United Nations A/CN.9/WG.I/WP.79/Add.4

General Assembly

Distr.: Limited
15 February 2012

Original: English

United Nations Commission on International Trade Law
Working Group I (Procurement)
Twenty-first session
New York, 16-20 April 2012

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 articles 7 to 11 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

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

V.12-50877 (E)

GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

…

Chapter I

Part II. Article-by-article commentary (continued)

…

Article 7. Communications in procurement [**hyperlink**] (continued)

1. In a time of rapid technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible or usable (whether for technical reasons, reasons of cost or otherwise). The procuring entity must seek to avoid situations when the use of any particular means of communication in procurement proceedings could result in discrimination among suppliers or contractors. For example, the exclusive choice of one means could benefit some suppliers or contractors who are more accustomed to use it to the detriment of others. Measures should be designed to prevent any possible discriminatory effect (e.g., by providing training or longer time limits for suppliers to become accustomed to new systems). The enacting State may consider that the old processes, such as paper-based ones, need to be retained initially when new processes are introduced, which can then be phased out, to allow a take-up of new processes.

2. The provisions of the Model Law do not distinguish between proprietary or non-proprietary information systems that may be used by procuring entities. As long as they are interoperable with those in common use, their use would comply with the conditions of paragraph (4). The enacting State may however wish to ensure that procuring entities should carefully consider to what extent proprietary systems, devised uniquely for the use by the procuring entity, may contain technical solutions different and incompatible with those in common use. Such systems may require suppliers or contractors to adopt or convert their data into a certain format. This can render access of potential suppliers and contractors, especially smaller companies, to procurement impossible or discourage their participation because of additional difficulties or increased costs. Effectively, suppliers or contractors not using the same information systems as the procuring entity would be excluded, with the risk of discrimination among suppliers and contractors, and higher risks of improprieties. The use of the systems that would have a significantly negative effect on participation of suppliers and contractors in procurement would be incompatible with the objectives, and article 7 (4), of the Model Law.

3. On the other hand, the recourse to off-the-shelf information systems, being readily available to the public, easy to install and reasonably easy to use and providing maximal choice, may foster and encourage participation by suppliers or

contractors in the procurement process and reduce risks of discrimination among suppliers and contractors.[1] They are also more user-friendly for the public sector itself as they allow public purchasers to utilize information systems proven in day-to-day use in the commercial market, to harmonize their systems with a wider net of potential trading partners and to eliminate proprietary lock-in to particular third-party information system providers, which may involve inflexible licences or royalties. They are also easily adaptable to user profiles, which may be important for example in order to adapt systems to local languages or to accommodate multilingual solutions, and scalable through all government agencies' information systems at low cost. This latter consideration may be especially important in the broader context of public governance reforms involving integration of internal information systems of different government agencies.

4. The Model Law does not address the issue of charges for accessing and using the procuring entity's information systems. This issue is left to the enacting State to decide taking into account local circumstances. These circumstances may evolve over time with the effect on the enacting State's policy as regards charging fees. The enacting State should carefully assess the implications of charging fees for suppliers and contractors to access the procurement, in order to preserve the objectives of the Model Law, such as those of fostering and encouraging participation of suppliers and contractors in procurement proceedings, and promoting competition. Ideally, no fees should be charged for access to, and use of, the procuring entity's information systems. If charged, they should be transparent, justified, reasonable and proportionate and not discriminate or restrict access to the procurement proceedings.

5. The objective of paragraph (5) of the article (which requires appropriate measures to secure the authenticity, integrity and confidentiality of information) is to enhance the confidence of suppliers and contractors in reliability of procurement proceedings, including in relation to the treatment of commercial information. Confidence will be contingent upon users perceiving appropriate assurances of security of the information system used, of preserving authenticity and integrity of information transmitted through it, and of other factors, each of which is the subject of various regulations and technical solutions. Other aspects and relevant branches of law are relevant, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality, intellectual property and copyright. The Model Law and procurement regulations that may be enacted in accordance with article 4 of the Model Law are therefore only a narrow part of the relevant legislative framework. In addition, reliability of procurement proceedings should be addressed as part of a comprehensive good governance framework dealing with personnel, management and administration issues in the procuring entity and the public sector as a whole.

