United Nations A/CN.9/590

General Assembly

Distr.: General
18 November 2005

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Report of Working Group I (Procurement) on the work of its eighth session

(Vienna, 7-11 November 2005)

Contents

V.05-90125 (E) 221205 231205

I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the "Commission") entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh session (New York, 4-8 April 2005) (A/CN.9/575), the Working Group started in-depth consideration of the use of electronic communications and technologies in the procurement process, being: (a) electronic publication and communication of procurement-related information; (b) the use of and controls over electronic means of communication in the procurement process and the electronic submission of tenders; (c) electronic reverse auctions; and (d) abnormally low tenders (A/CN.9/WG.I/WP.34 and Add.1-2, A/CN.9/WG.I/WP.35 and Add.1 and A/CN.9/WG.I/WP.36). The Working Group decided to accommodate the use of electronic communications and technologies (including electronic reverse auctions) as well as the investigation of abnormally low tenders in the Model Law and to continue at its eighth session the in-depth consideration of those topics and consequential revisions to the Model Law, on the basis of drafting materials that the Secretariat would prepare (A/CN.9/575, para. 9).

3. At its thirty-eighth session, in 2005, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172).

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its eighth session in Vienna from 7 to 11 November 2005. The session was attended by representatives of the following States members of the Working Group: Algeria, Brazil, Cameroon, Canada, China, Colombia, Czech Republic, France, Germany, Iran (Islamic Republic of), Italy, Jordan, Lithuania, Mexico, Morocco, Nigeria, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Thailand, Tunisia, Turkey, Uganda, United States of America, Venezuela and Zimbabwe.

5. The session was attended by observers from the following States: Democratic Republic of the Congo, Greece, Haiti, Indonesia, Iraq, Ireland, Oman, Peru, Philippines and Romania. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: Food and Agriculture Organization of the United Nations (FAO), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Secretariat and World Bank;

(b) *Intergovernmental organizations*: African Development Bank, European Commission and European Space Agency (ESA);

(c) *International non-governmental organizations invited by the Commission*: International Bar Association (IBA), International Development Law Organization (IDLO) and the European Law Students' Association (ELSA).

6. The Working Group elected the following officers:

Chairman: Mr. Stephen R. KARANGIZI (Uganda)

Acting Chairman: Mr. Olawale MAIYEGUN (Nigeria)
(*Friday afternoon session, 11 November 2005*)

Rapporteur: Mr. Gonzalo SUÁREZ BELTRÁN (Colombia)

7. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.37 and Corr.1);

(b) A note concerning the use of electronic communications in the procurement process, including drafting materials (A/CN.9/WG.I/WP.38 and Add.1);

(c) A note concerning electronic publication of procurement-related information, including a comparative study and drafting materials (A/CN.9/WG.I/WP.39 and Add.1); and

(d) A note concerning electronic reverse auctions and abnormally low tenders, including drafting materials (A/CN.9/WG.I/WP.40 and Add.1).

8. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

III. Deliberations and decisions

9. At its eighth session, the Working Group continued its work on proposals for the revision of the Model Law. The Working Group used the notes by the Secretariat referred to in paragraph 7 above (A/CN.9/WG.I/WP.38, 39 and 40 and their addenda) as a basis for its deliberations.

10. The Working Group agreed that the consideration at its ninth session would focus on the following aspects: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use, such as "accessibility standards", and the related principle of "functional equivalence" of all means of

communication; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; (c) electronic reverse auctions, including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered and their procedural aspects; and (d) abnormally low tenders, including their early identification in the procurement process and the prevention of negative consequences of such tenders. The Secretariat was requested to present revised drafting materials on these topics for consideration by the Working Group at its next session and to undertake a study on the following practical aspects of the functioning of electronic reverse auctions: (i) pre-qualification, qualification and ranking of bidders in the context of Model 2 electronic reverse auctions (see para. 85 below) and (ii) the use of tender securities in the context of electronic reverse auctions (see para. 100 below). The Working Group decided to take up the topics of framework agreements and suppliers' lists at its next session, time permitting.

11. On Friday morning, the Secretariat summarized its understanding of the changes required to be made to the drafting materials that were before the Working Group at its current session. The Working Group also heard presentations by the Secretariat on the progress made in the preparation of studies on the topics of framework agreements and suppliers' lists, to be submitted for the consideration by the Working Group at its next session. Some delegates shared information on the experience in their respective jurisdictions with framework agreements and suppliers' lists.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. Scope and extent of revisions of the Model Law and the Guide to Enactment (A/CN.9/WG.I/WP.38, paras. 4-23)

12. The Working Group considered the scope and extent of its revisions to the Model Law and the Guide to Enactment.

13. The Working Group acknowledged the importance of appropriate procurement planning and contract administration for overall effective functioning of procurement and fulfilling the objectives of the Model Law. Some delegations considered that the current scope of the Model Law, which covered the phase of the selection of a successful supplier or contractor only, should be broadened to address the procurement planning and contract administration phases (A/CN.9/WG.I/WP.38, paras. 12 and 13). The general view in the Working Group, however, was that the scope of the Model Law in that respect should remain unchanged and that it would be more appropriate for paragraph 10 of the Guide to be expanded as regards good practice in procurement planning and contract administration. On the other hand, some support was expressed for formulating at least minimum general principles applicable to those additional phases in the Model Law itself. The Working Group, recognizing the broader context in which that issue should be considered, decided to

address the issue further at a later stage, in conjunction with revisions to relevant articles of the Model Law.

14. As regards the scope and nature of the revised Guide to Enactment (A/CN.9/WG.I/WP.38, paras. 9-11 and 19-23), the Working Group agreed to defer the consideration of those issues until after reviewing the Model Law in its entirety. Such an approach, it was said, was necessary taking into consideration the interplay between various provisions of the Model Law and the Guide, to ensure the appropriate content and level of detail, and to avoid unnecessary repetition in the Guide.

15. Some support was expressed for the suggestion that the Guide should provide greater detail of matters to be addressed in regulations or even draft regulations themselves, especially in the light of the value that such regulations could have for harmonization of procurement law (A/CN.9/WG.I/WP.38, para. 9). On the other hand, the view was expressed that the harmonization of procurement regulations should be facilitative and should not remove all flexibility from enacting States, and the regulations themselves should not be overly prescriptive.

