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MODEL LAW ON PROCUREMENT

Compilation of Comments by Governments

Canada

The Government of Canada believes that the draft Model Law on Procurement, as adopted by the UNCITRAL Working Group on the New International Economic Order at its 15th session, is generally of a high order of quality and represents a fair and reasonable balance between the interests of procurement entities and those of contractors and suppliers. It would also promote transparency in the bidding process.

Nevertheless, the Government of Canada also believes that, in failing to provide for the fullest possible use of electronic data interchange in the procurement process, the draft Model Law in its present form, if enacted as domestic law, would constitute a step backwards technologically for many States. This will reduce its attractiveness as a legislative model for those States. Canada has expressed this view consistently during the sessions of the Working Group on the New International Economic Order and it has been reiterated in the written comments we have received during our wide consultations on the draft Model Law, as adopted by the Working group. In view of the fact that UNCITRAL is currently engaged in the preparation of the legal rules on Electronic Data Interchange (EDI), the restrictive approach in the draft Model Law is doubly unfortunate.

Based as well on our consultations, Canada also believes that there is some room for improvement of the draft Model Law and offers the following comments on the English language version of the document with the aim of making it more acceptable to States for enactment as domestic legislation.

Article 2(c) An example where the definition of "goods" may cause a problem is the acquisition of printing. In Canada, in many provinces it is considered a service, but in others it is considered a good. It is not clear whether some things might be considered to be a good or a service in various States. The Working Group expanded the definition to include electricity. The definition could be further modified to provide an option for specific inclusion by States of some things and specific exclusion of others. This would add transparency and could lessen the possibility of disputes.

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Article 2(e) The use of the expression "supplier or contractor" throughout the draft Model Law seems to be tautological because there does not appear to be any difference between a supplier and a contractor in this context. Both words refer to the same person. In fact, neither word is really appropriate in the prequalification or even in the tendering process because such persons have not yet become suppliers or contractors; they are applicants for prequalification or tenderers or bidders. The definition in article 2(e) attempts to circumvent the problem by including "any potential party". The document might be improved somewhat by referring throughout to a "supplier" and redefining that term to include, according to the context, the persons it is intended to cover.

Article 6(2)(d) Change the words "this State" at the end to "any State" because a failure to fulfil such obligations in another place may well be of concern to a State considering entering into contractual relations with someone who will perform work in the State. Admittedly, it may not be easy to obtain this information, but at least, the opportunity to use the information is there, if it is known.

Article 6(2)(e) After "years" add "or while a sentence is being served for the offence, whichever is the greater" so as to avoid the anomalous situation of qualifying a firm while its principal or principals are incarcerated for an offence referred to in the paragraph.

Article 6(6); also 7(8) Change the words "false or inaccurate" to "false, inaccurate or incomplete".

Article 6(7) The words "proposals or offers" after the word "tenders" in the penultimate line have somehow been deleted and should be reinserted.

Article 7(1) There is a structural problem with regard to the placement of articles 11 and 12, which will be explained later. This also affects article 7(1). To rectify, delete the words "the submission of tenders, proposals or offers" before the words "procurement proceedings" and replace with the words "engaging in".

Article 7(3) This provision imports article 19(1)(j) and would require the procuring entity to specify the place and deadline for the submission of tenders in the prequalification documents. The procuring entity may not always be in a position to provide this information at this stage. It is not apparent why this requirement is present. Therefore add paragraph (j) to the article 19 exceptions.

Article 7(4) It is not common practice by procurement entities to provide details of all clarifications to all parties during the prequalification process although this is done during the bidding process. As drafted, the provision precludes any discretion by the procurement entity and could result in unnecessary and possibly costly communication of information. Change the word "shall" at the beginning of the penultimate line to "may" so that the requirement is not mandatory.

Article 7(5) The decision is based on the criteria and on the information submitted by the applicant for prequalification. This is not correctly reflected in the last sentence, which should be amended to read, "In reaching that decision, the procuring entity shall use only those criteria that are set forth in the prequalification documents."

Article 7(8) See the comment on article 6(6), which also applies to this article. In any event, the words "and may disqualify...if it finds at any time... that the information submitted was false or inaccurate" overlap with and repeat the power in article 6(6) and are unnecessary and could be deleted.

Article 8 This article in effect gives national treatment to foreign firms, subject only to the procurement regulations or other provisions of law. There seems to be no cogent reason why a State would enter into agreements such as the GATT, the Canada-United States Free Trade Agreement or the North American Free Trade Agreement while at the same time giving generally free and open access to procurement to all foreign nationals. While recognizing that a reciprocity provision could be contained in regulations, it would be more transparent and therefore more certain if article 8 were recast and based on reciprocity by referring to participation by suppliers from States that have adopted the Model Law.

