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Contents

		Paragraphs	*Page*
I.	Introduction	1-9	3
II.	Organization of the session	10-15	5
III.	Deliberations and decisions	16	6
IV.	Consideration of proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/WG.I/WP.77 and Add.1-9)	17-136	6
	1. Part I. General remarks to provisions of the revised Model Law on challenges and appeals (A/CN.9/WG.I/WP.77/Add.3)	21-27	6
	2. Part II. Article-by-article commentary to chapter VIII. Challenges and appeals (A/CN.9/WG.I/WP.77/Add.4)	28-49	7
	3. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of restricted tendering (A/CN.9/WG.I/WP.77/Add.5, part A)	50-58	12
	4. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for quotations (A/CN.9/WG.I/WP.77/Add.5, part B)	59-62	13
	5. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals without negotiation (A/CN.9/WG.I/WP.77/Add.6, part A)	63-77	14
	6. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals with consecutive negotiations (A/CN.9/WG.I/WP.77/Add.6, part B)	78-81	17

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7. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of two-stage tendering (A/CN.9/WG.I/WP.77/Add.7) 82-96 18

8. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals with dialogue (A/CN.9/WG.I/WP.77/Add.8) 97-102 21

9. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of competitive negotiations (A/CN.9/WG.I/WP.77/Add.9, part A) 103-106 23

10. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of single-source procurement (A/CN.9/WG.I/WP.77/Add.9, part B) 107-115 24

11. Part I. General remarks (A/CN.9/WG.I/WP.77/Add.1 and 2) 116-136 26

V. Future work 137-139 31

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 "1994 Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82).

2. The Working Group began its work on the elaboration of proposals for the revision of the 1994 Model Law at its sixth session (Vienna, 30 August-3 September 2004) and completed that work at its nineteenth session (Vienna, 1-5 November 2010).[1]

3. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, 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 revised Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17, part I, para. 170, and A/63/17 and Corr.1, para. 307). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the 1994 Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the revised Model Law (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17, part I, para. 170). At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17 and Corr.1, para. 307).

4. At its forty-second session, in 2009, the Commission considered chapter I of the draft revised model law and noted that most provisions of that chapter had been agreed upon, although some issues remained outstanding. The Commission noted that the draft revised model law was not ready for adoption at that session of the Commission. It entrusted the Secretariat to prepare drafting suggestions for consideration by the Working Group to address those outstanding issues. At that session, the importance of completing the revised Model Law as soon as reasonably possible was highlighted (A/64/17, paras. 283-285).

5. At its forty-third session, in 2010, the Commission requested the Working Group to complete its work on the revision of the 1994 Model Law during the next two sessions of the Working Group and present a draft revised model law for finalization and adoption by the Commission at its forty-fourth session, in 2011. The

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[1] For the reports of the Working Group on the work of its sixth to nineteenth sessions, see A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640, A/CN.9/648, A/CN.9/664, A/CN.9/668, A/CN.9/672, A/CN.9/687, A/CN.9/690 and A/CN.9/713.

Commission instructed the Working Group to exercise restraint in revisiting issues on which decisions had already been taken (A/65/17, para. 239).

6. At its nineteenth session, having completed its work on the revisions of the 1994 Model Law (see para. 2 above), the Working Group reached the understanding that, according to the UNCITRAL practice, the draft Model Law on Public Procurement emanating from the nineteenth session of the Working Group (the "draft Model Law") would be circulated to all Governments and relevant international organizations for comment. It was noted that the comments received would be before the Commission at its forty-fourth session, in 2011, together with the draft Model Law. It was emphasized that no amendments would be made to the draft Model Law after the text was circulated for comment and before the Commission considered it (A/CN.9/713, para. 137).

7. At the same session, the Working Group reached the understanding that, at its twentieth session, it would focus on proposals for a revised Guide to Enactment. Although it was understood that the Commission was not expected to adopt the revised Guide together with the revised Model Law, the Working Group noted its intention of submitting a working draft of the revised Guide emanating from the work of its twentieth session to the Commission, so as to assist the latter with its consideration of the draft Model Law (A/CN.9/713, para. 138).

8. At the same session, the Working Group recalled that it had deferred a number of issues for discussion in the revised Guide. It was agreed that decisions of the Working Group on the treatment of those issues in the revised Guide should be maintained, unless they were superseded by subsequent discussion in the Working Group or Commission. It was also recalled that additional sections addressing issues of procurement planning and contract administration, a glossary of terms and table of correlation of the revised Model Law with the 1994 Model Law were agreed to be included in the revised Guide. The understanding was that, for lack of time, it was unlikely to be feasible to prepare an expanded Guide for implementers or end-users, and thus the revised Guide would primarily be addressed to legislators (A/CN.9/713, para. 139).

9. At the same session, the Working Group requested the Secretariat to follow the following guidelines in preparing the revised Guide: (a) to produce an initial draft of the general introductory part of the revised Guide, which would ultimately be used by legislators in deciding whether the revised Model Law should be enacted in their jurisdictions; (b) in preparing that general part, to highlight changes that had been made to the 1994 Model Law and reasons therefor; (c) to issue a draft text for the revised Guide on a group of articles or a chapter at or about the same time, to facilitate the discussions on the form and structure of the revised Guide; (d) to ensure that the text of the revised Guide was user-friendly and easily understandable by parliamentarians who were not procurement experts; (e) to address sensitive policy issues, such as best value for money, with caution; and (f) to minimize to the extent possible repetitions between the general part of the revised Guide and article-by-article commentary; where they were unavoidable, consistency ought to be ensured. It was agreed that the relative emphasis between the general part of the revised Guide and article-by-article commentary of the revised Guide should be carefully considered (A/CN.9/713, para. 140).

II. Organization of the session

10. The Working Group, which was composed of all States members of the Commission, held its twentieth session in New York, from 14 to 18 March 2011. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Benin, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Czech Republic, El Salvador, France, Germany, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Malaysia, Mexico, Morocco, Nigeria, Pakistan, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Uganda, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

11. The session was attended by observers from the following States: Congo (Democratic Republic of), Cuba, Indonesia, Iraq, Kuwait, Lithuania, Myanmar, Romania, Sweden and Zambia.

12. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: European Bank for Reconstruction and Development (EBRD), European Space Agency (ESA), European Union (EU) and International Development Law Organization (IDLO);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), International Federation of Consulting Engineers (FIDIC) and International Law Institute (ILI).

13. The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON (Sweden)[2]

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

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

(a) Annotated provisional agenda (A/CN.9/WG.I/WP. 76);

(b) Note by the Secretariat containing proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/WG.I/WP.77 and Add.1-9).

15. 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 a Guide to Enactment of the UNCITRAL Model Law on Public Procurement.
5. Other business.
6. Adoption of the report of the Working Group.

[2] Elected in his personal capacity.

III. Deliberations and decisions

16. At its twentieth session, the Working Group commenced its work on the elaboration of proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

IV. Consideration of proposals for a Guide to Enactment of the UNCITRAL Model Law on Public Procurement (A/CN.9/WG.I/WP.77 and Add.1-9)

17. The Working Group recalled guidelines for preparing the revised Guide formulated at its nineteenth session, reproduced in paragraph 9 above. The Working Group confirmed its understanding that the Guide should consist of two parts: the first describing the general approach to drafting the revised Model Law and the second part containing article-by-article commentary. The importance of Part I in particular for legislators in understanding complex provisions of the revised Model Law, reasons for changes made to the 1994 Model Law and policy choices involved in enacting procurement legislation on the basis of the revised Model Law was highlighted.

18. With reference to the draft before the Working Group, the general view was that the optimal balance in the discussion of various issues in the two parts of the Guide was still to be achieved. It was considered that many provisions currently set out in Part I were more appropriate for Part II while some points raised in the article-by-article commentary might be worth highlighting in Part I.