16. The view was reiterated that revisions to the Model Law and the Guide addressing the use of electronic means of communication and publication in public procurement should be drafted with the objective of enabling and, where appropriate, promoting such use without, however, discriminating against the use of other means, such as paper-based ones, in the procurement process.

B. Drafting suggestions

1. General introductory remarks in the Guide to Enactment on the use of electronic communications in procurement (A/CN.9/WG.I/WP.38, Chapter II, section B, subsection 2 (b))

17. The Working Group agreed to introduce the following amendments to the text: (i) delete the words “other socio-economic” in paragraph 3; (ii) replace the words “where possible” with the words “where appropriate” in paragraph 4; and (iii) redraft paragraphs 6 and 13 in a positive tone, stressing the need for States that would choose to enact the revised Model Law to adopt general electronic commerce legislation that provided for the legal recognition, validity and enforceability of electronic communications generated in the procurement process.

18. Views varied as regards the need for the text of articles 5, 6 and 8 of the UNCITRAL Model Law on Electronic Commerce (A/51/17, annex I) to be quoted in paragraph 9. Some delegations were of the view that the full quotation of the text of the relevant articles was justified to ensure that the revised Model Law with its Guide to Enactment could be used as a self-contained and stand-alone document, addressing all relevant aspects of the use of electronic communications in public procurement. Other delegations were of the view that the current level of detail in paragraph 9 was unnecessary in that part of the Guide (which contained general introductory remarks on the use of electronic communications), but that the points raised could be made elsewhere in the Guide. It was therefore suggested that paragraph 9 be deleted, and that cross-references to the UNCITRAL Model Law on Electronic Commerce were sufficient, though some additional explanation of the

provisions of that Model Law might be required. The Working Group requested the Secretariat in redrafting paragraph 9 and referring to provisions from other texts in other parts of the Guide, as appropriate, to try to reconcile considerations of economy, clarity and efficiency.

2. Functional equivalence (A/CN.9/WG.I/WP.38, paras. 24-29)

19. The Working Group recalled its earlier decision that it would provide for a general principle of "functional equivalence" regarding the use of communications in the procurement process, and that it would approach the drafting from a technologically neutral perspective (A/CN.9/575, para. 12).

20. The Working Group proceeded to consider drafting suggestions for a new article 4 bis of the Model Law (proposed to be entitled "Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents"), considering Variants A, B and C (A/CN.9/WG.I/WP.38, paras. 24-29).

21. It was noted that each of the three variants contained three main elements. The first was a description of the methods of communicating, publishing, exchanging or storing information or documents, and holding meetings, the second, a statement that electronic means of so doing would be sufficient, and the third, controls over the use of means of communications (A/CN.9/WG.I/WP.38, para. 26).

22. As to the first element, it was observed that the difference between the variants was that Variants A and C contained a list of the types of communications to which the article applied, and Variant B contained a generic description of the types of communication referred to, without a list. The Working Group decided that Variant B would be the better formulation, as it was the clearest and easiest to apply, and avoided the risk that procuring entities might seek to avoid the application of the provision through rigid construction of the items on the list. However, it was pointed out that the generic description might not be sufficiently wide to encompass all the items present in the list, including the opening of tenders electronically, the publication of procurement-related information, and a requirement for a document to be in a sealed envelope.

23. As to the second element, it was observed that the aim of the provision was to address all forms of communication, and to ensure their functional equivalence. While the relative novelty of electronic forms of communication might require greater explanation than traditional forms of communication, the Working Group stressed that the text should be drafted in a manner that encompassed any form of communication.

24. As to the third element, it was recalled that the controls concerned were the "accessibility standards" that the Working Group decided at its seventh session should apply to the means of communication chosen (A/CN.9/575, para. 14). It was noted that one aspect of the controls stated that any means of communication could be used "provided that the enacting State or procuring entity is satisfied that such use complies with the [accessibility standards]". It was observed that the provision as drafted conferred a wide discretion on the procuring entity, and that at the same time the procuring entity was not required to reduce to writing the justification for its decision as to the means of communication chosen, nor to include that decision in the record of the procurement under article 11 of the Model Law. Accordingly, it was proposed that the text should state "provided that such use complies with the

[accessibility standards]", a purely objective standard, and that the issue of requiring the procuring entity to record its selection of the means of communication should be revisited when the Working Group considered the formulation of the "accessibility standards".

25. It was proposed, in the alternative, that the "accessibility standards" might be set out elsewhere in the Model Law, and therefore that the text of the proposed article 4 bis could address the first two elements alone.

26. The Working Group decided that it would continue its deliberations on the basis of Variant B for draft article 4 bis, and requested the Secretariat to reformulate Variant B to take account of these proposals, in particular to revise the text expressly to accommodate all forms of communication, and without a statement of the accessibility standards within that article.

27. As regards the description of the communications, the Working Group noted that the draft text before it referred to both the "methods" and the "means" of communication (A/CN.9/WG.I/WP.38, para. 28). The Working Group considered the advantages and disadvantages of both terms, and agreed to continue its deliberations on this question at a future date.

3. Accessibility standards (A/CN.9/WG.I/WP.38, paras. 30-32)

28. The general view was that the provisions on the "accessibility standards" currently contained in article 4 bis should be dealt with as a separate consideration, and that they should clearly address all forms of communication, and not just electronic ones.

29. With respect to the draft provisions on the "accessibility standards" (A/CN.9/WG.I/WP.38, para. 30), it was noted that the aim of subparagraph (a) was to ensure, inter alia, that procuring entities duly consider cost implications in the choice of means of communication, and therefore the phrase "generally available" should be changed to "reasonably available". Another suggestion was to use the phrase "compatible (or interoperable) with those in common or general use". Reference was also made to paragraph 5 of A/CN.9/WG.I/WP.38/Add.1, in which the latter phrase was used, and it was also noted that similar wording appeared in the European Union procurement directives 2004/17/EC and 2004/18/EC.[1] Concern was expressed, however, that in practice it was difficult to comply with the requirement for "interoperability", as it was often impossible to achieve, and therefore excessive reviews of procurement decisions could result. Another suggestion was to replace the word "generally" with "commonly". As regards subparagraph (b), it was considered that the subparagraph should be deleted, as its content was not relevant to "accessibility standards."

30. Some delegations concurred with the observation of the Secretariat (A/CN.9/WG.I/WP.38, para. 31) that there was a degree of inconsistency between subparagraphs (a) and (c) in that a procuring entity could choose a method of communication that may be generally available but the choice could still be discriminatory. It was suggested that the entire provision could be replaced with the following text: "The procuring entity shall ensure that its method of communicating, publishing, exchanging or storing information or documents shall not unreasonably discriminate among or against potential suppliers or contractors or otherwise substantially limit competition."

