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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 528th MEETING

Held at Headquarters, New York,
on Monday, 6 June 1994, at 10 a.m.

Chairman: Mr. MORÁN (Spain)

CONTENTS

The meeting was called to order at 10.10 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

Draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (continued)

Article 41 sexies (continued)

1. Mr. WALLACE (United States of America) said that his delegation was generally satisfied with the wording of article 41 sexies, but believed that it might be useful to add subheadings to indicate the diversity of selection procedures and facilitate the reading of what was a complex article. It might also be advisable to specify in paragraph 1 (c) that the impartial panel of experts had only an advisory role. In paragraph 4, the concepts of "threshold" and "rating" should also be clarified.

2. Mr. UEMURA (Japan) said that the Commission should consider the possibility of providing for tender securities.

3. Mr. CHOUKRI SBAI (Morocco), returning to article 41 bis, paragraph 3, proposed adding a paragraph, which he read out.

4. The CHAIRMAN recalled that the Commission had already considered that point and said that since the proposed wording was very close to the current text, he would refer the proposal to the drafting group.

5. Mr. LEVY (Canada), returning to article 41 sexies, said that he, too, was concerned that the article was too complex and wished to make it easier to read, for example, by adding subheadings for paragraphs 2, 3 and 4. He suggested also inserting a footnote at the beginning of the draft Model Law, specifying that in addition to the two main methods for the procurement of services, the Model Law proposed several other methods which States had the option of not including in their legislation. The footnote could make a reference to the Guide to Enactment.

6. The CHAIRMAN said that at some point it would be necessary to reconsider the format of the draft Model Law, particularly with regard to the insertion of footnotes. He pointed out that paragraphs 2, 3 and 4 of article 41 sexies corresponded to the three main selection procedures: without negotiations, with simultaneous negotiations and with consecutive negotiations.

7. Mr. WALSER (Observer for the World Bank) said that paragraphs 2 and 4 accurately reflected the selection methods generally used by procuring entities in procuring consultancy services, with paragraph 2 describing the procedure in which price was a main criterion for evaluating offers, and paragraph 4 the procedure in which price was not a deciding factor. If subheadings were inserted they could note that distinction. Paragraph 3 should be deleted, since the procedure it described was not used in practice; paragraph 3 (d) was particularly vague. Responding to the comment made by the representative of Japan, he said that there were generally no tender securities in the procurement

of consultancy services, and the World Bank always recommended that government should not require them. Lastly, the Bank was not in favour of the margin of preference provided for in article 41 quater and believed it was dangerous to include that concept in the Model Law.

8. Mr. LOBSIGER (Observer for Switzerland) said that the Commission should specify the duties and authority of the panel of experts referred to in paragraph 1 (c) of article 41 sexies. Panels played a purely advisory role and gave opinions only on the aesthetic, artistic or technical aspects of a project; it was up to the procuring entity to supervise the panel's activities, and it alone made the decision to award a contract. If the Commission wished to add a clarification regarding the panel's advisory role, it could do so in the Guide to Enactment. The provisions, however, should be kept flexible in order to reflect the different practices in use. On the other hand, it would be useful to spell out the procuring entity's responsibility as the State authority in supervising the application of the general principles enunciated in the preamble of the Model Law.

9. The CHAIRMAN said it seemed clear from article 41 sexies that the panel of experts had only an advisory role.

10. Mr. TUVAYANOND (Thailand) said that, given the length and complexity of the article, his delegation was not opposed to clarifying it in footnotes or in the Guide to Enactment so that Governments could find their way through the provisions. Unlike some, he did not believe that paragraph 3 should be deleted. While it might not be of interest to the developed countries, it was of particular interest to the developing countries, who often used the services of consultants in certain highly technical fields, such as nuclear energy. Thailand itself used the method described in that paragraph. Moreover, it was unacceptable to delete an entire paragraph, since one of the purposes of the Model Law was to harmonize legislation in order to promote international trade. Perhaps it could be stated in a footnote or in the Guide that the fact that several methods were being proposed was meant to reflect the practices used in various countries. Finally, if the idea of using paragraph headings was accepted, it should be applied uniformly so that all paragraphs had headings.