6. Legal and technical solutions aimed at securing the authenticity, integrity and confidentiality may vary in accordance with prevailing circumstances and contexts. In designing them, consideration should be given both to their efficacy and to any possible discriminatory or anti-competitive effect, including in the cross-border context. The enacting State has to ensure at a minimum that the systems are set up

---

[1] Some commentators have questioned the validity of this statement: the Working Group is requested to advise further.

in a way that leaves trails for independent scrutiny and audit and in particular verifies what information has been transmitted or made available, by whom, to whom, and when, including the duration of the communication, and that the system can reconstitute the sequence of events. The system should provide adequate protection against unauthorized actions aimed at disrupting normal operation of public procurement process. Technologies to mitigate the risk of human and other disruptions must be in place. So as to enhance confidence and transparency in the procurement process, any protective measures that might affect the rights and obligations of potential suppliers and contractors should be specified to suppliers and contractors at the outset of procurement proceedings or should be made generally known to public. The system has to guarantee to suppliers and contractors the integrity and security of the data that they submit to the procuring entity, the confidentiality of information that should be treated as confidential and that information that they submit will not be used in any inappropriate manner. A further issue in relation to confidence is that of systems' ownership and support. Any involvement of third parties needs to be carefully addressed to ensure that the arrangements concerned do not undermine the confidence of suppliers and contractors and the public at large in procurement proceedings. (Further aspects relevant to the provisions of article 7 on the form and means of communication are discussed in the commentary to articles 40 and 42 of this Guide [**hyperlink**].)

7. In addition to imposing requirements on the form and means of communication, the article deals with measures and requirements that the procuring entity may impose in procurement involving classified information to ensure the protection of such information at the requisite level. Provisions to that effect are found in paragraph (3)(b). For example, it is common in procurement containing classified information, to include the classified information in an appendix to the solicitation documents, which is not made public. If such measure or any other exception to transparency requirements of the Model Law or any other measure for protection of classified information is taken, it is to be disclosed at the outset of the procurement in accordance with paragraph (3) of the article. (For the definition of "procuring involving classified information" and the commentary thereto, see article 2(l) [**hyperlink**].)

8. The requirements or measures referred to in paragraph (3)(b) are to be differentiated from the requirements and measures referred to in paragraph (5) of the article. While the latter referred to general requirements and measures applicable to any procurement, regardless of whether classified information is involved, paragraph (3)(b) refers to technical requirements and measures addressed to suppliers or contractors to ensure the integrity of classified information, such as encryption requirements. They would allow the procuring entity to stipulate, for example, the level of the officer tasked with receiving the information concerned. These requirements and measures would be authorized by the procurement regulations or other provisions of law of the enacting States only in procurement involving classified information and only with respect to that type of information, not any other information that the procuring entity may choose to protect at its own discretion.

Article 8. Participation by suppliers or contractors [**hyperlink**]

9. The purposes of article 8 are to specify the grounds upon which the procuring entity may restrict the participation of certain categories of suppliers or contractors in procurement proceedings (paragraphs (1) and (2)) and to provide procedural safeguards when any such restriction is imposed (paragraphs (3) to (5)). Any such restriction of participation of suppliers or contractors in procurement proceedings restricts trade and may violate commitments by States under relevant international instruments, such as the WTO Agreement on Government Procurement [**hyperlink**].

10. Both paragraphs (1) and (2) stipulate that the grounds for restricting the participation of suppliers and contractors in procurement proceedings are limited to those found in procurement regulations or other provisions of law of the enacting State. Whereas paragraph (1) refers to a restriction on the ground of nationality, paragraph (2) is open-ended as regards the nature of the grounds that may be found in the procurement regulations or other provisions of law of the enacting State. Although socio-economic policies of an enacting State may involve restrictions on the grounds set out in either of the paragraphs, the provisions are not themselves limited to socio-economic issues: other issues of concern to the State, such as safety and security, may justify these restrictions.

11. Paragraph (1) does not mean "domestic procurement" only in the sense that domestic suppliers or contractors alone, however they may be defined in the enacting State, are permitted to participate in the procurement proceedings (noting that domestic procurement removes the obligation of international solicitation under article 32). International procurement under paragraph (1) may involve the exclusion of only certain nationalities, for example in order to fulfil the enacting State's obligations under international public law to avoid dealings with persons of a foreign State that is subject to international sanctions.