31. It was noted that (i) the proposed alternative text did not address the use of electronic means of communication in public procurement per se, (ii) the addition of a reference to "holding meetings" might be warranted, (iii) the phrase "shall not unreasonably discriminate" was susceptible to different interpretations across jurisdictions, and an alternative to the notion of "reasonableness" would be preferable, and (iv) all discrimination on the part of the procuring entity should be prohibited, and that therefore the word "substantially" should be deleted.

32. The Working Group noted that there was a difference between the notion of "general availability" in subparagraph (a) and "non-discrimination" in subparagraph (c) (A/CN.9/WG.I/WP.38, para. 31), and considered whether both concepts should be expressly provided for, or whether a requirement that the means of communication be generally available could be regarded as encompassed within the requirement for non-discrimination. The Working Group decided that it would revisit that issue at a later date.

33. Noting that no final determination on the question had been made, the Working Group requested the Secretariat to prepare a revised draft for the "accessibility standards", based on the text set out in paragraph 30 above, incorporating the comments made at the current session, and to revise the proposed Guide to Enactment text accordingly. The Working Group deferred the decision on the location of these provisions in the text of the Model Law, and requested the Secretariat to make proposals on the question for its consideration at its next session.

4. Form of communication—proposed revisions to article 9 of the Model Law (A/CN.9/WG.I/WP.38/Add.1, paras. 1-5).

34. Noting the close interaction between the topics of "functional equivalence" of all means of communication, and "accessibility standards" considered earlier in the session (see paras. 19-33 above), and the provisions on the form of communication in revised article 9 (A/CN.9/WG.I/WP.38/Add.1, para. 3), some views were expressed that the relevant provisions should be located together. Other delegations considered that article 9 of the Model Law was restricted in scope to the form of communications between the procuring entity and suppliers and that provisions addressing matters beyond that specific topic should be located elsewhere in the text.

35. As regards paragraph (1) bis of the revised article 9, it was noted that the proposed text might be superfluous in the light of provisions in article 4 bis (addressing "functional equivalence"), which gave the procuring entity the discretion to select the means of communication.

36. As regards paragraph (1) ter, it was noted that "accessibility standards" as they apply to the submission of tenders could be accommodated in article 30 of the Model Law. However, the Working Group noted that the "accessibility standards" should apply to all procurement phases, and that one article should address all phases.

37. The Working Group agreed provisionally to delete paragraphs (1) bis and ter pending finalization of its deliberations on "functional equivalence" and the electronic submission of tenders, respectively. However, if the formulation of article 9, paragraph (1) bis, were retained in the ultimate provision on "functional

equivalence", it was observed that the text should address all communications in the procurement process, and so the reference to "communications with" suppliers or contractors should be to "communications between the procuring entity and suppliers or contractors".

38. As regards paragraph (1) quater, it was suggested that the provisions could alternatively be included in the article addressing "accessibility standards". The alternative text for "accessibility standards" (see para. 30 above), as redrafted, could either replace paragraph (1) quater, or could be located elsewhere in the text.

39. It was further observed that the formulation of the "accessibility standards" and proposed article 9, paragraph (1) quater, should be considered in the context of proposed article 9, paragraph (1) quinquiens. The latter paragraph provided that enacting States might wish to issue regulations addressing technical issues raised by the use of electronic communications and the accessibility of those communications. The Working Group considered whether the issue of such regulations should be mandatory or non-mandatory. Certain delegations noted that an obligation to regulate such matters might be onerous.

40. After deliberations, the Working Group considered that regulations proposed in article 9, paragraph (1) quinquiens, addressing the technical issues should not be mandatory, but that those on the question of accessibility should be mandatory, subject to resolution of the drafting issues outstanding on the "accessibility standards" themselves. The Working Group also agreed that the text of the Guide should explain the aims of the regulations, and underscore the objective of functional equivalence of all forms of communication so that higher standards of authenticity, integrity, interoperability and confidentiality should not be imposed more on electronic than paper-based communications. It was also suggested that the text of the Guide could usefully alert enacting States on the need for accessibility and interoperability requirements as necessary safeguards, especially in the context of international procurement, to ensure non-domestic suppliers' access to procurement markets.

41. The Working Group also considered the question of whether the provision of software by the procuring entity to potential suppliers should be made without charge (A/CN.9/WG.I/WP.38/Add.1, para. 5). The Working Group noted that procuring entities would be required to obtain a licence to use software, and to specify the numbers of users for that purpose (a requirement that might be impossible to satisfy), and also that there were circumstances in which it would be appropriate to charge for software provided. Consequently, the Working Group concluded that it would not be appropriate to require procuring entities to provide all software without charge, but that the Guide should provide that procuring entities should not use a charging facility to levy disproportionate charges or to restrict access to the procurement.

42. The Working Group requested the Secretariat to prepare a revised draft of article 9, and accompanying text for the Guide accordingly.

5. Notion of "electronic" and related terms (A/CN.9/WG.I/WP.38/Add.1, paras. 6-12)

43. The Working Group considered whether a definition of the term "electronic" or "electronic means of communication" should be provided for in the text of the

Model Law, noting that although some procurement regimes and electronic commerce legislation included equivalent definitions, other systems had no such definition (A/CN.9/WG.I/WP.38/Add.1, para. 9 and endnote 5). Included in the latter category was the Model Law on Electronic Commerce, which defined the terms "data message" and "electronic data interchange" from a functional perspective. As electronic communications was an evolving area, it was also observed that as broad an interpretation as possible would be required, and that any definition might become obsolete, the Working Group concluded that the text of the Model Law should not include a definition of these terms. Nonetheless, the Working Group considered that the Guide to Enactment should describe the concepts, referring to "functional equivalence" provisions in the Model Law as necessary.

6. Legal value of procurement contracts concluded electronically (A/CN.9/WG.I/WP.38/Add.1, paras. 13-15)

44. The Working Group agreed to the proposed text (A/CN.9/WG.I/WP.38/Add.1, the section following para. 14), with a note that citations from the Model Law on Electronic Commerce were to be replaced by appropriate cross-references.