19. As regards Part I in particular, the importance of the text being easily understandable by legislators was emphasized. The point was made that legislators often did not have the resources or time to read through long and complex materials. Extensive discussion on any topic and the use of technical terms requiring expert knowledge or additional research for their understanding should therefore be avoided in Part I. There was also suggestion to move references to particular articles of international instruments to footnotes.

20. The Working Group decided to consider first the proposed guidance on challenges and appeals contained in addenda 3 and 4 of document A/CN.9/WG.I/WP.77 and defer the consideration of addenda 1 and 2 to a later stage at the session.

1. Part I. General remarks to provisions of the revised Model Law on challenges and appeals (A/CN.9/WG.I/WP.77/Add.3)

21. The general view was that the general remarks to provisions of the revised Model Law on challenges and appeals in Part I of the Guide should substantially be reduced. It was considered that many provisions, in particular paragraphs 112, 113 and 118-120, might be removed to the commentary to the relevant provisions of chapter VIII of the revised Model Law and some might be moved to an introduction to that chapter. It was emphasized that only provisions setting out policy considerations for drafting chapter VIII and the main objectives and principles achieved through chapter VIII should remain in Part I. Examples of the latter provisions, it was said, were contained in paragraphs 121, 124, 125 and 130.

Concern was expressed about some repetitive provisions, which raised issues of inconsistency and confusion.

22. The Working Group agreed that the general remarks to provisions of the revised Model Law on challenges and appeals should be redrafted: provisions that were linked to specific articles of chapter VIII should be moved to the commentary to those articles; and provisions explaining general technical aspects as related to chapter VIII as a whole might be consolidated in an introduction to chapter VIII.

23. With respect to footnote 1, support was expressed for the suggestion to avoid extensive discussion in the Guide of the notion of "independent body", the ideal degree of separation of powers and whether authorities under article 66 should be given to a newly established or existing body. It was explained that these issues were to be addressed by enacting States in the light of prevailing local circumstances. The suggestion was made to refer instead in the Guide to the guidelines of the Organization for Economic Cooperation and Development (OECD) on integrity of review bodies where the relevant issues were adequately covered.

24. Another view was that more specific guidelines as regards the independent body should be provided in the Guide. It was explained that such discussion might in particular benefit vulnerable States that did not have resources to create any new body for the purpose of fulfilling article 66 provisions and might have doubts regarding existing bodies to which the powers under article 66 should be given. Defining basic requirements that such an independent body should fulfil, and in particular specifying which bodies would not be suitable to perform article 66 functions, was considered important for those States.

25. The Working Group agreed to consider the issues raised in footnote 1 in connection with the relevant commentary to article 66 (for further discussion on these issues, see para. 36 below).

26. With respect to footnote 2, opposition was expressed to describing rules of procedure and rules of evidence in detail in any part of the Guide. The view was shared that those issues were outside the scope of the Guide and the revised Model Law and it would be impossible to present exhaustive and accurate discussion of such issues in a concise manner in the Guide.

27. The view was expressed that the term "peer-based system" or "peer system" with reference to challenge mechanism under article 65 should be avoided since that description was not accurate. It was also suggested that references to "options" in paragraphs 127-129 might be replaced with references to "alternatives".

2. Part II. Article-by-article commentary to chapter VIII. Challenges and appeals (A/CN.9/WG.I/WP.77/Add.4)

Article 63

28. The Working Group agreed that the penultimate sentence in paragraph 2 of the commentary to article 63 should be revised to convey more accurately the intended meaning. It was suggested in particular in this context that reference to "capacities" should be replaced with reference to "abilities" or "possibilities". Another view was that the reference should be to conditions under which suppliers or contractors could seek the review. The latter however was considered excessively broad since some

conditions were already covered in article 63 while the goal of the last sentences of paragraph 2 was to give examples of issues that were not regulated in the revised Model Law, such as eligibility of persons to file complaints under provisions of law of enacting States.

29. It was also suggested that reference in the provisions in question to "the nature or degree of interest or detriment" should be replaced with reference to "the nature or degree of loss or injury", in order to make guidance closer to the wording of article 63. There was general understanding that reference in that context was intended to be made to requirements that might be found in other provisions of law of enacting States as regards proof of loss or injury, or likelihood thereof.

30. It was understood that abilities or possibilities to seek review and the nature or degree of loss or injury would differentiate frivolous complaints or applicants without standing from complaints that ought to be entertained and eligible applicants. After discussion, the Working Group agreed to replace the penultimate sentence in paragraph 2 with the following wording: "In addition, this article does not deal with the requirements under domestic law that a supplier or contractor must satisfy in order to be able to seek review or obtain a remedy."

Article 64

31. As regards paragraph 3 of the commentary to article 64, the suggestion was made that the use of the term "inquisitorial" should be reconsidered; the phrase "inquisitorial rather than adversarial" was considered clearer. It was also agreed that in the last sentence reference to "evidence" should be replaced with a reference to "elements".

Article 65

32. As regards a cross-reference in paragraph 1 of the commentary to article 65 to possible provisions of the Guide on debriefing, the view was shared that including discussion on debriefing in the Guide was essential. The impact of effective debriefing systems on reducing the number of complaints was noted. Reference was made to jurisprudence that supported the importance of effective and timely debriefing. A delegation suggested assisting the Secretariat with drafting the relevant provisions for the Guide and subsequently proposed the following text:

> "As a best practice, procuring entities should provide a debriefing to any supplier or contractor that requests one; debriefings may be provided to suppliers or contractors excluded during the course of the procurement (such as during a pre-qualification proceeding), or after award. A debriefing should be provided as soon as practically possible. Debriefings of successful and unsuccessful suppliers or contractors may be done orally, in writing, or by any other method acceptable to the procuring entity. At a minimum, the debriefing information should include:
>
> (1) The procuring entity's evaluation of the significant weaknesses or deficiencies in the requesting supplier or contractor's bid or proposal, if applicable;
>
> (2) The overall evaluated price (including unit prices) and technical rating, if applicable, of any successful supplier or contractor and the requesting supplier

or contractor, and qualification information regarding the requesting supplier or offeror;

(3) The overall ranking of all bidders or offerors, when any ranking was developed by the agency during the procurement process;

(4) A summary of the rationale for any award;

(5) A precise description of the product or service to be delivered by the successful supplier or contractor; and

(6) Reasonable responses to relevant questions about whether the procurement procedures contained in the solicitation, applicable regulations, and other applicable authorities, were followed.

The debriefing shall not reveal any commercially sensitive information prohibited by this law, or otherwise, from disclosure. A summary of the debriefing shall be included in the contract file."

33. As regards a query raised in the first sentence of footnote 1, it was reiterated (see para. 26 above) that no detailed information on rules of evidence or procedures should be included in the Guide in the context of article 65 or any other provisions of the revised Model Law. As regards queries in the remaining part of that footnote, the Working Group agreed that no additional wording should be included in the Guide since the suggested addition conveyed the wrong idea that no corrective action could be taken by the procuring entity after the procurement contract entered into force. Including such wording, it was noted, would contradict the statement in paragraph 7 of the commentary to article 65 of the draft Guide that the procuring entity might take some limited corrective actions after the award, such as some disciplinary measures against personnel involved in improprieties. The possibility of taking such limited corrective actions was, it was emphasized, without prejudice to the provisions of the revised Model Law setting time limits for submission of complaints to the procuring entity before the entry into force of the procurement contract. It was also generally understood that such possibility would exist regardless of whether the concluded procurement contract was cancelled or not.