12. Paragraph (2) is intended to cover situations where restriction of participation in procurement proceedings is undertaken wholly or partly for other reasons, such as to implement set-aside programmes for SMEs or entities from disadvantaged areas). The paragraph may cover, as paragraph (1) does, domestic procurement (e.g. procurement with participation of only suppliers or contractors coming from disadvantaged areas within the same State) or international procurement limited to certain groups of suppliers or contractors (e.g. persons with disabilities).[2]

13. When any of the grounds in the procurement regulations or other provisions of law is invoked by the procuring entity as a justification for restricting participation

---

[2] The suggestion in the Working Group was that the Guide should highlight that the article deals with measures of a clearly discriminatory nature, authorized in the procurement regulations and other provisions of law of the enacting State, but some measures may be taken in practice that produce, albeit inadvertently, an equally discriminatory effect on suppliers or contractors, domestically and/or internationally (for example, stipulating the use of the language spoken only by the ruling minority in a State, or imposing technical requirements that reflect standards applied only in one domestic region or in one country in a geographical area) (see A/CN.9/WG.I/WP.75/Add.1, footnote 47). The location of such statement in the Guide is to be considered.

in procurement proceedings, paragraph (3) requires the procuring entity to make declaration to such effect at the outset of the procurement proceedings. This declaration is to be published in the same place and manner in which the original information about the procurement proceedings, such as the invitation to participate in the procurement proceedings (e.g. invitation to pre-qualification or to tender) or the notice of the procurement under article 33, is published, and simultaneously with such information. To ensure fair and equitable treatment of suppliers or contractors, the declaration cannot be later altered.

14. Where the procuring entity uses domestic procurement, it also may invoke other exemptions in its solicitation documents, including an exemption from the requirement to indicate information about currency and languages, which may no longer be pertinent (see, further, the commentary to the articles on solicitation documents, such as article 39 [**hyperlink**]).

15. Paragraph (4) and (5) contain other procedural safeguards. Under paragraph (4), the procuring entity will be required to put on the record the reasons and circumstances on which it relied to justify its decision, indicating in particular the legal source where the ground invoked to restrict participation is found. The same information is required to be provided to any member of the public upon request under paragraph (5) of the article. Such a decision is an example of the type for which the procuring entity is required to substantiate the reasons and circumstances with legal justifications, as discussed in the introduction to this Chapter above [**hyperlink**] and in the commentary to article 25 on the procurement record below [**hyperlink**].

Article 9. Qualifications of suppliers and contractors [**hyperlink**]

16. The purposes of the article are: to set out an exhaustive list of criteria that the procuring entity may use in the assessment of qualifications of suppliers or contractors at any stage of the procurement proceedings (paragraph (2)); to regulate other requirements and procedures that it may impose for this assessment (paragraphs (3) to (7)); and to list the grounds for disqualification (paragraph (8)). The provisions aim at restricting the ability of procuring entities to formulate excessively demanding qualification criteria or requirements and through their application, reducing the pool of participants for the purpose, among other things, of limiting their own workload.

17. The article is also intended to prevent the qualification procedure from being misused to restrict market access through the use of hidden barriers to the market (whether at the domestic or international level). Requirements for particular licences, obscure diploma requirements, certificates requiring in-person attendance or adequate past experience may be legitimate for a given procurement, or may be an indication of an attempt to distort participation in favour of a particular supplier or contractor or group of suppliers or contractors. The provisions are therefore permissive in scope, and the risk of misuse is mitigated through the transparency provisions of paragraph (2), which enable the relevance of particular requirements to be evaluated. Of particular concern would be unnecessary requirements that discriminate directly or indirectly against overseas suppliers, used as a

non-transparent manner of limiting their participation (where, for example, the permitted restriction under article 8 is not explicitly invoked, as further discussed in the commentary to paragraphs (2)(e) and (6), below).

18. As stated in paragraph (1) of the article, the provisions of the article may be applied at any stage of the procurement proceedings. Assessment of qualifications may take place: (i) at the outset of the procurement through pre-qualification in accordance with article 18 [**hyperlink**] or pre-selection in accordance with article 49(3); (ii) during the examination of submissions (see for example, that the grounds for rejection of a tender in article 43(3)(a) include that the supplier is unqualified); (iii) at any other time in the procurement proceedings when pre-qualified suppliers or contractors are requested to demonstrate again their qualifications (see paragraph (8)(d) of this article and the commentary in paragraph … below); and/or (iv) at the end of the procurement proceedings when the qualifications of only the winning supplier or contractor are assessed (see article 57(2) [**hyperlink**]) or when that supplier or contractor is requested to demonstrate again its qualifications (article 43(6) [**hyperlink**]).

19. The assessment of qualifications at the outset of the procurement through pre-qualification or pre-selection, while appropriate in some procurement, may have the effect of limiting competition and should therefore be used by the procuring entity only when necessary: the Model Law promotes open competition unless there is a reason to limit participation. The provisions of the Model Law in chapter VIII [**hyperlink**] allow challenges to decisions on disqualification made early in the procurement proceedings, but only where the challenge is submitted before the deadline for presenting submissions. This limited time frame, supported by stricter provisions on suspension of the procurement proceedings, ensures that the procurement proceedings will not be disrupted at later stages for reasons not related to those stages.