11. Mr. CHATURVEDI (India) said that article 41 sexies was detailed, unduly complicated and led to confusion. It would be better to reduce it to one or two paragraphs. If, however, it was decided to retain the text as it stood, subheadings should be inserted. The proposal to insert a footnote explaining the various selection procedures should be retained, but such explanations should appear in the Model Law, not in the Guide to Enactment. The establishment of a threshold referred to in paragraph 2 was not feasible for developing countries. Paragraph 3 (a) was also impracticable, particularly in the case of services. In fact, the procuring entity was not usually prepared to negotiate with suppliers or contractors which had submitted proposals that came close to meeting the requirements it had set, and one could not require it to negotiate with "all" of them. Paragraph 3 (c) should be deleted, since price considerations could not be dissociated from technical evaluations.

12. Mr. WALLACE (United States of America) endorsed the proposal made by Canada and supported by Thailand and India to insert a footnote or commentary in the Guide to Enactment, particularly if the proposal to place chapter IV bis after chapter III, which dealt with tendering proceedings, and before chapter IV, which dealt with other methods, was adopted. Paragraph 3 of article 41 sexies should be retained. It dealt not only with consultancy services but also with other categories of services which Governments might use. That was particularly important since the paragraph was subject to all the securities provided for in articles 41 bis to 41 quinquies. With regard to the comment by the observer for the World Bank concerning the margin of preference provided for in article 41 quater, in which he had expressed a concern shared by other delegations, it would be recalled that the Commission had decided to provide such explanations in the Guide to Enactment.

13. The representative of India had asked whether the procuring entity had to consult with all suppliers and contractors. While it was true that provision had been made for a threshold, it was perhaps necessary to go back to article 41 bis and add a fifth paragraph stipulating that in cases where notification was not required and where only direct solicitation or selection could be used, or in cases where a notice had been published and where several suppliers and contractors had responded, the entity was not obligated to consult other suppliers or contractors. Under the terms of paragraphs 2 and 3 of article 41 bis, the procuring entity was authorized to limit the number of suppliers and contractors from whom it solicited technical proposals.

14. Mr. WALSER (Observer for the World Bank) noted that some delegations thought that the panel of experts provided for in paragraph 1 (c) would evaluate only the artistic or aesthetic aspects of proposals submitted. In the view of the World Bank, chapter IV bis dealt primarily with consultancy services, and in order to evaluate proposals involving those services, a panel was essential. In fact, an objective and mathematical evaluation was impossible in such cases. A whole range of criteria was involved, including the experience of the company and its personnel, their knowledge of local conditions, and previous projects, and only a panel of experts could evaluate the technical merits of each proposal in the light of those criteria. It was evident that the experts did not make any decisions. Whether price considerations played a role or not, it was up to the procuring entity to decide to whom it would award the contract and with whom it would negotiate. In many cases it was impossible to function without such a panel, which offered the sole means of evaluating proposals.

15. Mr. LEVY (Canada) suggested that article 41 sexies should be divided into four separate articles whose titles would indicate the method of selection dealt with in each one. The title of article 41 sexies would remain "Selection procedures" and the following articles - paragraphs 2, 3 and 4 - might be called, for example, "Selection with establishment of a threshold level", "Selection with negotiations" and "Selection with a threshold level and negotiations". He agreed with the proposal made by the representative of the United States of America to place chapter IV bis after chapter III, which dealt with tendering proceedings, and before chapter IV, which dealt with other methods.

16. Mr. CHOUKRI SBAI (Morocco) said that the selection of an impartial panel of experts was certainly not required of the procuring entity. The text of the Model Law should make it clear that the procuring entity would have the final say. Since using a "group" of experts could prove very expensive, as Morocco had learned by experience, it was important to give the procuring entity complete freedom of choice. It must have the freedom to request the opinion of a single expert.