7. Requirement to maintain a record of the procurement proceedings (A/CN.9/WG.I/WP.38/Add.1, paras. 16-18)

45. The Working Group recalled its previous decision that the form of the record should not be prescribed, but made subject to the "accessibility standards" described above (A/CN.9/575, paras. 43-46). The Working Group considered that the proposed requirement for the procuring entity to keep electronically stored information in the record accessible even as technologies changed would be technically difficult. It was agreed that this requirement should continue only until the time for review under article 52 of the Model Law had elapsed. The Secretariat was requested to amend the proposed text of paragraph (1) bis of the Guide to Enactment addressing article 11 of the Model Law accordingly.

8. Electronic submission of tenders, proposals and quotations (A/CN.9/WG.I/WP.38/Add.1, paras. 19-27)

46. The Working Group based its deliberations on proposed revisions to article 30 of the Model Law (A/CN.9/WG.I/WP.38/Add.1, para. 24). The aim of the revisions, it was noted, was to remove the previous right of a supplier under article 30 (5)(b) to submit a tender in writing, in a sealed envelope. The Working Group deferred consideration of the extent to which the provisions should be addressed in the Model Law, Guide to Enactment in the form of narrative text, or in draft regulations.

47. As regards the revisions to article 30 (5)(a), it was decided that the text should remove any possibility that the supplier could insist on the submission of a paper-based tender. Accordingly, it was proposed that the Secretariat revise the provision to provide that a tender must be submitted in the form as required in the solicitation documents. It was also agreed that controls equivalent to those set out in the current article 30 (5)(b), requiring that the form of the tender provided a record of its content and at least a similar degree of authenticity, security and confidentiality, should be included (to the extent that they were not set out elsewhere in the Model Law, in particular in the "accessibility standards" set out above). The Working Group also noted that the provisions of article 27 (Contents of solicitation

documents) should include an obligation on the part of the procuring entity to set out in those documents the form in which tenders should be submitted, with appropriate cross-references to the "functional equivalence" provisions, so as to encompass all forms in which tenders might be submitted.

48. The Working Group deferred its consideration of the accompanying Guide to Enactment text (A/CN.9/WG.I/WP.38/Add.1, paras. 26-27), and the issue of whether further provision addressing the modification of tenders would be required, pending its finalization of the revisions to article 30 (5)(a) of the Model Law.

49. It was also observed that the question of tender securities might need specific provision, in the light of the experience of certain delegations and observers that tender securities remained paper-based documents, and simultaneous submission with electronic tenders might not be possible. It was noted that tenders had been rejected for failure to furnish tender securities when required in these circumstances. The Secretariat was requested to provide the Working Group with further information and proposals on this question at its next session, for example considering whether there was any practice allowing for a short period for post-tender submission of securities (see also para. 100 below).

9. Electronic opening of tenders (A/CN.9/WG.I/WP.38/Add.1, paras. 28-32)

50. The Working Group considered the technical issues raised by the electronic opening of tenders, and the level of detail regarding those issues that should be set out in the revised Model Law and Guide to Enactment. The Working Group recalled its earlier conclusions that an electronic equivalent to the physical presence of suppliers and contractors contemplated by the current article 33 (2) of the Model Law (A/CN.9/575, paras. 37-42) should be provided for. It was suggested that proposed paragraphs (4) and (5) of article 33 could be combined by inserting the words "in accordance with the requirements of article 33 (2)" before the words "to be present at the opening of the tenders" in paragraph (4), and deleting paragraph (5).

51. The Working Group deferred its consideration of the accompanying Guide to Enactment text (A/CN.9/WG.I/WP.38/Add.1, para. 32) pending its finalization of the revisions to article 33 (2) of the Model Law.

10. Electronic publication of procurement-related information (A/CN.9/WG.I/WP.39 and Add.1)

(a) General remarks

52. It was recalled that, when article 5 of the Model Law was drafted, the then Working Group did not have sufficient exposure to national practices regarding the public availability of procurement-related information to provide a scope of article 5 beyond the legal texts referred to in the current text of that article. An expanded scope of article 5 might be evidenced by a reference to a broader range of "laws and regulations directly pertinent to the procurement proceedings" found in article 27 (t) of the Model Law. It was suggested that it might be proper for the Working Group to reconsider the scope of article 5.

53. The Working Group noted that caution should be exercised in transposing such concepts as "publication" and "systematic maintenance" from the paper-based to the

electronic environment, where those concepts may have different connotations. For example, did the requirement for "systematic maintenance" pre-suppose ongoing maintenance of information for future reference? Did the term "publication" mean continuous or one time posting on the Internet? The terms to be used in the revised article 5 required careful consideration, it was said, in order for the article to achieve its intended purposes. In addition, it was noted that, in trying to achieve transparency in the procurement process, the Working Group should not overlook the legitimate interests of States to keep some information (such as that regarding national security and defence) out of the public domain.

54. With reference to publication of regulatory texts under some domestic procurement regimes (A/CN.9/WG.I/WP.39, paras. 20-28), it was suggested that the Guide should draw a distinction between information intended to bind procuring entities vis-à-vis suppliers or contractors, and other information that by its nature was intended for the internal use of procuring entities only. It was observed that different publicity requirements would apply to each category of information. In response, it was noted that the intended recipients of information and the form that the information took were of less importance than its substance so that information would cover all important aspects of national procurement practices and procedures relevant to suppliers. Reference in that regard was made to the consideration of a similar issue in the World Trade Organization (A/CN.9/WG.I/WP.39, para. 19).

(b) Public accessibility of procurement-related information—proposed revisions to article 5 of the Model Law (A/CN.9/WG.I/WP.39 and A/CN.9/WG.I/WP.39/Add.1, paras. 34-39)

55. The Working Group had before it the text of the revised article 5 (A/CN.9/WG.I/WP.39/Add.1, para. 35) and recalled its deliberations on the article at its seventh session (A/CN.9/575, paras. 24 28).

56. It was noted that the revised draft dealt with several types of information: (i) regulatory texts, (ii) procurement-specific information required to be published under the Model Law, such as solicitation of tenders and award notices; and (iii) other information not required to be published under the Model Law, such as information on forthcoming opportunities, and internal controls or guidance (optional types of information). Divergent views were expressed on whether all three types of information should be dealt with in the same article. It was noted that the publicity requirement might differ for various types of information. For example, a requirement that the publication of information should be centralized and standardized might be justified for information required to be published under the Model Law, while for other types of information the same requirement might be onerous.