20. Paragraph (2) lists the qualification criteria that can be used in the process. The criteria must be relevant and appropriate in the light of the subject matter of the procurement. It is not necessary to apply all the criteria listed in paragraph (2); the procuring entity should use only those that are appropriate for the purposes of the specific procurement. The criteria to be used must be specified by the procuring entity in any pre-qualification or pre-selection documents, and in the solicitation documents; in addition to enabling the relevance of the criteria to be evaluated, such early disclosure allows a challenge to them to be made before the procurement is concluded.

21. The requirement in paragraph (2)(a) that suppliers or contractors must possess the “necessary equipment and other physical facilities” is not intended to restrict the participation of SMEs in public procurement. Often such enterprises would not themselves possess the required equipment and facilities; they can ensure nevertheless through their subcontractors or partners that the equipment and facilities are available for the implementation of the procurement contract.

22. The reference in paragraph (2)(b) to “other standards” is intended to indicate that the procuring entity should be entitled to satisfy itself, for example, that suppliers or contractors have all the required insurances, and to impose security clearances or consider environmental aspects where necessary. Since environmental standards in particular may have the effect of excluding foreign suppliers (where

regional environmental standards vary), the enacting State may wish to issue rules and/or guidance on the use of environmental standards to ensure that procuring entities may apply such standards without risk of disruptive challenge procedures. These standards relate to the standards and processes followed by suppliers or contractors generally, rather than to the environmental characteristics of the subject matter of the procurement (which are addressed in the commentary to articles 10 and 11 below [**hyperlinks**]).

23. Paragraph (2)(e) should be implemented bearing its potentially discriminatory effect on foreign suppliers or contractors without any permanent presence (either through a branch, representative office or subsidiary) in the enacting State in mind. Foreign suppliers would generally not have any obligation to pay taxes or social security contributions in the enacting State; article 8 prohibits the procuring entity from imposing requirements other than those permitted in the procurement regulations or other provisions of law of the enacting State that would have the effect of deterring participation in the procurement proceedings by foreign suppliers or contractors.

24. Paragraph (2)(f) refers to the disqualification of suppliers and contractors pursuant to administrative suspension or debarment proceedings. Such administrative proceedings — in which alleged wrongdoers should be accorded due process rights such as an opportunity to refute the charges — are commonly used to suspend or debar suppliers and contractors found guilty of wrongdoing such as issuing false or misleading accounting statements or committing fraud. It may be noted that the Model Law leaves it to the enacting State to determine the period of time for which a criminal offence of the type referred to in paragraph (2)(f) should disqualify a supplier or contractor from being considered for a procurement contract. For general commentary on debarment proceedings, see Section ** of the general commentary above [**hyperlink**].

25. Paragraph (3) allows the procuring entity to demand from suppliers or contractors appropriate documentary evidence or other information to prove their satisfaction of the qualification criteria specified by the procuring entity in any pre-qualification or pre-selection documents and in the solicitation documents. Such documentary evidence may comprise audited annual reports (to demonstrate financial resources), inventories of equipment and other physical facilities, licences to engage in certain types of activities and certificates of compliance with applicable standards and confirming legal standing. Depending on the subject matter of the procurement and the stage of the procurement proceedings at which qualification criteria are assessed, a self-declaration from suppliers or contractors may or may not be sufficient. For example, it may be sufficient to rely on this type of declaration at the opening of simple stand-alone electronic reverse auctions as long as it is envisaged that a proper verification of the winning supplier's compliance with the applicable qualification criteria will take place after the auction. Requirements imposed as regards the documentary evidence or other information must apply equally to all suppliers or contractors and must be objectively justifiable in the light of the subject matter of the procurement (see paragraphs (4) and (6) of the article).

26. Paragraph (4) requires all criteria and requirements as regards assessment of qualifications of suppliers or contractors to be set out in any pre-qualification or pre-selection document and in the solicitation documents. In some jurisdictions,

standard qualification requirements are found in procurement regulations, and the pre-qualification/pre-selection/solicitation documents may simply cross-refer to those regulations. For reasons of transparency and equal treatment, the Model Law requires all requirements to be set out in the relevant documents; however, the requirements of paragraph (4) may be satisfied where the documents refer to the qualification requirements in legal sources that are transparent and readily available (such as by using hyperlinks).

27. Paragraph (6) prohibits any measures that may have a discriminatory effect in the assessment of qualifications or that are not objectively justified, unless they are expressly authorized under the law of the enacting State. Despite these prohibitions in the Model Law, some practical measures, such as a choice of the language, although objectively justifiable, may lead to discrimination against or among suppliers or contractors or against categories thereof.