Article 9 (in general) This article addresses the form of communication and not the time at which any such communication is deemed to be effective and it is therefore not satisfactory as a notice provision. As drafted, the Model Law seems to address this issue only within the context of article 32(4). A general rule should be agreed on and inserted, eg. when the notice is dispatched, if sent by EDI or fax, when it is received, if sent by mail or it could be left open as an option for the enacting State.

Article 9 (1) As indicated at the outset, the draft Model Law does not adequately respond to the needs of States that utilize electronic data interchange extensively in the procurement process. There are a number of such provisions in the document. The authority in article 9(1) to use EDI is made subject to such provisions. In order to commend itself to States that use EDI, article 9(1) should be amended to provide an option to make such provisions subject to this article so that States that use EDI could continue to do so while others would be free to continue to use paper if they so wish.

Article 11 and 12 There is a structural drafting problem because these articles refer to tenders, proposals and offers in the context of records and of inducements, but those types of procurement have not been described or even referred to in previous articles. There is therefore no logical structural foundation for the references in these two articles. The draft could be improved by placing articles 11 and 12 after article 16.

Article 11(1) There are jurisdictions where a central procuring entity does the procuring on behalf of client departments, which prepare the records. To accommodate all situations, change "shall prepare" to "shall maintain".

Article 11(1)(k) For consistency with the rest of the document, this provision should refer to "grounds and circumstances", not just to "grounds".

Article 11(3) It is not the normal practice of some procurement entities to automatically produce all this information for inspection, but rather to discuss with a particular bidder, if he inquires on a debriefing, why his bid was deficient or otherwise unsuccessful. Also, the information can be produced upon a specific application under access to information legislation. It is suggested that the words "for inspection by" in the second line be deleted and replaced by the word "to" so that the article will provide for availability without indicating the mode.

Article 12 As worded at present, this article does not catch bribes, commissions or other inducements that are offered through an agent. To correct this omission, insert the expression "directly or indirectly" in the third line after the words "submitted it". Insert the words "State or the" before the words "procuring entity" in the fourth line so as to cover other persons in a position to exercise influence on the procurement process.

Article 17(b) The reference to the "low amount or value" is not entirely clear. The expression of the idea might be improved by referring instead to the "small quantity or low monetary value".

Article 18(2) The requirement to publish invitations to tender or to prequalify in a newspaper or trade publication or technical journal of wide international circulation could cause significant difficulties and expense for procurement entities in some States unless electronic means could be used instead. This is just one of the problems with article 9, as drafted at present.

Article 19(10(b) or (c) The place of delivery of the goods should be stated in the invitation to tender.

Article 25(5) The Working Group agreed to add the word "single" before the words "sealed envelope" (para. 125 of the Report) and this decision is not reflected in the draft. However, there is a more serious problem for some States in that, as drafted, this provision does not permit electronic tendering. See the comments on article 9 with respect to EDI.

Article 26(1) The phrase "in effect" is somewhat ambiguous and should be replaced by the more specific phrase "open for acceptance".

Article 26(3) As drafted, this provision is contrary to the law and contracting practices as found in Canada and some other common law jurisdictions, a point the Canadian delegation made at the Working Group when it suggested that this article should be deleted. The law in Canada is that absent other specific terms and conditions, a contract is brought into being automatically upon the submission of a tender in response to a tender call. Article 26(3), in its present form, would change this in a way that many procurement entities would likely find disruptive and confusing. It is therefore suggested that the article be modified to permit the solicitation documents to state when, if at all, a bidder can withdraw his tender without forfeiting his tender security.

Article 29(1)(b) This provision places too strong an onus on a procurement entity because it could subject it to a post mortem on whether or not an error was or was not apparent on the face of a tender. The provision should be changed to provide either that the procurement entity "may correct", instead of "shall correct" or else that the procurement entity "shall correct...errors that it may discover on the face of a tender".

Article 32(3) It is assumed that the purpose of the last sentence is to provide that a failure by the procuring entity to obtain the necessary approvals within the specified time will not automatically extend the period of effectiveness of the tender or the tender security although the bidder may wish to do so. As the provision is drafted, this is not entirely clear. The provision should be amended by inserting the word "automatically" before the word "extend" at the beginning of the third last line of the last sentence.

Article 38 to 43 These provisions on review are optional. Having regard to the fact that Canada has well-developed systems of administrative law, federally and provincially (both common and civil law), it is not likely that these provisions would be adopted as such by any Canadian jurisdiction. Therefore, it would not be appropriate for Canada to comment on them.

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