17. Mr. MELAIN (France) said it was clear from the text as drafted that the possibility of using a group of experts or an independent panel represented a choice and not an obligation for the procuring entity. It was nevertheless important to stress the experts' independence and impartiality, particularly in relation to the competition itself. It was obviously essential that the experts should have no direct relationship to the competing suppliers.

18. Mr. TUVAYANOND (Thailand) said that his delegation could accept paragraph 1 of article 41 sexies as it stood but wondered whether paragraph 1 (c) could not be deleted, since it went without saying that the procuring entity could resort to a group of experts.

19. Mr. CHATURVEDI (India) said that, on the contrary, paragraph 1 (c) was appropriate and should not be modified. The paragraph set out one of the options available to the procuring entity. Moreover, when speaking about the use of outside bodies to obtain an opinion, it was important to bear in mind the point made by the representative of Morocco regarding the cost of groups of consultants. In paragraph 1 (a), the phrase "that has been notified to suppliers or contractors in the request for proposals" was somewhat problematic, for it was usually impossible to indicate in a request for proposals which procedure would be adopted since it was not known at the outset whether there would be any negotiations and which of the methods specified in paragraphs 2, 3 and 4 would be used. He also agreed with the United States proposal to limit the choice of suppliers in article 41 bis.

20. Mr. WALLACE (United States of America) said that paragraph 1 (c) was justified since it dealt with a panel of experts that came from outside the procuring entity and not from one of its own offices that normally evaluated tenders. In the present case, judgements would be based on criteria other than the lowest price, the criterion normally used by the procuring entity, which was important when the transaction had an artistic or aesthetic component. Naturally, the two were not mutually exclusive, and it was possible to use both the procuring entity's own staff and an external panel of experts.

21. Mr. WALSER (Observer for the World Bank) thanked the representative of the United States of America for his explanation and said that since he had been unable to participate in the previous session of the Working Group, it had been his understanding that paragraph 1 (c) referred to the internal group of experts in any ministry whose purpose was to evaluate suppliers' proposals in terms of their technical quality. He therefore felt that if paragraph 1 (c) referred to an external panel, that paragraph and paragraphs 2 and 4 must specifically say so.

22. Mr. CHATURVEDI (India), citing the various titles which the representative of Canada had proposed for the different paragraphs of article 41 sexies, pointed out that the procedures in question were linked: for example, once a threshold had been established, negotiations could not be excluded. It was therefore impossible to indicate at the outset which method would be used, as was stated in paragraph 1 (a).

23. Mr. LOBSIGER (Observer for Switzerland), replying to the question raised by the representative of Thailand as to why the provision dealing with panels of experts had been included in paragraph 1 of article 41 sexies, pointed out that while paragraph 1 (a) set forth the principle that the three selection methods were exclusive, paragraph 1 (c) nevertheless sought to indicate that that exclusivity did not prevent the procuring entity from resorting to a panel of experts. It was perhaps unfortunate that the logical connection between paragraphs 1 (a) and 1 (c) had been broken.

24. The CHAIRMAN said that the Commission had concluded its consideration of paragraph 1 and suggested that the Working Group should attempt to clarify the rule set out in paragraph 1 (c). The view expressed by the representative of India was not shared by other delegations, since the current wording of paragraph 1 (c) seemed generally acceptable.

25. Mr. CHATURVEDI (India) proposed that paragraph 1 (c) should be left unchanged.

The meeting was suspended at 11.45 a.m. and resumed at 12.10 p.m.

Paragraph 2

26. The CHAIRMAN said that, as proposed, the Working Group would consider the possibility of making paragraphs 2, 3 and 4 separate articles and giving each an appropriate heading.