28. In order to facilitate participation by foreign suppliers and contractors, paragraph (7) bars the imposition of any requirement for the legalization of documentary evidence provided by suppliers and contractors as to their qualifications other than by the supplier or contractor presenting the successful submission. Those requirements must be provided for in the laws of the enacting State relating to the legalization of documents of the type in question. The article does not require that all documents provided by the winning supplier or contractor are to be legalized. Rather, it recognizes that States have laws concerning the legalization of documents and establishes the principle that no additional formalities specific to procurement proceedings should be imposed.

29. Paragraphs (8)(a)-(c) address the consequences where suppliers or contractors submit information that is false, constitutes a misrepresentation, or that is inaccurate or incomplete. Subparagraph (a) requires the disqualification of a supplier for the submission of false information or for misrepresentation. Subparagraph (b) permits the procuring entity to disqualify a supplier or contractor where its qualification information was “materially inaccurate or materially incomplete”.[3] Subparagraph (c) allows the procuring entity to disqualify a supplier for non-material inaccuracies or incompleteness only where the supplier, when so requested, does not remedy the inaccuracy or incompleteness.

30. The purpose of paragraphs 8(a)-(c) is to safeguard both the interests of suppliers and contractors in receiving fair treatment and the interest of the procuring entity in entering into procurement contracts only with qualified suppliers and contractors, while conferring an element of flexibility as regards insignificant inaccuracies.[4]

31. The purpose of paragraph (8)(d) is to provide for reconfirmation, at a later stage of the procurement proceedings, such as at the time of examination of submissions, of the qualifications of suppliers or contractors that have been pre-qualified. It is intended to permit the procuring entity to ascertain whether the qualification information submitted by a supplier or a contractor at the time of

---

[3] The Commission requested an explanation of the term materiality in the Guide and conformity among all languages.

[4] The Working Group may wish to consider how to address the obvious risks of corruption here, by linking the concepts of “materiality” and “misrepresentation” to some objective standard.

pre-qualification, or if qualification is considered separately early in the procedure, remains valid and accurate, again with the procedural safeguards described in the preceding paragraph. In most procurement (with the exception perhaps of complex and time-consuming multistage procurement), the application of these provisions should be limited to the supplier or contractor presenting the successful submission as envisaged in articles 43(6) and (7) and 57 (2) of the Model Law.

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement [**hyperlink**]

32. The purpose of article 10 is to emphasize the importance of the principle of clarity, sufficient precision, completeness and objectivity in the description of the subject matter of procurement in any pre-qualification or pre-selection documents and in the solicitation documents. Descriptions with those characteristics encourage participation by suppliers and contractors in procurement proceedings, enable suppliers and contractors to formulate and present submissions that meet the needs of the procuring entity, and enable suppliers and contractors to forecast the risks and costs of their participation in procurement proceedings and of the performance of the contracts or framework agreement to be concluded, and thus to offer their most advantageous prices and other terms and conditions. Furthermore, properly prepared descriptions of the subject matter of procurement enable tenders to be evaluated and compared on a common basis, which is one of the essential requirements of the tendering method. They also contribute to transparency and reduce possibilities of erroneous, arbitrary or abusive actions or decisions by the procuring entity. In addition, the application of the rule that the description of the subject matter should be set out so as not to favour particular contractors or suppliers will make it more likely that the procurement needs of the procuring entity may be met by a greater number of suppliers or contractors, thereby facilitating the use of as competitive a method of procurement as is feasible under the circumstances (and in particular helping to limit abusive use of single-source procurement).

33. Together with the procedural requirement to publish the description in the solicitation documents under article 39(d) (or the equivalent for other open methods) [**hyperlinks**], these provisions ensure transparency, objectivity and participation. The first two paragraphs ensure access to the procurement, by prohibiting discriminatory treatment; the remainder of the article seeks to ensure that all suppliers or contractors understand the requirements in the same way.