34. The Working Group agreed to amend the last sentence of paragraph 7 to read "the latter cases may fall instead within the purview of quasi-judicial or judicial review". That wording, it was explained, conveyed more accurately the idea that some corrective measures, such as cancellation of the procurement contract that entered into force, under the revised Model Law would fall generally under the purview of the independent body or judicial authority.

Article 66

35. The level of detail in the first two sentences in paragraph 2 of the commentary to article 66 was considered excessive. The suggestion was made to replace those sentences with a sentence reading "The enacting State may consider not enacting article 66." It was observed that this option was not a condition of anything, as indicated in the draft text of the Guide.

36. Recalling its consideration earlier at the session about the notion of an "independent body" (see paras. 23 and 24 above), the Working Group agreed that paragraphs 4 and 5 of the commentary to article 66 should be redrafted on the basis

of provisions contained therein as well as provisions of paragraphs 118-119 of addendum 3 of document A/CN.9/WG.I/WP.77. It was pointed out that such issues as appointment and removal of the independent body's officers and determining to which body the independent body should be accountable, involved many sensitive issues that should be approached with caution. The Secretariat was also requested to reconsider the reference to "vulnerable States". Emphasizing in this context points raised in the last part of paragraph 5 of the commentary to article 66 was considered sufficient. It was also suggested referring to "authorities of the independent body" in lieu of "competence of the independent body".

37. It was suggested that paragraph 10 of the commentary to article 66 and paragraph 6 of the commentary to article 65 should be redrafted to make them consistent as regards powers of an independent body in the case of cancellation of the procurement proceedings. Reference in this regard was made to provisions of article 66 (2) (b) (ii) of the draft Model Law that referred to two possibilities that might exist in enacting States: first, where an independent body has the authority to review any challenges related to procurement that had been cancelled and second, where only courts might have such authority. It was suggested that paragraph 6 of the commentary to article 65 and paragraph 10 of the commentary to article 66 should be redrafted to reflect those two possibilities.

38. The need for consistency in references to cancellation and termination of procurement proceedings in articles 66 (2) (b) (ii) and 66 (9) (f) of the draft Model Law was queried. In response, it was observed that the use of distinct terms might be desirable in order to differentiate cancellation of the procurement proceedings by the procuring entity from termination of the procurement proceedings by the independent body. The nature of the latter as an available remedy in the challenge and appeal proceedings was emphasized. It was however noted that the consequences of cancellation and termination of the procurement proceedings were the same.

39. With reference to paragraph 25, the point was made that it might be burdensome for the independent body to review all documents related to the procurement proceedings transferred to it by the procuring entity as required under article 66 (8) of the draft Model Law. It was therefore suggested that paragraph 25 should instead refer not to all documents relating to the procurement proceedings that were in the procuring entity's possession but only to those documents that were relevant to the review proceedings. Concerns were expressed about that suggestion since it contradicted the wording in article 66 (8) and would also introduce much discretion for the procuring entity to decide which documents were relevant to the review proceedings and which were not. The exercise of such discretion might lead to abuse, in particular withholding relevant documents on purpose.

40. A related point was that instead of requiring the physical transfer of all documents, which might be burdensome for both the procuring entity and the independent body, the procuring entity should be required to provide immediate access by the independent body to all documents in the procuring entity's possession relevant to the procurement proceedings. In such cases, it was explained, the independent body would decide itself which documents were relevant to the review proceedings. In response, it was observed that electronic records and electronic transmission of data made the transfer of documents and determining their relevance considerably easier.

41. Support was expressed for retaining the provisions of paragraph 25 of the Guide as drafted, taking into accounts risks involved in the suggested alternative approach.

42. The Secretariat was requested to specify to which version of the Agreement on Government Procurement of the World Trade Organization (GPA) reference was made in paragraph 28. The attention of the Working Group was brought in this regard to paragraph 13 of Part I of the draft Guide that noted the need to ensure the accurate references to two versions of the GPA. The Secretariat took note of the need to refer throughout the Guide to the accurate version of the GPA in the context of the provisions analyzed. The suggestion to relocate paragraph 28 to Part I did not raise any objection. (See also para. 119 (d) below.)

43. The Working Group agreed with the suggestion to add in the end of the wording in the second set of parentheses in paragraph 29 the words "but for the non-compliance of the procuring entity with the provisions of this Law".

44. It was agreed that the following parts in the proposed text should be deleted: in paragraph 8, the sentence reading "It is also acknowledged that in most States, there is a determined limitation period for any civil claim"; and in paragraph 29, references to "future losses" and to "the loss of a chance" and the last part of the last sentence, reading "if the power to award financial compensation lies in a small entity or the hands of a few individuals." It was also suggested that the wording "the term 'overturn' does not carry any particular consequences" and the use of the term "quash" in paragraph 27 should be reconsidered, and that guidance should be provided in the appropriate parts of the Guide as regards reasonable duration of the standstill period.

Article 67

45. The need to ensure meaningful, not necessarily literal, translation in various languages of the phrase "fishing expeditions" found in paragraph 4 was emphasized.

Article 68

46. No comments were made with respect to the portion of the draft Guide addressing this article.

Article 69

47. Different views were expressed as regards the need for the article and the footnote accompanying it in the revised Model Law. A strong view was expressed that no footnotes should appear in the revised Model Law. Another view was that footnotes appearing in the draft Model Law (as contained in addenda to document A/CN.9/729) served a useful purpose and should be retained. Most of them, it was pointed out, explained optional texts included in parentheses in the revised Model Law and made it clear that they would not be part of the national law enacted on the basis of the revised Model Law. The point was made that footnote 14 accompanying article 69 was unclear in that latter respect but that deficiency should not undermine the importance of retaining the footnote in the revised Model Law. Concern was expressed that issues raised in that footnote might be overlooked if the text of the footnote appeared only in the Guide.

48. After discussion, support was reiterated for retaining footnote 14 in the revised Model Law. Some delegations supported retaining it together with article 69 with no guidance on article 69 to be included in the Guide while others preferred deleting article 69 and moving footnote 14 to article 63 or the title of chapter VIII. The opposing view was that either that footnote (as all other footnotes currently in the draft Model Law) should be removed to the Guide or its content should be included in article 69.

49. The Working Group recognized that there were deficiencies in provisions of article 69 read together with article 63 of the draft Model Law. It was considered that the Commission should be invited to eliminate them during its finalization of the draft Model Law at its upcoming session. At that stage, it would also decide on the location of footnote 14.

3. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of restricted tendering (A/CN.9/WG.I/WP.77/Add.5, part A)

50. The appropriate location for guidance on the changes to the 1994 Model Law as regards the use of procurement methods was considered. A preference was expressed for including the discussion in a separate part of the Guide, rather than putting it together with the guide to the revised Model Law. The point was made that such an approach would better accommodate two groups of readers: one group that was not familiar with the 1994 Model Law and would be interested only in guidance to the revised Model Law as such; and another that was familiar with the 1994 Model Law and would be interested in understanding the changes made to the 1994 Model Law and the reasons therefor.

51. It was agreed that the word “and” in the third sentence of paragraph 1 should be replaced with the word “or”. The Secretariat was requested to reconsider the examples given in that paragraph, in particular to replace the reference to standard cleaning services with a reference to the supply of pins intended to be traded at sporting events (as an example of procurement of goods of a very nominal value, with many suppliers capable of supplying them), and also to reconsider the use of the term “nuclear” power plants. An alternative view on the latter suggestion, which was eventually agreed, was to retain the term “nuclear” when referring to these power plants, as an indication of the type of highly complex procurement covered by article 28 (1) (a).

52. As regards paragraph 2, the fourth sentence was considered to be accurate only in situations where there was sufficient competition in the market. The Secretariat was requested to redraft the sentence accordingly. The suggestion was made that the use of open tendering with pre-qualification might be considered more appropriate in situations referred to in article 28 (1) (b).