57. It was suggested that paragraph 1 of article 5 should be restricted to legal texts as per the current article 5 of the Model Law, with an addition of a reference to judicial decisions of general application to align the text with the respective text in the Agreement on Government Procurement of the World Trade Organization (GPA).[2]

58. Caution was expressed as regards expanding the scope of the article to cover other types of information, such as to type (ii) information set out in paragraph 56 above. A suggestion was made that regulations might be a more appropriate place to

discuss the publicity requirements for that type of information. Otherwise, it was noted, the Model Law would become less flexible and could give rise to possibly frivolous protests on the basis of non-compliance with publicity requirements.

59. On the other hand, it was suggested that article 5, paragraph 2, might also deal with the publication of information on forthcoming opportunities, and be merged with the provisions on that subject contained in paragraph 40 of A/CN.9/WG.I/WP.39/Add.1 (see also paragraph 62 below).

(c) Publication of information on forthcoming opportunities (A/CN.9/WG.I/WP.39/Add.1, paras. 1-17, 38 and 40-41)

60. The Working Group had before it the revised article on publication of information on forthcoming opportunities (A/CN.9/WG.I/WP.39/Add.1, para. 40) and recalled its deliberations on the subject at its seventh session (A/CN.9/575, paras. 29-31).

61. The Working Group noted the advantages of publishing information on forthcoming procurement opportunities, such as transparency in the procurement process through reducing cases of "ad hoc" and "emergency" procurements, and, consequently, less frequent recourse to less competitive methods of procurement. The Working Group also considered the opportunities for cost saving and an increase in competition by enabling more suppliers to be informed about procurement opportunities, to assess their interest in participating and accordingly to plan in advance (A/CN.9/WG.I/WP.39/Add.1, paras. 5 and 41). The Working Group noted that, under some procurement regimes, the publication of such information enabled procuring entities to shorten the minimum time limit for the receipt of tenders (A/CN.9/WG.I/WP.39/Add.1, para. 14).

62. The general preference was for optional publication of information on forthcoming procurement opportunities (A/CN.9/WG.I/WP.39/Add.1, para. 17). Views varied as to whether the Model Law or regulations would be the appropriate place to deal with the issue. The Working Group agreed on a preliminary basis to include provisions relating to forthcoming procurement opportunities in the Model Law, and to define a clear timeline for publication of that type of information using words to the effect of "as promptly as possible".

(d) Other issues (A/CN.9/WG.I/WP.39/Add.1, paras. 18-33)

63. The Working Group noted that electronic publication, besides bringing potential benefits for interested suppliers or contractors and the public in general, such as by providing easier access of broader audience to more procurement-related information, had enabled practices that raised a number of concerns not found in paper-based environment, and that might necessitate specific regulation. The attention of the Working Group was brought to the concerns arising from unsystematic, non-standardized and non-centralized ways of posting procurement-related information on the Internet, the absence of systematic maintenance of information posted and charging fees for the provision of information. These issues indicated that the retrieval of procurement-related information that was necessary, useful and accurate might be impeded. The Working Group noted that regulations did not often adequately deal with those and other issues arising from the

publication of procurement-related information by electronic means. It decided to defer the consideration of these issues to a future session.

11. Electronic reverse auctions (A/CN.9/WG.I/WP.40 and Add.1, paras. 1-20)

(a) General remarks (A/CN.9/WG.I/WP.40, paras. 4-8)

64. Recalling its request to the Secretariat made at its seventh session to draft enabling provisions on electronic reverse auctions (A/CN.9/575, para. 67), the Working Group took note of the parameters for the draft, which were as follows: (i) the provisions should allow for electronic reverse auctions as a procurement method rather than as a phase in other procurement methods, (ii) they should address the general conditions for use of electronic reverse auctions (of which the most important was that the specifications could be drafted with precision and the criteria to be subject to auction easily and objectively quantified), and (iii) they should not exclude any category of procurement per se. Finally, the provisions should take account of other international procurement regimes on the topic (A/CN.9/575, paras. 51-67).

65. Some delegations noted that the decision of the Working Group at its seventh session leading to the first parameter should be revisited. Other delegations noted that the decision had been taken on the basis that allowing electronic reverse auctions as a phase in other procurement methods would undermine the principle of tendering that was the preferred procurement method under the Model Law. However, noting that the extent of current use of auctions under other procurement regimes required the Model Law to address them, the Working Group agreed to consider the text of the draft provisions before it, pending resolution of the first parameter.

66. The Working Group agreed that the Guide to Enactment should address the benefits of ensuring as wide a participation as possible, although noted that it might not be desirable for suppliers to participate in the electronic reverse auction through a proxy and over the telephone, as such participation might give rise to a risk of abuse. It was observed that the use of the Internet would ensure the traceability of the proceedings, which telephone systems might not.

(b) Conditions for use of electronic reverse auctions (article 19 bis) (A/CN.9/WG.I/WP.40, paras. 9-17)

67. The Working Group observed that as a general matter the draft should allow for the evolution of electronic reverse auctions, and should not exclude any type of auction pending decisions on the first parameter set out above.

68. As regards paragraph (1) of article 19 bis, which provided for an organ of the enacting State other than the procuring entity to approve the use of electronic reverse auctions, some delegations noted that the decision as to whether an electronic reverse auction was an appropriate procurement tool in each case was complicated, and the involvement of a party other than the procuring entity would be beneficial. However, it was noted that such third-party authorization might not be possible under the constitutions of all enacting States. Other delegations expressed the view that such decisions should not be taken other than by the procuring entity itself.

69. As regards subparagraph (1) (a), it was observed that the main issue for consideration was whether it would be appropriate to procure construction and services through an electronic reverse auction, given that such procurement tended to be complex in nature, involve qualitative evaluation criteria, and experience had indicated that electronic reverse auctions where permitted for such procurements might have been inappropriately used and overused.

70. As to construction, it was noted that not all construction procurement was complex (such as paving roads) and that developments over time might mean that what was viewed today as complex would not be so viewed in the future. On the other hand, it was observed that for the electronic reverse auction to function correctly and ensure that bidders priced their bids realistically and provided their best offers, bidders would be required to know the cost structure of their bids in detail. Prime contractors in complex construction contracts would not have such knowledge as regards the subcontracted elements of their bid. As a result, artificial prices could result. It was also observed that over the medium term, small- and medium-sized enterprises would tend to be excluded in favour of larger suppliers.

71. As regards services, it was observed that although some services might be capable of precise specification and purely objective evaluation, the class of services known as intellectual services would not be appropriately procured through this mechanism.