34. The minimum requirements referred to in paragraph (1) are intended also to allow for the use of two procurement methods under Chapter V of the Model Law: two-stage tendering and request for proposals with dialogue proceedings (under articles 30(1)(a) and 30(2)(a) [**hyperlinks**]). The use of these methods is predicated on the impossibility of drafting a “detailed” description of the subject-matter of the procurement as required by subparagraph (b), in the case of two-stage tendering at the outset of the procedure, and in the case of request-for-proposals with dialogue generally. (For a more detailed consideration of

this topic, see the commentary to those procurement methods below, [**hyperlinks**].)**[5]

35. Paragraphs (3)-(5), however, do not impose absolute obligations. Paragraph (3) sets out a possible range of elements that can constitute the description, and paragraph (4) requires objectivity to the extent practicable, and allows the procuring entity the flexibility of using technical, quality and performance characteristics as the circumstances warrant: the description can be based on what the subject-matter is made up of (input-based) or what it should do (output-based). Where descriptions are input-based, the risk of using brand names or trademarks that will limit access to the procurement is more likely to arise. Hence paragraph (4) continues that such use is permitted only where no other sufficiently precise or intelligible description can be used and then only if the solicitation specifies the salient features of the subject matter being sought, and states specifically that the brand name item "or equivalent" may be offered. The procurement regulations or guidance from the public procurement agency or other body may usefully discuss the extent of the procuring entity's discretion to use brand names in such circumstances, given the potential breadth of this provision. In this regard, the interaction between paragraphs (4) and (5) should be considered; where there is a generally used industry standard (which may be reflected in standardized trade terms), permitting the use of a brand name or a trademark instead of a very long and technical description may improve suppliers' understanding of the procuring entity's needs. However, in such cases, monitoring of the procuring entity's willingness to accept equivalents will be a necessary safeguard, and guidance on how suppliers are to demonstrate equivalence, and objectivity in this regard, will be required.

36. The reference in paragraph (4) to the relevant technical and quality characteristics or the performance characteristics may also cover characteristics relevant to environment protection or other socio-economic policies of the enacting State.[6]

37. In some jurisdictions, practices that require including in any pre-qualification or pre-selection documents and in the solicitation documents a reference source for technical terms used (such as the European Common Procurement Vocabulary **UN equivalent [**hyperlinks**]**)) have proved to be useful, supporting the requirement in paragraph (5) for standardized trade terms.

---

[5] The Working Group may wish to consider how this requirement works in practice in the context of framework agreements. Guidance can also be provided in Chapter VII, with a cross-reference here.

[6] In the Working Group, the suggestion was made that the accompanying Guide text should elaborate on the way the socio-economic factors can be taken into account in setting out the description of the subject matter of the procurement and the terms and conditions of the procurement contract or a framework agreement. The provision of guidance to the Secretariat is requested on the scope of the commentary which might include, for example, a consideration of the use of appropriate and relevant requirements by reference to national standards, to avoid an ad hoc and potential misuse of flexibility in this regard; to the interaction of socio-economic requirements as they may be applied in articles 9, 10 and 11, and the use of transparency mechanisms to ensure objectivity in the process. See, also, the guidance to articles 9 and 11.

Article 11. Rules concerning evaluation criteria and procedures [**hyperlink**]

38. The purpose of the article is to set out the requirements governing the formulation, disclosure and application by the procuring entity of evaluation criteria. The main rules as reflected in paragraphs (1) and (6) of the article are that, with the exceptions related to socio-economic criteria listed in paragraph (3) of the article, all evaluation criteria applied by the procuring entity must relate to the subject matter of the procurement (see paragraph (1)). This requirement is intended to ensure objectivity in the process, and to avoid the misuse of the procedure through invoking criteria intended to favour a particular supplier or contractor or group of suppliers or contractors. The provisions are permissive (they do not set out an exhaustive list of criteria),[7] to allow the procuring entity the flexibility to design the criteria to suit the circumstances of the given procurement. As was described above regarding qualification criteria, the transparency mechanisms that accompany the substantive requirement — that only those evaluation criteria and procedures that are set out in the solicitation documents may be applied in evaluating submissions and determining the successful submission — are designed to allow the objectivity of the process to be evaluated and, where necessary, challenged.[8]

39. The principle in paragraph (1) that evaluation criteria must relate to the subject matter of the procurement is a cornerstone to ensure best value for money and to curb abuse. This principle also assists in differentiating criteria that are to be applied under paragraph (2) of the article from the exceptional criteria that may be applied only in accordance with paragraph (3) of the article, as explained in paragraph … below.

40. Paragraph (2) sets out an illustrative list of evaluation criteria on the understanding that not all evaluation criteria listed would be applicable in all situations and it would not be possible to provide for an exhaustive list of evaluation criteria for all types of procurement, regardless of how broadly they are drafted. The procuring entity can apply evaluation criteria even if they do not fall under the broad categories listed in paragraph (2) as long as the evaluation criteria meet the requirement set out in paragraph (1) of the article — they must relate to the subject matter of the procurement. The enacting State may wish to provide further rules and/or guidance to assist procuring entities in designing appropriate and relevant evaluation criteria.