53. Concern was raised as regards reference to the term “lottery” in paragraph 6. It was noted that in many jurisdictions the use of lotteries in public procurement was prohibited. It was therefore suggested that the term “lottery” should be replaced with references to examples of objective selection methods, such as to random selection by drawing lots, to random selection from among a pool of suppliers or contractors and to selection on a first come first served basis. The need to ensure consistency in this respect between paragraphs 6 and 10 was highlighted.

54. The Secretariat was requested to reconsider the reference to small, medium and micro enterprises (SMMEs) in paragraph 18 and elsewhere in the Guide. It was considered that the term might be confusing since the difference between small and micro enterprises was not evident. The view was expressed that the Guide should refer to a more traditional generic term "small and medium enterprises (SMEs)" and explain in the glossary that this term might include micro enterprises. (On this point, see also para. 127 (c) below.)

55. With reference to footnote 1, the suggestion was made that general points related to solicitation might be placed in introductory guidance to section II of chapter II of the revised Model Law, while discrete guidance per procurement method should be placed in the commentary to each relevant procurement method. The value of repeating guidance on advance notices in the commentary to each relevant procurement method (restricted tendering, competitive negotiations and single-source procurement) was noted, in particular in the light of the different implications of such an advance notice in different procurement methods.

56. A query was raised as regards the reference in paragraph 18 to an invitation to tender in the context of restricted tendering, and its relation to an advance notice of procurement. The Secretariat was requested to revise the guidance to avoid confusion with an invitation to tender in open tendering. The accuracy of the seventh sentence of the paragraph was also questioned: it was noted that while the provisions of the draft Model Law excluded the application of article 37 to restricted tendering, the guidance stated that only some provisions of article 37 would not apply, and the Secretariat was requested to reconsider the interaction of these items.

57. The Secretariat was requested to eliminate repetitive provisions and excessive cross-references in paragraphs 4, 11, 12 and 17. It was also requested to avoid excessive detail when referring to other procurement tools and techniques, and challenge proceedings, which might confuse the reader. The possibility of listing all relevant cross-references at the outset of the guidance to a particular article or topic was considered.

58. The Working Group decided to defer the consideration of proposed provisions of the Guide discussing changes made to the 1994 Model Law to a later stage, at which time an entire section consolidating such proposed provisions would be before the Working Group (for the discussion of this point, see para. 50 above).

4. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for quotations (A/CN.9/WG.I/WP.77/Add.5, part B)

59. With reference to footnote 3, support was expressed for harmonizing the provisions of the draft Model Law on thresholds by requiring that they should be set out in procurement regulations, rather than in the law, for example, to allow exchange rate movements and inflation to be accommodated without needing to change the law. The Working Group noted that this point would be brought to the attention of the Commission.

60. In response to a suggestion that reference to higher-value procurement should be included in paragraph 4, it was agreed that there was no need for such a reference and, indeed, the reference to complex procurement should be eliminated, since both were outside the scope of article 28 (2). It was agreed that the second sentence in

this paragraph should be replaced with a sentence reading: “For repeated purchases, establishing a framework agreement may be an appropriate alternative.”

61. The suggestion was made that examples for the use of this procurement method and suggested alternatives should be added, such as procurement of spare parts for vehicles: they could be procured using request for quotations when the need for a single small purchase existed or through a framework agreement when the need for spare parts for a fleet of vehicles might arise on a repeated basis.

62. The complexities involved in selection of a procurement method under the revised Model Law were noted. The Secretariat was requested to simplify the text of the Guide by avoiding extensive comparative analysis between various procurement methods and excessive cross-references, such as in paragraph 9. It was agreed that paragraph 5 should be moved elsewhere in the Guide, and a reference to standardized products (such as in the information technology and communication (ITC) sector) should be included in paragraph 1 as an example of off-the-shelf products that could be defined by reference to industry standards.

5. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals without negotiation (A/CN.9/WG.I/WP.77/Add.6, part A)

Conditions for use

63. The view was shared that the content of footnote 1 was of sufficient importance to be included in the Guide, and it was agreed that the appropriate location would be the guidance to articles 26 and 27 of the revised Model Law (on the selection of procurement methods). In drafting the relevant commentary on the basis of the footnote, the Secretariat was requested to consider adding the following text in the end of the second sentence of that footnote: “and it may shift certain performance risks to the supplier or contractor that presents the proposed output or solution”. It was explained that the procuring entity would bear the performance risks arising from mistakes in detailed specifications, whereas the performance risks arising from mistakes or omissions in output-based specifications would be borne by the supplier or contractor. This point was considered by some delegations to be an important consideration in the selection of a procurement method.

64. While supporting the suggestions described in the preceding paragraph, concerns were expressed that the resulting guidance should not convey the idea that output-based specifications were relevant only in request-for-proposals proceedings and not in tendering. It was noted that this element of differentiation between tendering and request for proposals proceedings was not found in the draft Model Law. The Working Group decided to defer the consideration of the issue to a later stage, at which the guidance to the request for proposals with dialogue would be considered. (For further discussion of this issue, see para. 83 below.)

65. With reference to paragraph 3 and footnote 3 of the commentary to article 28 (3), there were different views as regards the desirability of replacing the term “financial aspects” with “price-related aspects” both in the draft Model Law and consequently in supporting guidance. The latter term was considered narrower and more appropriate in the context of article 46 (9) and (10), whereas the former was considered very broad; while there might be benefits in a broader scope, it could also encompass the financial capacities of bidders, which would be evaluated

in the context of technical and quality aspects of proposals and so included in the first envelope. The method of request for proposals without negotiation, it was said, raised some uncertainties, including as regards the expected content of the first and second envelopes. The view was expressed that a term that would describe as narrowly and precisely as possible the expected content of the second envelope should be used.

66. The alternative view was that the term "financial aspects" should be retained, as it was intended to refer to all financial aspects of proposals included in the second envelope. It was added that the term was not intended to refer to the financial capacities of bidders. Delivery and warranty terms were cited as examples of financial, not price-related, aspects of proposals. In the view of other delegations, however, delivery and warranty terms would most likely be evaluated in the context of technical proposals. A further proposal was to use the term "commercial aspects" in lieu of "financial aspects". The point was made that regardless of the term used in the revised Model Law, its intended meaning was to be clarified in the Guide, as paragraph 3 of the commentary to article 28 (3) currently sought to do. In addition, it was emphasised that the solicitation documents should set out exactly which aspects should be included in which of the two envelopes, and this would determine what the procuring entity meant by technical or quality aspects and what it meant by financial aspects.

67. The suggestion was made that references in the Guide to envelopes should appear in quotation marks, with an explanation that the term was intended to convey the separate presentation of technical/quality and financial aspects, rather than an envelope per se: in some procurement, large quantities of documents might be submitted as part of the technical proposals. It would also be emphasized that the two envelopes would be submitted simultaneously.

68. With reference to paragraph 4 and footnote 4 of the commentary to article 28 (3), the view was expressed that provisions on clarification should be introduced in article 46 of the Model Law, and in other appropriate procurement methods, where interactive clarifications mechanisms were essential, for example because excessively high or low technological solutions might be sought or proposed. A similar provision would be considered for pre-qualification proceedings and for the assessment of qualification.

69. The following amendments were proposed to the last two sentences of paragraph 5 of the commentary to article 28 (3): "Enacting States should be aware nevertheless that some multilateral development banks are of the view that the use of procurement methods sharing features of request for proposals without negotiation as provided for in the revised Model Law may apply only to the procurement of routine advisory services. Some multilateral development banks may not authorize the use of this method in projects financed by them."

