procedures from the 1994 text, see section B.4 immediately below.

4. Points regarding single-source procurement 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

15. Article 29 sets out the conditions for use of single-source procurement. It is based on the provisions of article 22 of the 1994 Model Law, save that some justifications for the use of single-source procurement found in the 1994 text have been eliminated. [Detail to be included at a later date.] For further guidance on the use of the method in the circumstances permitted by article 29, and related considerations, see paragraphs [...] of the guidance to the method itself.

16. Other than in situations referred to in article 29 (5) (e) (see paragraphs [...] above), the revised Model Law, unlike the 1994 text, does not require an approval by a designated organ for resort to single-source procurement. This is in conformity

with the decision of UNCITRAL not to require, as a general rule, in the revised Model Law the procuring entity to seek an approval of another body for steps to be taken by the procuring entity (for the guidance on this point, see paragraphs ... above). This stance has also been applied as regards procuring entity's decision to resort to single-source procurement, taking into account the changes made in the conditions for use of this procurement method, which, compared to the 1994 Model Law, are considerably more restrictive.

Solicitation

17. Paragraph (4) of article 33 regulates solicitation in single-source procurement. It draws on the provisions of article 51 of the 1994 Model Law [detail of differences to be added at a later date].

Procedures

18. Article 51 addresses the procedures for single-source procurement. An equivalent provision was not included in the 1994 Model Law. Article 51 of the 1994 Model Law provided only the manner of solicitation, which in the revised Model Law is reflected in article 33 (4) of the revised Model Law. The provisions in the revised Model Law also require the procuring entity to engage in negotiations, unless to do so is not feasible (see the guidance to the article 51 above).