41. Depending on the circumstances of the given procurement, evaluation criteria may vary from the very straightforward, such as price and closely related criteria (“near-price criteria”, for example, quantities, warranty period or time of delivery) to very complex (including socio-economic considerations, such as characteristics of the subject matter of the procurement that relate to environmental protection). Although ascertaining the successful (responsive) submission on the basis of the price alone provides the greatest objectivity and predictability, in some proceedings

---

[7] The section of the Guide that will explain revisions made to the 1994 text will need to reflect the departure from the approach to provide for the exhaustive list of evaluation criteria in the Model Law (see article 34 (4) of the 1994 Model Law).

[8] The Working Group may wish consider whether this paragraph should be expanded, in particular by providing examples.

the procuring entity cannot select a successful submission purely on the basis of the price factor, or so doing may not be the appropriate course. Accordingly, the Model Law enables the procuring entity to select the "most advantageous submission", i.e., one that is selected on the basis of criteria in addition to price. Paragraph (2)(b) and (c) provides illustrations for such additional criteria. (Other permissible criteria that do not relate to the subject matter of the procurement are to be found in paragraph (3), as further discussed in paragraph … below.)[9]

42. The criteria set out in paragraph (2)(c) (the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel involved in providing the subject matter of the procurement) would be applicable only in request for proposals proceedings. This is because request for proposals proceedings have traditionally been used for procurement of "intellectual type of services" (such as architectural, legal, medical, engineering) where experience, reliability and professional and managerial competence of persons delivering the service is of the essence. It is important to note that these criteria are evaluation criteria and not qualification criteria — while the same types of characteristics may be described as both qualification and evaluation criteria, qualification criteria represent minimum standards. The evaluation criteria describe the advantages that the procuring entity will assess on a competitive basis in awarding the contract.

43. Requiring in paragraph (4) that the non-price criteria must, to the extent practicable, be objective, quantifiable and expressed in monetary terms is aimed at enabling submissions to be evaluated objectively and compared on a common basis. This reduces the scope for arbitrary decisions. The wording "to the extent practicable" has been included in recognition that in some procurement proceedings, such as in the request for proposals with dialogue proceedings (article 49 of the Model Law), expressing all non-price evaluation criteria in monetary terms would not be practicable or appropriate. The enacting State may wish to spell out in the procurement regulations and/or guidance by the public procurement agency or other body how factors are to be quantified in monetary terms where to do so is practicable.

44. A special group of evaluation criteria comprise those set out in paragraph (3). Through them the enacting State pursues its socio-economic policies (see the relevant definition in article 2(n) of the Model Law, the commentary to that article and Section ** of the general commentary above [**hyperlinks**]). Paragraph (3) encompasses two situations: when the procurement regulations or other provisions of law of the enacting State provide for the discretionary power to consider the relevant criteria and when such sources require the procuring entity to do so. These criteria are of general application and are unlikely to be permitted as evaluation criteria under paragraph (2) in that they will ordinarily not relate to the subject matter of the procurement. Examples may include the manner in which the procuring entity may dispose of by-products of a manufacturing process, may offset carbon emissions from the production of the goods or services at issue, on the extent

[9] The Working Group is requested to consider whether the latter part of this paragraph should be revised to allow for a more balanced discussion of quality and price factors. As currently presented, it retains more of the flavour of the "lowest evaluated tender" than the "most advantageous submission".

to which particular groups of society will be employed or be engaged as sub-contractors, and so on. By contrast, the environmental requirements for the production of the subject-matter of the procurement relates to that subject-matter, and can therefore be included as an evaluation criterion under paragraph (2): no authorization under the procurement regulations or other laws is required. The guidance issued by the public procurement agency or other body should direct procuring entities to other relevant laws and rules, so that they are aware of any mandatory socio-economic criteria to be applied and of the extent of their discretion in other socio-economic criteria.

45. The socio-economic criteria are therefore listed separately from the criteria set out in paragraph (2). They will be less objective and more discretionary than those referred to in paragraph (2) (although some of them, such as a margin of preference referred to in paragraph (3)(b), may be quantifiable and expressed in monetary terms as required under paragraph (4) of the article). For these reasons, these criteria should be treated as exceptional, as recognized by the requirement that their application be subject to a distinct requirement — that they must be authorized or required for application under the procurement regulations or other provisions of law of the enacting State.