27. Mr. FRIS (United States of America), said that, with regard to the threshold concept used in paragraph 2, the practice for evaluating the technical merits of proposals could vary from country to country and from organization to organization. He believed that the expression "establish a threshold level" derived from the practice of the World Bank and other organizations which was to establish, at the time the request for proposal was made, a quantitative norm on the basis of which the proposals would be evaluated. Other countries, including the United States of America, did not specify a threshold level in the solicitation documents, since it was understood that the technical merits of proposals would be evaluated in order to rank them. It would be useful to refer in the Guide to Enactment to practices other than those described in paragraph 2.

28. Mr. WESTPHAL (Germany), supporting the remarks made by the preceding speaker, said that Germany did not use the threshold method, but that the rest of the procedure described in paragraph 2 (a) was widely used. It seemed excessive to require the procuring entity to establish a threshold level and he did not feel that it would be useful to do so in the Model Law. However, if the

Commission wished to retain the threshold concept, it should make it clearer, for example by adding a sentence to the text.

29. Mr. CHATURVEDI (India) said that, after listening to the representatives of the United States of America and Germany, his doubts regarding the value of paragraph 2 and subparagraph (a) had increased. Moreover, the paragraph was of no value for developing countries. He therefore suggested that it should be deleted.

30. Mr. WALSER (Observer for the World Bank) said he thought it was essential to provide for a threshold level in paragraph 2, although he did not care what term was used. For example, reference could be made to "minimum technical requirements", or other wording could be found. It was less important to provide for a threshold level in paragraph 4 that could be used to determine the best proposal from the technical standpoint so that the price could then be negotiated with the author. However, a threshold level was absolutely necessary in paragraph 2 (b) (ii), in order to ensure that proposals that were mediocre from the technical standpoint were not selected on the basis of price alone. That precaution, which was particularly important for developing countries, offered the best guarantee in selecting qualified consultants.

31. The CHAIRMAN said that the Commission seemed to be in favour of retaining paragraph 2 as it stood; the Working Group ought to be able to find wording that would clarify the idea contained in the paragraph.

32. Mr. AL-NASSER (Saudi Arabia) said that his delegation had already expressed reservations at the previous session about the provision under consideration. The concept of a threshold level was not used in procurement proceedings in Saudi Arabia. In any event his delegation would see what the drafting group did with that provision before taking a final position.

33. Mr. CHATURVEDI (India) said that the words "as set out in the request for proposals" in paragraph 2 (a) should be deleted and the rest of the paragraph reworded.

34. Mr. JAMES (United Kingdom) said that those words referred to the criteria set out in article 41 quater, which the Commission had already considered. While there was some merit in the argument put forward by the representatives of Germany and the United States of America that it was not always possible to establish a threshold level or a range in a request for proposals, it was necessary to include in a request the criteria referred to in article 41 quater. It seemed that the Commission felt that reference to a threshold level was sufficient and that the concept could be developed in the Guide to Enactment rather than in the text of the Model Law itself.

35. Mr. WALSER (Observer for the World Bank) said it was essential that the threshold level should be indicated in the request for proposals, since that was the line which separated the suppliers who were selected from the rest. In the absence of a threshold level, the latter might feel that they were the victims of an injustice. That concept must therefore be preserved in the interests of transparency and free competition.

36. Mr. YOUSIF (Sudan) said that in the article under consideration and in the rest of the text, the Arabic translation of the word "proposal" was incorrect. He requested the Secretariat to take the necessary steps to correct the translation.

37. Mr. SHIMIZU (Japan), reverting to the question of tender securities, requested the representative of the World Bank to explain why such securities were not desirable for the procurement of consultancy services.

Paragraph 3

38. Mr. FRIS (United States of America) said that he felt that the observer from the World Bank was using the term "consultancy services" in a very broad sense, applying it to all services that would not be covered by tendering proceedings. However, there could be justification, in some cases, for having tender securities.

39. He had two comments about the last sentence of paragraph 3 (a). First, where it stated that all suppliers or contractors that had submitted proposals should have an opportunity to participate in the negotiations, no reference was made to proposals that had not been solicited but had been submitted by suppliers who had heard about the procurement procedures and wished to participate in them. That situation was not really covered in the provision. Second, in the reference to proposals which "have not been rejected", there was no indication as to what criteria were applied to select or reject such proposals. It should be specified whether the concept of a threshold level in paragraph 2 applied also in paragraph 3.