70. Reservation was expressed at including the proposed wording, as it referred to the practice of one or a few delegations or observers. The point was made that similar provisions appeared throughout the draft Guide, such as in paragraph 14 of document A/CN.9/WG.I/WP.77/Add.1 and in paragraph 19 of document A/CN.9/WG.I/WP.77/Add.8; all should be reconsidered, it was said. The point was made that the Guide should reflect the result of the Working Group's consensus on the provisions. Concern was also expressed that the proposed wording

might reflect only current practices and not future developments; the text might become obsolete while the Guide continued to be used. It was therefore suggested that the suggested wording should not be included or, alternatively, that the last sentence should be deleted from the proposal.

71. In response to a query as regards whether the proposal would reflect the position of multilateral development banks ("MDBs") other than the World Bank (only the latter's position was made known at the session), the Secretariat informed the Working Group that it had received broadly consistent feedback (both formally and informally) from regional MDBs on this and similar questions, and it was recalled that some of the banks concerned had expressed such views at earlier Working Group sessions.

72. A further view was that in considering the proposal and similar provisions throughout the Guide, the needs of potential end-users of the revised Model Law, which in many cases might be those benefitting from loans extended by MDBs, should not be overlooked. Those end-users, it was noted, should be alerted that they might face difficulties in securing loans from the MDBs if they used certain procurement methods in the full range of circumstances contemplated in the revised Model Law.

73. After discussion, the Working Group agreed that the proposed discussion of the practice of the MDBs should be consolidated in one section that might be put in Part I of the Guide or as commentary to article 3. The consolidated discussion should state that certain provisions of the revised Model Law might not be consistent with the rules of certain MDBs with respect to projects financed by them, and that the latter's policies would need to be consulted if relevant. In addition, it was agreed that the Guide should not include comparative analysis between procurement methods of the revised Model Law and the practices of MDBs. (For further discussion of this point, see paras. 120 and 133-136 below.)

Solicitation

74. The view was expressed that the Guide should discuss all the exceptions to open solicitation in request for proposals in the order in which they were dealt with in the revised Model Law. It was also suggested that guidance on solicitation within the commentary on a particular procurement method should focus on the distinct features of solicitation for that method: in this case, the guidance should address request for proposals without negotiation rather than request for proposals generally.

75. As a general observation as regards the manner of presenting discussion in the Guide, it was suggested that the provisions of the revised Model Law should not be simply repeated in the Guide for the sake of completeness: discussion should be included only where explanations were provided.

Procedures

76. With respect to footnote 5, a reservation was expressed to the suggestion to amend the description of the successful proposal to the "most advantageous proposal" in article 46. However, support was expressed for the suggestion because the current wording in different procurement methods was not consistent, even where the same concept was being addressed. The point was made that any

suggested change to the draft Model Law, including this one, would need to be considered by the Commission.

77. As regards paragraph 8 of the commentary to article 46, questions were raised as regards the scoring methods used under this procurement method and the wording in the draft Guide referring to the possibility of selecting the successful proposal under this method on the basis of price alone (the possibility not being referred to in the draft Model Law itself). The reference to price "alone" was considered inaccurate as the method presupposed always evaluation of technical and quality aspects together with price. The Secretariat was requested to redraft the relevant part of paragraph 8 to eliminate inaccuracy, stressing that the successful proposal would always be selected from those that met or exceeded the technical and quality threshold.

6. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals with consecutive negotiations (A/CN.9/WG.I/WP.77/Add.6, part B)

Conditions for use

78. The suggestion was made that examples for the use of this procurement method should be provided. It was recalled that the Working Group had already noted that this procurement method had traditionally been used for the procurement of intellectual services (e.g. advisory services such as legal and financial, design, environmental studies, engineering works). It was observed that the term "intellectual services" was not familiar to all, and that the Guide should reflect terminology used in different systems (e.g. "professional or consulting services"). A further example of the use of this procurement method was offered: procurement of accommodation (i.e. office space) for Government. It was the understanding in the Working Group that, consistent with the Working Group's decision earlier at the session to remove specific references to the current practices of the MDBs from the guidance to specific procurement methods (see paras. 69-73 above), paragraph 4 of the commentary to article 29 (3) should be redrafted, though retaining references to the use of the method in practice mainly for such services.

79. It was agreed that the words "cannot" should be replaced with the words "may not" in the last sentence of paragraph 3 of the commentary to article 29 (3).

Procedures

80. The suggestion was made that guidance on the purpose of scoring in this procurement method should be provided, i.e. that the ranking was determined on the basis of the scores assigned, and that negotiations would then commence with the highest-ranked supplier.

81. The Secretariat was requested to redraft paragraph 3 of the commentary to article 49 in more balanced terms, and to reconsider the order of paragraphs 3 and 4, so as to explain the benefits and potential difficulties in the use of consecutive negotiations, with particular reference to the bargaining position of the procuring entity.

7. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of two-stage tendering (A/CN.9/WG.I/WP.77/Add.7)

Conditions for use

82. With reference to footnote 1, the view was expressed that no changes in the text of the draft Model Law were required, as the provisions accurately reflected that the envisaged need for discussions with suppliers or contractors was taken into account in deciding to use this procurement method; that the need might not actually materialize was a different consideration. It was also noted that article 47 on the procedures for two-stage tendering made the use of discussions an optional step. The alternative view was that the main justification for use of this procurement method was the need to refine aspects of the description of the subject matter, for which purpose discussions were envisaged, and that the current draft did not fully reflect this emphasis. It was agreed that the Commission should be invited to consider these points when addressing the drafting of article 47.

83. With reference to footnote 2, the suggestion was made that the following words should be added in the end of the last sentence of paragraph 2: ", with input from prospective suppliers or contractors." It was explained that not only the procuring entity but also the suppliers or contractors that provided input for the final description of the subject matter of the procurement should be responsible for the technical solution and should assume the performance risk arising from any mistakes made therein. The point was made, however, that the last sentence of the paragraph was not intended to deal with allocation of responsibility and contract performance risks, but to convey the idea that in two-stage tendering, unlike in request for proposals with dialogue, the procuring entity remained in charge of finalizing the revised set of terms and conditions of the procurement; the drafting would be reviewed to ensure that this point was accurately reflected.

84. The Secretariat was requested to reconsider the examples provided in paragraph 2 in the light of the last sentence in that paragraph. The point was made that in turnkey projects in particular, suppliers and contractors, not the procuring entity, were in charge of finalizing the detailed description of the technical solution and were subsequently responsible for any failures, but it was acknowledged that the examples reflected in particular the experience of certain MDBs with the use of this procurement method.

85. With reference to footnote 3, the following addition was suggested at the end of the first sentence of paragraph 3: "; nor will discussions allow the procuring entity to weigh costs against potential technical benefits." It was explained that where commercial terms and technical aspects should be compared so as to finalize the description of the subject matter of the procurement, the use of the method might not be appropriate.

86. Also with reference to the first sentence of paragraph 3, a query was raised as to whether the draft Model Law in fact prohibited any discussion of the financial aspects of proposed technical solutions. The point was made that, in practice, it was common to discuss the financial implications of certain technical aspects at the first stage.

87. The Working Group decided to consider the issues raised in connection with paragraph 3 when it reviewed the commentary to article 47 (see paras. 90-93 below). The need to consider paragraph 8 in that context was also highlighted.

88. The Working Group requested the Secretariat to reflect in the guidance to two-stage tendering that the method was a variant of open tendering; therefore all the safeguards of open tendering applied. The understanding was that the provisions on clarification of solicitation documents also applied to the second stage. Additionally, it was agreed that the guidance should emphasize that discussions were permitted only at the first stage.