72. It was observed that in some jurisdictions, electronic reverse auctions were conducted on the basis of lists or catalogues that set out items that could be procured through the mechanism.

73. Accordingly, the Working Group decided that neither construction nor services procurement in their entirety should be excluded from the provisions governing electronic reverse auctions, pending further deliberations as to which type of procurement would be suitable for electronic reverse auction.

74. As regards the text of subparagraph (1) (a), it was agreed that the words “and accurate” and “such that homogeneity in the procurement can be achieved” should be deleted.

75. As regards paragraph (1) (b), it was observed that the aim of the provision was to ensure that electronic reverse auctions should be contemplated in competitive markets, but that it would not be appropriate to specify the number of potential suppliers or contractors that would constitute a competitive market. Accordingly, the Working Group decided to delete the words “at least [ten]” from the proposed text, and to reformulate the provision to provide that the number of suppliers should be such that effective competition would be ensured.

76. As regards paragraph (1) (c), it was agreed that the main issue for consideration was whether the price alone, or price and other evaluation criteria should be subject to the electronic reverse auction. Some delegations considered that only the price should be subject to auction, so as to ensure transparency in the process. Other delegations expressed the view that allowing non-price criteria to be auctioned would confer a benefit, for example, should technical issues (such as energy consumption, and others that may not be quantifiable) be included in the evaluation criteria, noting that the weighting accorded to each such criterion should be disclosed in the solicitation documents.

77. Yet other delegations considered that any non-price criteria should in any event be capable of quantification and objective evaluation, in order to preserve transparency in the process and the benefits of the auction. Certain delegations cautioned that the requirement that criteria be capable of quantification meant that they should be readily and objectively quantifiable.

78. The Working Group considered the functional approach of the text, and noted that providing that auctions should include only items that could be precisely specified, and for which the evaluation criteria in addition to price could be objectively quantified, would exclude by itself some categories of construction and services not suitable for the electronic reverse auction. However, it was also observed that this formulation would not address the question of costs structures noted in paragraph 70 above. On the other hand, the attention of the Working Group was drawn to the fact that drafting the text so as to exclude "construction" and "services" would raise complex issues of definition, and therefore that one solution might be to leave the text with those terms included, with appropriate guidance in the Guide to Enactment. It was agreed that the criteria issue would also determine the complexity of the electronic reverse auction, and the Working Group decided that its deliberations on the question should continue at its next session.

79. As regards the text of paragraph (1) (c), it was agreed that the words "standard products" and "commodities" should be deleted, but the remainder of the text would remain pending finalization of the Working Group's deliberations on the above issues.

80. The Working Group requested the Secretariat to revise the text for the Model Law and to make consequential changes to the proposed text of the Guide to Enactment, taking into account the above matters.

(c) Pre-auction period (article 47 bis) (A/CN.9/WG.I/WP.40, paras. 18-25)

81. The Working Group noted that it would not be possible to finalize its deliberations on the proposed text of article 47 bis (A/CN.9/WG.I/WP.40, the section following para. 20) pending resolution of the issues regarding the conditions of use of electronic reverse auctions set out in paragraphs 65 to 80 above. The desirability of keeping the provisions as concise as possible was also stressed.

82. It was noted that the aim of the provisions was that competition would be unrestricted, so the provisions governing tender proceedings would be followed, save that the bids submitted, and their evaluation, would be "initial". It was noted that "initial" in this context meant that all criteria would be presented and evaluated against the stipulated selection criteria in the normal manner, but the price (and any other criteria to be determined through the auction) would be submitted to the electronic reverse auction, so as to determine the successful supplier.

83. It was noted that the draft text enabled the number of participants invited to participate in the auction to be restricted, and that the Guide to Enactment should note that the conditions of use for restricted tendering would normally not apply to procurement suitable for an electronic reverse auction. Accordingly, it was considered that the number of participants should not, in normal circumstances, be restricted other than as a result of the initial evaluation as set out above.

84. It was observed that paragraph (4) of the draft article in particular required the Working Group to consider the models of electronic reverse auctions that should be provided for. It was recalled that the Working Group, at its seventh session, had considered two models that could be provided for in the text. In Model 1, all aspects of tenders that were to be compared in selecting the winning supplier, and which could be the price alone, would be submitted through the auction itself. In Model 2, there would be a prior assessment of all elements of the initial bid or of those not to be submitted to the auction, and suppliers would be provided with information on their ranking based on the initial evaluation. All evaluation criteria would be factored in a mathematical formula, which would then re-rank the bidders on the submission of each bid during the auction itself. In both models, the auction would determine the successful supplier (unlike other possible models, which the Working Group had provisionally decided not to address in the Model Law).

85. As regards Model 2, certain delegations noted that it was difficult to understand how non-quantifiable criteria could be included in the procedure, since such criteria might be considered to undermine the logic of the procedure itself. It was also observed that the higher-ranking suppliers, whose products might be produced on a higher cost basis than those of lower-ranking suppliers, might submit unrealistically low prices during the auction itself, and therefore a performance risk might arise. It was observed that a way of avoiding this possibility would be to permit only the price to be subject to the auction, and not other criteria, that is a restricted version of Model 1.

86. The Working Group requested the Secretariat to produce two alternative provisions addressing the pre-auction period, one on the basis of Model 1, and one on the basis of Model 2, noting that the main issue for consideration was whether the electronic reverse auction should include non-price criteria that were qualitative and not quantifiable. The Working Group decided that it would be appropriate to consider the text of the Guide to Enactment and any draft regulations once the draft text of the Model Law, as revised, had been considered.

(d) Auction phase (article 47 ter) (A/CN.9/WG.I/WP.40, paras. 26-35)

87. It was noted that the Working Group would not be able to finalize its deliberations on the proposed text of article 47 ter (A/CN.9/WG.I/WP.40, the section following para. 27) until the issues set out above had been resolved. However, the Working Group provided preliminary commentary on the text as follows.

88. As regards subparagraph (1) (b), it was noted that the word “provide” and the alternative phrases “whether it has the top ranking in the auction” and “to establish the changes needed to any bid to give it the top ranking in the auction” should be deleted.

89. As regards paragraph (2), it was proposed that the text following the words “participate in the auction” in subparagraphs (a) and (b) considered procedural matters that could be addressed in regulations or the Guide to Enactment, and should be deleted from the draft text.