40. As to subparagraph (c), even if one did not like the procedure described in paragraph 3, one had to recognize that it was widely used, a fortiori if services were defined very broadly. Clearly, factors other than price should be separated from price; that was what was referred to in practice as the two-envelope method, with one envelope for technical aspects and the other for price. If that was what was meant, subparagraph (c) was sufficient, but that should perhaps be made clear in the request for proposals and, consequently, specified in article 41 ter.

41. Mr. JAMES (United Kingdom) said that paragraph 3 should be retained, since otherwise the procuring entity would have to resort to the method of competitive negotiations, which was even less structured. The method envisaged in paragraph 3 was widely used by States, particularly developing countries, and could not be disregarded when drawing up a model law.

42. With regard to the observation made by the United States representative, the Working Group had taken up the question, as could be seen from paragraph 79 of its report (A/CN.9/392). The Working Group had felt that the words "have not been rejected" were of value. Strictly speaking, they did not imply a threshold level in the sense that the term was used in paragraphs 2 and 4, but rather the procuring entity's ability to reject proposals which were clearly inadequate before beginning negotiations. That was perhaps not clear from the text, but if the Commission accepted the principle, the drafting group could try to develop more explicit wording.

43. The question of the envelope system had also been considered in the Working Group. It seemed that it was not desirable to include that method, which had developed in practice, in the Model Law itself. It would be preferable to leave the text as it stood but to provide explanations in the Guide to Enactment.

44. Mr. TUVAYANOND (Thailand) said that, with regard to the words "have not been rejected" at the end of subparagraph (a), the rejection of proposals was not arbitrary; there were criteria which applied. It was simply a matter of enabling the procuring entity to reject proposals that were clearly inadequate or came from unqualified contractors. As to the question of the two-envelope method, he supported the comments made by the representative of the United Kingdom and agreed that the term should not be taken literally and ought not to be included in the Model Law itself. Subparagraph (c) was acceptable as it stood.

45. Mr. CHATURVEDI (India) suggested that subparagraphs (b) and (c) should be deleted. Subparagraph (b) was unnecessary because the procuring entity which negotiated the procurement of services should not have to negotiate with "all" suppliers or ask them for their "best and final offer". As to subparagraph (c), it did not take into account the fact that it was not always possible to separate the price of an offer completely from its technical aspects.

46. Mr. WALSER (Observer for the World Bank) agreed with the representative of the United States of America that chapter IV bis concerned all services for which a tendering procedure was impossible. As to the words "have not been rejected" at the end of paragraph 3 (a), they were necessary and referred to the threshold principle set out in paragraphs 2 and 4. In any event, that was how he understood them.

47. With regard to the two-envelope system, it was not the term that mattered; however, the World Bank felt that, when price was a criterion, the procuring entity should not know the price when it was considering the technical aspects of proposals, so as not to be influenced by it. It must therefore be indicated very clearly in paragraph 3 that the price should not be known until the technical evaluation was completed. That was not necessary in paragraph 4 since, according to the method provided for in that paragraph, the evaluation would be made first on strictly technical grounds, after which the procuring entity would engage in negotiations on price. If paragraph 3 was retained - and the World Bank felt that it should not be - the price should be submitted with the "best and final offer" so as to maintain a certain degree of transparency in a method which was in any case complex, perhaps even dangerous.

48. Mr. LEVY (Canada) endorsed the comments made by the representative of the United Kingdom regarding paragraph 3; if the drafting group reworded subparagraph (a) it might wish to consider the following wording:

"Where the procuring entity uses the procedure provided for in this paragraph, it shall engage in negotiations with suppliers or contractors that have submitted acceptable proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all such suppliers or contractors."

The meeting rose at 1.05 p.m.