Solicitation

89. With reference to paragraph 13, in the context of the second exemption from international publication in article 32 (4), it was considered that greater emphasis should be attached to the qualitative assessment that only domestic suppliers or contractors were likely to be interested in presenting submissions, among other things because of the low value of the procurement concerned. The need to elaborate on other criteria that the procuring entity would have to take into account in such qualitative assessment was emphasized. Examples provided were geographic factors and limited or the absence of supply base from abroad (indigenous crafts). With reference to footnote 4, it was explained that the exemption was not limited to a value threshold, and should therefore be distinguished from the issues arising in articles 21 (3) (b) and 22 (2), which were based on the application of a financial threshold alone. It was the understanding that in the light of this explanation, paragraph 13 should be revised (also to ensure that the interaction with article 8 (1) was clear), and most of paragraph 14 considering issues of the coherence of low-value thresholds would be more appropriately reflected in the commentary to those other articles in which threshold considerations arose.

Procedures

90. The Working Group agreed to make the following amendments in the guidance:

(a) To redraft paragraph 20 by stating from the outset that chapter III of the revised Model Law applied to two-stage tendering and subsequently explaining which provisions of chapter III applied to which stage and in which context;

(b) With reference to footnote 7, to bring to the attention of the Commission the proposal to change the terminology;

(c) To explain in paragraph 22 that initial tenders would be rejected as non-responsive if they included price, and to highlight that the scope of discussions under article 47 (3) therefore could not include price;

(d) To explain in paragraph 23 the term “equal opportunity” found in the last sentence, by highlighting the similarities and differences in achieving equal treatment of suppliers during discussions in two-stage tendering and during dialogue in request for proposals with dialogue, drawing on the provisions of article 48 (10) as appropriate, while providing for appropriate safeguards against disclosure of confidential information and the risks of collusion;

(e) To align more closely the wording of paragraph 28 as regards permissible changes in examination and/or evaluation criteria with the provisions of article 47 (4) (b) (ii); and

(f) To reflect in the guidance, perhaps in paragraph 23, the need to put on the record details of the discussions, with a cross-reference to article 24 on the documentary record of procurement proceedings.

91. In the context of paragraph 23, the Working Group recalled its consideration earlier at the session (see paras. 85, 86 and 90 (c) above) on the scope of discussions at the first stage of two-stage tendering. It was noted that at the first stage, while price bids were not allowed, informal discussions on market data might take place.

92. The view was expressed that it would be natural to expect the procuring entity, during the discussions, to consider all aspects of the subject matter of the procurement, including the relative price of certain items available in the market, in order to be able to arrive at the best technical solution. It was therefore proposed that paragraph 3 and other similar provisions throughout the guidance should be amended so as not to exclude the possibility of discussing price-related aspects. Doubts were expressed, however, as to the extent to which the procuring entity could base its choice of the technical solution on non-binding information about market or general prices supplied during discussions, which might turn out to be speculative. It was also noted that it would be unrealistic to disregard the implications of price and price-related aspects in the choice of the technical solution. In this regard, it was noted that the guidelines of certain MDBs prohibited the submission of price at the first stage.

93. The Secretariat was requested to consider all these issues in revising the relevant provisions of the guidance, including paragraphs 3, 8 and 23, and to ensure consistency throughout the guidance in reflecting the permissible scope of discussions.

94. As regards changes to the terms of the procurement as a result of the discussions, it was observed that the first stage solicitation documents were likely to focus on the functional aspects of the items to be procured, using broad terms of reference, and the second stage would allow for the technical aspects to be refined and included in the request for final tenders. Hence the subject matter could not be changed during the discussions, but the technical solutions to provide that function could indeed change. The Secretariat was also requested to provide practical examples in the context of paragraph 26 that would illustrate how changes to technical and quality aspects might or might not change the description of the subject matter of the procurement, so as to allow for an easier understanding of the concepts at issue.

95. The Working Group recalled its consideration of this topic at its earlier sessions and that it had not defined the concept of material change to the description of the subject matter, because the many variables involved had indicated that a descriptive approach allowing a procurement-by-procurement consideration would be the better approach. It was considered that it would similarly not be possible to provide a definition of when the description of the subject matter changed in this context; it would require a case-by-case analysis, reflecting, for example, whether a different group of potential suppliers or contractors might participate as a result of the change (for example, changes in the type of trains procured or length of the

roads to be built might change the pool of suppliers in some cases and might not in others). In this regard, it was noted that it would be helpful for the Guide to indicate criteria that would illustrate whether a change was to technical aspects or to the description as a whole. It was also agreed that the Guide should cross refer to the provisions of article 10 (4) which regulated the description of the subject matter of the procurement. The suggestion was made that general issues might better be discussed in the commentary to that article with a cross-reference in paragraph 26 to that discussion, while discrete issues arising from article 10 in the context of two-stage tendering should be discussed in paragraph 26. The implications of changes to the solicitation documents that might require a new procurement under the provisions of article 15 were also highlighted in this regard.

96. The Working Group also recalled, with reference to footnote 3, that real-life examples of the use of two-stage tendering as opposed to request for proposals with dialogue were still outstanding. In response, supply and installation of a plant was mentioned, noting that certain MDBs did not contemplate the use of request for proposals with dialogue for such procurement. Building roads and the procurement of metro cars were cited as other examples. In those examples, formulating detailed specifications from the outset of the procurement would be possible but, after discussions with suppliers, the procuring entity might refine some technical aspects of the subject matter reflecting the information supplied (such as on more sophisticated materials or methods available in the market). The point was made that the difference between two-stage tendering and request for proposals with dialogue was not so much in the subject matter of the procurement but rather in the experience of the procuring entity in the use of these procurement methods: would the procuring entity be able to procure the subject matter in question better through request for proposals with dialogue as opposed to two-stage tendering? Another point made was that the use of two-stage tendering was diminishing in practice. (For further discussion on differences between these procurement methods, see para. 97 below.)

8. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals with dialogue (A/CN.9/WG.I/WP.77/Add.8)

Conditions for use

97. The Secretariat was requested to provide real-life examples for the use of the request for proposals with dialogue in the guidance. Examples suggested related to procurement aimed at seeking innovative solutions, such as for saving energy or achieving sustainable procurement, where various technical solutions existed for the same need (e.g. in an energy-saving example, differences might be in the materials used, and the use of one source of energy as opposed to the other (wind vs. solar)). The experience of one international organization with the use of the method was shared, noting that it saved considerable time as compared with that required for the use of two-stage tendering.

98. With reference to footnote 1, reservations were expressed to changing the text of article 10. The point was made that article 10, addressing the description of the subject matter of the procurement, should remain generic and sufficiently broad to accommodate tendering and non-tendering procurement methods and detailed and output-based performance specifications. Were any changes required to ensure consistency between articles 10 and 48, they should be made to article 48.

99. Allied to this issue, the wording in paragraph 5 referring to the notion in article 48 on the feasibility of formulating a detailed description of the subject matter of the procurement was queried. It was suggested that the use of the words "cannot formulate" in the guidance was not the same test as set out in article 48, in that the guidance implied that the test would be whether the procuring entity was unable objectively to formulate a detailed description of the subject matter. It was recalled that the Working Group had taken a more flexible approach when it had drafted the provisions of the draft Model Law and that approach should not be tightened through the guidance. The point was made that the reasons for deciding not to formulate a single and detailed description of the subject matter might include a lack of sufficient resources or expertise, or that so doing was considered a sub-optimal approach (for example, where the available solutions were not fully known or not fully appreciated). The Secretariat was requested to reconsider the wording to reflect these various grounds, including that suppliers might be in a better position to formulate detailed technical solutions to meet certain needs of the procuring entity, such as those that required significant level of expertise and skills (for example, architectural works, or civil engineering services).