46. In addition, in the case of margins of preference, the procurement regulations must provide for a method of their calculation. That method of calculation may envisage applying a margin of preference to price or the quality factors alone or to the overall ranking of the submission when applicable; the enacting State will wish to decide how to balance quality considerations and the pursuit of socio-economic policies. The procurement regulations should set out rules concerning the calculation and application of a margin of preference could also establish criteria for identifying a “domestic” supplier or contractor and for qualifying goods as “domestically produced” (e.g., that they contain a minimum domestic content or value added) and fix the amount of the margin of preference, which might be different for different subject-matter of procurement (goods, construction and services).[10] As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the submission prices of all submissions import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting submission prices, other than those that are to benefit from the margin of preference, the amount of the margin of preference or the actual import duty, whichever is less.[11]

47. The use of the criteria of the type envisaged in paragraph (3)(a) and margins of preference referred to in paragraph (3)(b) in evaluating submissions should be considered exceptional given their potential impact on competition and economy in procurement, and reduce confidence in the procurement process (see, further, the discussion in Section ** of the general commentary above [**hyperlink**]). Caution is advisable in providing a broad list of non-price criteria in

---

[10] The Working Group may wish to consider whether references to other texts with similar notions, such as the WTO GPA on offsets, might assist in understanding the scope of these matters.

[11] Further discussion is to be added on: (i) how a margin of preference is generally applied in practice, and the merits and demerits of the possible alternative approaches; and the link between the provisions on margins of preference in subparagraph (b) and those on socio-economic policies in subparagraph (a), and in particular their possible cumulative effect (A/CN.9/713, para. 131). The provision of guidance to the Secretariat is requested.

paragraph (3)(a) or circumstances in which a margin of preference referred in paragraph (3)(b) may be applied, in view of the risk that such other criteria may pose to the objectives of good procurement practice. In specifying such criteria references to broad categories, such as environmental considerations, should be avoided. For example, as already envisaged in paragraph (2)(b) of the article, some environmental considerations, such as the level of carbon emissions of the subject matter of procurement (e.g. cars), are linked to the subject matter of the procurement and the procuring entity could therefore consider them under paragraph (2)(b) even through such considerations may not be specifically authorized or required to be taken into account under procurement regulations or other provisions of law of the enacting State. When however they are not so linked, they could still be considered but under the conditions of paragraph (3) of the article. The procurement regulations or other rules or guidance from the public procurement agency or similar body should not only provide for the criteria but also regulate or guide how the criteria under paragraph (3) should be applied in individual procurements to ensure that they are applied in an objective and transparent manner.

48. As with any other evaluation criteria, the use of any criteria in accordance with paragraph (3)(a) or the margin of preference in accordance with paragraph (3)(b) and the manner of their application are required to be pre-disclosed in the solicitation documents under paragraphs (5) and (6) of the article. In addition, the use of any socio-economic criterion or margins of preference is to be reflected in the record of the procurement proceedings together with the manner in which they were applied (see article 25(1)(i) and (t)). These transparency provisions are essential to allow the appropriate use of the flexibility conferred in these articles to be evaluated; another benefit is that the overall costs of pursuing socio-economic considerations can potentially be compared with their benefits. (See paragraph … of Part I of the Guide concerning the reasons for using a margin of preference as a technique for achieving national economic objectives while still preserving competition. See further paragraphs … of Part I of the Guide on restrictions imposed by some international and regional treaties on States parties to such treaties as regards application of socio-economic criteria in the procurement proceedings, in particular with the aim to accord preferential treatment.)

49. Paragraph (5) sets out information about the evaluation criteria and procedures that must be specified, at a minimum, in the solicitation documents. This minimum information comprises: (i) the basis for selecting the successful submission (the lowest priced submission (where the award is to the lowest priced submission) or the most advantageous submission (where price in combination with other criteria are to be evaluated in selecting the successful submission)); (ii) the evaluation criteria themselves; and (iii) the manner of application of each criterion, including a relative weight given to each criterion, or where that is not possible or relevant (such as in request for proposals with dialogue proceedings under article 49 where it is often not possible to establish the relative weight of evaluation criteria at the outset of the procurement), descending order of importance of the evaluation criteria. This provision is intended to ensure full transparency, so that suppliers or contractors will be able to see how their submissions will be evaluated. A basket of non-price criteria will normally include some quantifiable and objective criteria (such as maintenance costs) and some subjective elements (for example, the relative value that the procuring entity places on speedy delivery or green production lines),

amalgamated into an overall quality ranking. Thus for procurement not involving negotiations, the procuring entity has to disclose both how the non-price basket factors will weigh, and how the basket will weigh against price. The importance of setting out the appropriate level of detail of the evaluation criteria is reiterated by the corresponding provisions in the articles regulating the contents of solicitation documents in the context of each procurement method (see articles 39, 47 and 49).