90. As regards subparagraph (2) (c), it was suggested that the text should form a separate paragraph.

91. As regards paragraph (3), it was suggested that the procuring entity might also need to terminate the electronic reverse auction under the circumstances referred to in the paragraph and it was proposed therefore that the words "or terminate" should be added to the paragraph after the word "suspend" (and that this matter should receive detailed treatment in the Guide).

92. As regards paragraph (6), it was noted that the second part of the paragraph addressed options available should the successful bidder fail to enter into a procurement contract. They included that a further electronic reverse auction should be held, that the second-best bidder should receive the contract (noting that identifying the second best bidder would not necessarily be possible), and that negotiations with other bidders might be permitted. It was also observed that, where the rules would award the contract to the second best bidder, there had been instances observed in practice of a bidder placing an artificially low but winning bid, in the knowledge that the second-best bidder would receive the contract. The Working Group agreed to consider this issue further at a future session.

93. The Working Group decided that it would be appropriate to consider the text of the Guide and any draft regulations once the draft text of the Model Law had been revised in accordance with the above points, but noted in the interim that the text of the Guide and any draft regulations should be drafted so as to prevent obsolescence as much as possible.

(e) Revisions to the Model Law to enable the use of electronic reverse auctions (A/CN.9/WG.I/WP.40/Add.1, paras. 1-20)

94. With respect to the proposed revisions to article 11 of the Model Law (Record of procurement proceedings) (A/CN.9/WG.I/WP.40/Add.1, para. 3) it was suggested that the proposed wording in paragraph 1, subparagraph (i) bis, of the article should be replaced with the following wording: "[i]n procurement proceedings involving the use of electronic reverse auctions pursuant to article 19 bis, a statement to that effect", to ensure consistency with the wording in other parts of the same article.

95. No comments were made with respect to the proposed revisions to article 18 of the Model Law (Methods of procurement) (A/CN.9/WG.I/WP.40/Add.1, para. 4).

96. With respect to the proposed revisions to article 25 (Contents of invitation to tender and invitation to prequalify) and article 27 (Contents of solicitation documents) (A/CN.9/WG.I/WP.40/Add.1, paras. 6 and 7, respectively), the point was made that reference to "tendering proceedings" might be inappropriate as "tendering proceedings" had a specific meaning and scope under chapter III of the Model Law, which was considerably more comprehensive than electronic reverse auctions. It was also suggested that the term "opening" should be replaced with the term "start" as the former had particular connotations in procurement proceedings.

97. It was considered that the level of detail in the proposed revisions to article 27 should be reviewed: those provisions that did not require regulation by the Model Law should be removed to regulations or the Guide. The need for subparagraph (n) bis (i) was questioned as its content could be encompassed in subparagraph (q) of the same article. It was suggested that the term "lowest evaluated tender" in subparagraph n (bis) (v) should be replaced with the term "most economically advantageous tender" (as used in EU public procurement directive 2004/18/EC, article 53), as the former term might imply the "offer with the

lowest price". The understanding of the Working Group with respect to the latter suggestion, however, was that the term "lowest evaluated tender" used in the Model Law (see, in particular, article 34 (4) (b) (ii)) corresponded in meaning to the term "most economically advantageous tender". In response to an inquiry, it was confirmed that subparagraphs (a) to (n) of article 27, including the provisions on the treatment of alternatives contained in subparagraph (g), would apply in the context of electronic reverse auctions, and the Guide would explain, where necessary, how those provisions operated in that context.

98. No comments were made with respect to the proposed revisions to article 28 of the Model Law (Clarification and modifications of solicitation documents) (A/CN.9/WG.I/WP.40/Add.1, para. 11).

99. The Working Group acknowledged the connection between the proposed revisions to article 31 (Period of effectiveness of tenders; modification and withdrawal of tenders) (A/CN.9/WG.I/WP.40/Add.1, para. 12), the provisions regulating cancellation and suspension of electronic reverse auctions addressed in proposed article 47 ter (see para. 91 above), and the provisions on tender securities addressed in the proposed revisions to article 32 (see next paragraph). It was also observed that if suppliers could withdraw their bids before the electronic reverse auction itself, the impact on the level of competition that would be required for an effective auction should be considered. The Secretariat was requested to address this issue when revising the draft provisions.

100. With respect to the proposed revisions to article 32 of the Model Law (Tender securities) (A/CN.9/WG.I/WP.40/Add.1, para. 13), the Working Group noted that allowing for tender securities in the context of electronic reverse auctions might be problematic, as banks generally required a fixed price for the security documents. It was observed that little experience on the use of tender securities in electronic reverse auctions had been accumulated so far around the world and that existing practices were highly diverse (A/CN.9/WG.I/WP.40/Add.1, para. 13, discussing article 32 of the Model Law (Tender securities)). It was also noted that at least in one jurisdiction no tender securities were used at all in electronic reverse auctions. The view was expressed that it would be difficult therefore for the Working Group to formulate any strict rules on that issue. It was suggested that the Guide should note that practices might continue to evolve, as more relevant experience was accumulated. The Working Group deferred the consideration of the proposed revisions and asked the Secretariat to present to the Working Group at its next session a study on practical experiences with the use of tender securities in the context of electronic reverse auctions.

101. With respect to the proposed revisions to article 34 of the Model Law (Examination, evaluation and comparison of tenders) (A/CN.9/WG.I/WP.40/Add.1, paras. 14-17), it was suggested that the proposed addition to the end of subparagraph 1 (a) might enable a non-responsive tender to be amended so as to become responsive, and the addition should therefore be rephrased so as to ensure that it enabled the items that were to be presented in the auction alone to be amended after the submission of the initial tender.

102. The Secretariat was requested, in redrafting the articles, not to distort the way other procurement methods were handled in the Model Law, carefully to choose terminology to prevent confusion and to try to avoid repetition, especially in the

light of the "functional equivalence" principle. At the same time, it was acknowledged that the ultimate drafting of those provisions would depend on resolution of the unsettled issue as to whether electronic reverse auctions should be treated in the Model Law as a separate procurement method or a phase in tendering proceedings.

(f) Location of provisions on electronic reverse auctions

103. It was suggested that all provisions related to electronic reverse auctions could be dealt with in a separate part, either within chapter V or as a chapter V bis, rather than piecemeal in revisions to relevant articles of the Model Law. This would assist, it was said, in determining which provisions should remain in the Model Law and which should be subject to regulations or addressed in the Guide, and in making the relevant provisions in the Model Law more workable and user-friendly. A further suggestion was made that a separate part of the Model Law would contain only those provisions relevant to electronic reverse auctions that derogate from the provisions in other parts of the Model Law and, to avoid repetition, where necessary, cross-references could be used.