100. The Working Group requested the Secretariat:

(a) To remove the reference to construction from paragraph 1;

(b) To eliminate the automatic link between the complexity of what was to be procured and the use of request for proposals with dialogue in paragraphs 1 to 3. Concern was expressed in particular as regards inconsistent references to complex, relatively complex and highly complex procurement in various paragraphs of the guidance;

(c) To include in paragraph 8 a cross-reference to the commentary to article 20 that addressed conflicts of interest that would arise where one supplier might be involved in designing the technical solution and subsequently participated in the procurement;

(d) To ensure that the references to negotiations and dialogue in the guidance to chapter V as a whole were accurate, i.e. that references to bargaining and negotiations would not be made when discussing dialogue, and the term "negotiations" would be used only in the procurement methods using that term in their title;

(e) To align the text more closely with the conditions for use in article 29 (2);

(f) To make consequential changes in the text reflecting the decisions reached by the Working Group earlier in the session, in particular as regards issues that might more appropriately be addressed in general guidance (such as the notion of approval by an external authority and the position of certain MDBs as regards the use of some procurement methods under the Model Law (see paras. 69-73 above));

(g) To consider relocating paragraphs 12 and 13 from the guidance to article 29 (2) to the guidance to article 48, save to the extent that the procedural aspects of the procurement method discussed in paragraphs 12 and 13 might affect the decision of the procuring entity as regards the selection of the procurement method. It was also observed that the approach to this structural question should be consistent for all procurement methods;

(h) To eliminate repetition in the discussion of best and final offers (BAFOs).

Procedures

101. With reference to footnote 4, the view was expressed that the wording in square brackets in the guidance should remain in the text without square brackets. It was suggested that the sentence where that wording was found should be divided into two; the first sentence should indicate that article 48 (5) listed information that must (not "should") be included in the request for proposals; and the second sentence should explain that the procuring entity was responsible for ensuring that the information provided was adequate for suppliers to prepare their proposals and for the procuring entity to evaluate such proposals equitably.

102. The Working Group agreed:

(a) With the suggestions made in footnotes 5 and 6 that the guidance concerned should be moved from the guidance to article 48 to the discussion of qualification criteria and evaluation criteria respectively. The text of paragraph 31 should also be reviewed to ensure that it was clear that both qualification criteria and evaluation criteria could reflect the skills and experience of suppliers' personnel;

(b) To redraft the last sentence of paragraph 34 to convey that the procuring entity was required by article 11 of the Model Law to provide a true picture of the evaluation criteria and procedure;

(c) With reference to footnote 7, to delete the last sentence in square brackets from paragraph 38, on the understanding that it would be ineffective and counterproductive to oblige suppliers to remain participating in the dialogue if they did not want to participate further, and that tender securities would not provide a workable solution to the issue of ensuring sufficient participation. (A related point, linked to para. 40 of the guidance, was that the possibility of excluding suppliers during the dialogue procedure was regulated differently in various jurisdictions.)

9. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of competitive negotiations (A/CN.9/WG.I/WP.77/Add.9, part A)

103. With reference to paragraph 7 and footnote 1 of the commentary to article 29 (4), it was pointed out that if the additional guidance suggested in the footnote were included, it should be borne in mind that addressing a lack of effective negotiation skills could not be addressed when an urgent procurement arose. The view was expressed that issues of capacity should not be addressed in the guidance to this procurement method, but rather should be treated as a general matter or a matter to be addressed in the context of, for example, request for proposals with dialogue.

104. The Working Group noted that in practice the method was used widely in the circumstances other than those listed in article 29 (4), such as for the procurement of services.

105. The Working Group agreed:

(a) To replace in paragraph 7 of the commentary to article 29 (4) the reference to "competitive dialogue" with a reference to "competitive negotiations";

(b) With reference to the provisions of article 33 (5) and similar provisions throughout the Model Law, to recommend to the Commission that it might wish to reconsider specifying in the law itself, rather than in procurement regulations, the place of publishing an advance notice of procurement and similar information;

(c) As suggested in footnote 2, to explain in the glossary the term "BAFO", but the explanation of the rule that there could be only one round of BAFOs should appear in the guidance to article 50;

(d) With reference to paragraph 13 of the commentary to article 50, to highlight the differences between concurrent negotiations in competitive negotiations and dialogue that took place concurrently in request for proposals with dialogue, emphasizing that negotiation would need to be of a very short duration given the urgency that would be involved;

(e) With reference to paragraph 17 of the commentary to article 50, to replace the phrase "freezes specifications" with the phrase "terminates the ability of the procuring entity to modify its requirements and the terms and conditions of the procurement"; and to replace the reference to "the contract terms offered by suppliers and contractors" with a reference to the "terms and conditions offered by suppliers and contractors", and to clearly distinguish between consequences of the request for BAFOs and making BAFOs;

(f) To use consistently throughout the Guide the term "best practice" in preference to "good practice".

106. The Secretariat was requested to ensure a uniform and structured approach in the guidance to each procurement method.

10. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of single-source procurement (A/CN.9/WG.I/WP.77/Add.9, part B)

Conditions for use

107. With reference to paragraph 1 of the commentary to article 29 (5), it was observed that a common use of single-source procurement arose in the purchase of products protected by intellectual property rights, such as spare parts; accordingly, it was suggested that the guidance should encourage procuring entities to plan for future procurements and to acquire appropriate licenses, so as to allow for competition in such future procurement. With reference to paragraph 1 and footnote 3, the Working Group's consideration earlier at the session of the description of the subject matter of the procurement was recalled (see paras. 95 and 98 above). The suggestion was therefore made that the issues raised in footnote 3 should be addressed elsewhere.

108. The Working Group agreed to replace the word "normally" with the word "possibly" in paragraph 2 and to emphasize at the end of that paragraph that the amount procured in emergency situations should be strictly limited to the needs arising from that emergency situation.

109. With reference to paragraph 5 and footnote 4, the general view was that the example provided in the paragraph, although taken from the 1994 Guide, was inappropriate and should be removed. Another view was that the entire paragraph should be deleted. In response, it was observed that the provisions on safeguards contained in the paragraph should be retained.

110. After discussion, it was agreed that paragraph 5 should be redrafted to align it with the wording of article 29 (5) (e), which did not itself refer to cases of serious economic emergency. In redrafting the paragraph, the Secretariat was requested to highlight that risks of abuse were present in all cases of single-source procurement, but might be greater under article 29 (5) (e), and to emphasize the following points: that the use of single-source procurement was exceptional and the use of the method under article 29 (5) (e) was even more exceptional, as evidenced by the ex-ante approval and public consultation requirements (which would take the method outside the general competitive market); that urgent procurement arising from catastrophes and emergency procurement were addressed elsewhere; that the example of economic emergency taken from the 1994 Guide was misleading and should not be repeated in the revised Guide; although examples of when the method could be used should not be included here to avoid confusion, notably as regards how the exclusive ability of the supplier is to be determined, examples of cases that would be excluded from the application of the provisions should be provided; and that socio-economic policies could be better pursued through other avenues available under the revised Model Law.

111. Another view was that article 29 (5) (e) of the draft Model Law should be removed since it was contrary to the objectives of the revised Model Law. In response, it was observed that the provision had been subject to extensive discussion and the Working Group had decided to retain it. It was observed that there might be good reasons for resort to the measures referred to in that article or in the guidance, and that the deletion of article 29 (5) (e) could be counterproductive, as a State in a situations envisaged in article 29 (5) (e) might decide to pursue those types of measures. Without the provision under discussion, it could do so without the safeguards of the revised Model Law.

112. It was recalled that it would be for the Commission to decide on any proposed amendment to or deletion of the provisions of the draft Model Law. It was also noted that, as was the case with the 1994 Model Law and its Guide to Enactment, the Commission was expected to approve both the revised Model Law and the revised Guide.