104. Concerns were expressed about this suggestion, in that it presupposed that the issue of whether electronic reverse auctions were treated as a separate method or a phase in other procurement methods had already been resolved in favour of the former resolution. In response, it was noted that provisions could be drafted in such a way as to encompass both options.

105. Another concern expressed was that additional amendments might be required to address the fact that the principle of "functional equivalence" made electronic procurement of all kinds possible and not only electronic reverse auctions. Some suggested that the Secretariat should follow the approach of amending each relevant article of the Model Law and refine what was proposed in A/CN.9/WG.I/WP.40/Add.1. The Working Group's attention was also drawn to the fact that, with constantly evolving technological solutions and their introduction to procurement processes, it would be difficult to place electronic reverse auctions in a fixed structure and therefore sufficient flexibility in that regard should be retained. It was noted that caution should be exercised in taking a final decision on the issue of structure, and to focus on the resolution of substantive issues in the first instance.

12. Abnormally low tenders (A/CN.9/WG.I/WP.40/Add.1, paras. 21-29)

106. Views varied as to whether the provisions on abnormally low tenders should be included in the Model Law. On the one hand, strong support was expressed for inclusion of provisions in the Model Law. When reviewing tenders, procuring entities, it was said, should be allowed to seek justification of prices if they suspected abnormally low tenders. It was observed that the consequences of not doing so would be extremely disruptive for procurement process. Not only was there a performance risk, but also experience, particularly in the construction sector, indicated that businesses submitting abnormally low tenders subsequently tended to use all possible means to contest procurement proceedings and to improve the terms of the contract, with attendant upward pressure on the contract price. Addressing the issue in the Guide only would not be sufficient. It was also noted that the Working Group should look at the problem with abnormally low tenders in a broader context of public policy since the submission of abnormally low tenders often involved

criminal acts (e.g., money-laundering) or illegal practices (e.g., non-compliance with minimum wage or social security obligations). It was also observed that where there were such obligations, an abnormally low tender whose price would not allow the minimum wage or social security obligations to be paid could be seen as clearly and objectively low.

107. On the other hand, some delegates were of the view that express provision should not be included in the Model Law because: (i) in practice, the right given to procuring entities to reject tenders on the basis that their tender price was abnormally low would be open to abuse (the tenders could be rejected as abnormally low without justification); (ii) what constituted an abnormally low tender could be a very subjective criterion, especially in international procurement; and (iii) there were other ways of dealing with the abnormally low tenders. Further, it was observed that although the subjectivity might be most apparent in international procurement, as what is an abnormally low price in one country may be perfectly normal in another, in the domestic procurement context such techniques as selling old stock below cost or below cost pricing to keep the workforce occupied were legitimate. Therefore, prices could be low but not abnormally low. Accordingly, and instead of addressing the subject in the Model Law, it was suggested that the Guide should provide guidance to the following effect: "if an enacting State chooses to introduce the right of a procuring entity to reject tenders on the basis that their tender price was abnormally low, the State has to ensure that proper procedures are in place to prevent arbitrary decisions and abusive practices." The point was made that this approach would be preferable in the light of the fact that the multilateral development banks did not accept the rejection of tenders on the basis that their tender price was abnormally low.

108. In response to some of those concerns, it was noted that risks of contract non-performance would be mitigated through the proper implementation of articles 6 (Qualifications of suppliers and contractors) and 32 (Tender securities) of the Model Law, which would enable the qualifications of the supplier and the resources available to undertake the contract to be assessed. A particular emphasis was placed on the qualification criteria that the suppliers had to meet to participate in procurement proceedings listed in article 6 (1) (b), such as professional and technical qualifications and financial resources. It was also noted that the concerns regarding possible abuse of procedures designed to address abnormally low tenders could be met if safeguards ensuring transparency and clarity were put in place: for example, if it were noted in the solicitation documents that a price realism analysis could be conducted should it be suspected that the tender price was abnormally low. Objectivity in the process could also be improved if procuring entities were to compare prices received with pre-tender estimates based on market prices. Finally, it was observed, many possible abnormally low tenders when closely examined would turn out to be non-responsive tenders that would be rejected as such.

109. The Working Group decided to proceed on the basis that some minimum provisions would be included in the Model Law, supplemented by detailed discussion in the Guide, in particular as regards the necessary safeguards to prevent arbitrary decisions and abusive practices. The Secretariat, in preparing the revised provisions, was asked to apply the following considerations: (i) the procuring entity should be allowed but not required to reject abnormally low tenders; (ii) introducing in the Model Law a possibility of assessing bid prices on the basis of cost rather

than price (noting that the draft texts before the Working Group were based on a price assessment) was undesirable since cost assessment was cumbersome and complicated; (iii) only the procuring entity, and not a third party, should be able to take measures where an abnormally low tender was suspected, and the assessment of the tender concerned must be carried out on a purely objective basis; and (iv) it was important to address possible abnormally low tenders before the relevant contract had been concluded, as measures thereafter might lead to even higher prices and disruption to the procurement concerned.

110. As regards the proposed changes to article 34 (A/CN.9/WG.I/WP.40/Add.1, paras. 23 and 26), the general view was that: (i) the proposed addition to article 34 (4) (b) (A/CN.9/WG.I/WP.40/Add.1, para. 23) should be deleted so that the question of qualification was not confused with the evaluation of tenders. However, the Working Group considered that the principle set out in the draft addition could be included in the proposed text for article 34 (3) (d) bis (A/CN.9/WG.I/WP.40/Add.1, para. 26); (ii) the language of the proposed text for article 34 (4) (b) should be amended so as to provide that before a procuring entity could reject a tender on the basis that its price was abnormally low, the procuring entity had to follow certain procedures such as those that were set out in the proposed article 34 (3) (d) bis; and (iii) in the proposed article 34 (3) (d) (bis), the phrase in the chapeau "and raises concerns as to the ability of the tenderer to perform the contract" should be deleted.

111. The Secretariat was requested to reflect the above issues when proposing revised text for the Guide to Enactment.

Notes

[1] Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council of 31 March 2004 (*Official Journal of the European Union*, No. L 134, 30 April 2004, pp. 1 and 114, respectively. Both available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm).

[2] See annex 4 (b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf, article XIX (1).