113. With reference to paragraph 8, the point was made that the hierarchy between competitive negotiations and single-source procurement was not always clear. The view was expressed that one of the criteria for selecting a procurement method under article 27 — to seek to maximize competition to the extent practicable — made single-source procurement the method of last resort, as it was the only method in which no competition was envisaged. It was suggested that the guidance to articles 26 and 27 should facilitate the toolbox approach to the selection of the procurement method and could give examples of the risks (notably to competition and integrity) arising in each procurement method, and risks of extraneous considerations such as greater familiarity with certain procurement methods that might distort an objective selection.

Solicitation

114. A query was raised as to whether a reference to article 29 (4) (a) should be added to article 33 (6) of the Model Law. The Secretariat was requested to consider this point and, if appropriate, to bring any suggested change to the attention of the Commission.

Procedures

115. The Secretariat was requested to reflect in paragraph 14, consistent with the approach in paragraph 13, the exemption to the requirement for an advance notice in the case of urgency under article 29 (5) (b).

11. Part I. General remarks (A/CN.9/WG.I/WP.77/Add.1 and 2)

General comments

116. The view was expressed that addenda 1 and 2 should be significantly revised, to remove imprecise terms and discussion of secondary issues and consequences, and to focus more clearly on the concepts at issue.

Sections I.A.1. and I.A.2. History and Purpose

117. The following suggestions were made:

(a) To combine the sections on "History" and "Purpose", explaining the original purposes in 1994 and those underlying current work;

(b) To reflect that UNCITRAL's main objective when preparing the 1994 Model Law was to provide a mature, complete and satisfactory model for public procurement to all United Nations Member States, which could operate as an alternative to the varying procurement policies of bilateral and multilateral donors;

(c) To amend paragraph 4 to reflect the mandate for, and the objectives in, revising the 1994 Model Law;

(d) To refer in paragraph 5 to both international and national trade;

(e) To revise paragraph 6 by deleting the final sentence, and clearly delineating the remaining purposes set out in the paragraph. The substance of the final sentence would then be located elsewhere, as an introduction to the presentation of the revisions to the 1994 Model Law; cross-references between Part I and this section would be included.

Section I.A.3. Universal application of the Model Law

118. The following suggestions were made:

(a) To reconsider the section title, perhaps replacing the word "universal" with the word "general" and to consider including a reference to the broader scope of the revised Model Law;

(b) To replace references to "flexible and non-prescriptive provisions of the Model Law", such as in paragraph 9 and elsewhere, with references to options envisaged in the text;

(c) To combine paragraphs 8 and 9 and to add a reference to the users of the 1994 Model Law;

(d) In paragraph 10, to reflect the concepts of neutrality and objectivity; to revise the reference to "all types of States" and to include a reference to different legal traditions; to relocate the final sentence to the proposed section "History and Purpose of the Model Law" (see para. 117 (a) above). An alternative view was to retain the first part of that final sentence, reading "Sound laws and practices for public sector procurement are necessary in all countries", in paragraph 10;

(e) To refer to article 3 that affected the concept of universal application.

Section I.A.4. Interaction with other international texts addressing public procurement

119. The following suggestions were made:

(a) As the main issue was to note that the revised Model Law was subject to international agreements as per article 3, to highlight only those issues that might be of concern to enacting States; to eliminate unnecessary factual detail on other international instruments, so as to ensure that inaccurate statements were not made;

(b) To treat the points raised as regards article 3 in paragraphs 11 and 13 as a discrete item deserving separate discussion;

(c) To reconsider the drafting of the last sentence in paragraph 12 as regards the relationship between the revised Model Law and the United Nations Convention against Corruption;[3]

(d) To revisit the references to the GPA in paragraph 13 in due course, to ensure accuracy (see also paragraph 42 above), and to mention that preparatory work on the revised GPA had also been taken into account in preparing the revised Model Law; in the same paragraph, to refer to bilateral free trade agreements;

(e) To outline in paragraph 14 the differences between the revised Model Law and MDBs' policies, avoiding detailed comparison;

(f) In paragraph 14, to refer to "projects" and not "procurement projects"; to link the two first sentences with the rest of the paragraph; to refer only to the harmonization of the MDBs' internal policies; to redraft the last sentence to avoid any implication that a domestic law based on the revised Model Law would automatically be acceptable to the MDBs; and to relocate this paragraph, as it did not refer to international instruments addressing public procurement.

120. The view was expressed that the MDBs' position on the use of some procurement methods in the Model Law in projects financed by them should be reflected in the commentary to article 26. Earlier decisions by the Working Group to provide historical background on the use of some procurement methods by MDBs were recalled. A general statement to the effect that countries seeking financing from MDBs should seek information about their current applicable policies was considered insufficient in this regard. In response, it was observed that views of the

[3] United Nations, *Treaty Series*, vol. 2349, No. 42146.

MDBs, which could change over time, should not be reflected in the Guide. (For further discussions on this point, see paras. 133-136 below.)

Section I.B. Purpose of the Guide

121. It was agreed to add a reference in the text to a new section of the Guide that would describe the changes made to the 1994 Model Law.

Section II.A. Objectives

122. The view was expressed that paragraph 19 should also provide the context and derivation of the objectives listed, and should discuss their relative importance. Another view was that such background information might involve excessive theoretical discussion and might be controversial.

123. The suggestion was made that the section should highlight that the objectives referred to public procurement, so as not to create expectations in private sector procurement, and should also include commentary on the satisfaction of public needs. It was also suggested that the section, perhaps in paragraph 20, should highlight that the objectives might be reinforcing but might also contradict each other and that in some procurement methods one or some objectives might prevail over others. The view was expressed that the discussion in the section was excessively economics-focused.

124. With reference to paragraph 20, the suggestion was made that the words "may not confer" should be replaced with the words "does not itself confer" in the first sentence or, alternatively, that the sentence might not be accurate and should be deleted. After discussion, it was agreed to retain the wording in the 1994 Guide ("does not itself"), subject to possible review by the Commission. It was also suggested that the phrase "is assured" should be replaced with the phrase "is better assured" and the phrase "abuse is absent" should be replaced with the phrase "abuse is addressed".

Value for money

125. The following suggestions were made:

(a) To replace the word "includes" with the words "is a concept including" and add "and aimed at an optimal relationship between both for the procuring entity" in the first sentence of paragraph 21; and to reverse use of the terms economy and efficiency;

(b) Simpler examples should be provided in paragraph 21, and a more robust reference to the use of life-cycle costing should be included elsewhere;

(c) Paragraph 22 should be deleted, with its general substance being added to paragraph 21.

Participation and competition

126. Views differed as to whether participation and competition should be addressed together or separately, but it was agreed that further explanation of the objective of competition should be added. The concept, it was said, encompassed three aspects: the number of competitors; their capacity and quality; and their

willingness to participate and compete. The view was expressed that the overlap between the objective of participation and the objective of competition should be explained in the Guide.

127. It was agreed:

(a) To add the words "on balance" in the first sentence of paragraph 23 after the word "effective" and to refer to "these objectives" rather than "the objectives" of the revised Model Law;

(b) In paragraph 24, to refer to the "limited and exceptional circumstances" in which international participation could be limited and to replace the words "on both a domestic and international level" with "by both domestic and international suppliers and contractors";

(c) To delete the reference to "micro enterprises" in paragraph 27 (on this point, see also para. 54 above);

(d) To consider replacing in paragraph 28 the reference to "a more concentrated market" with a reference to a market with a limited number of suppliers or contractors capable of delivering the subject matter of the procurement concerned; to refer to concentrating rather than consolidating the market at the end of the paragraph;

(e) To delete the second sentence in paragraph 28 as it went beyond a description of the revised Model Law's objectives. A reservation was expressed about this suggestion as the sentence included valuable concepts. It was suggested that the substance of the paragraph could be relocated, such as to a section of the Guide discussing the interaction of procurement regulation and other government policies affecting participation and competition;

(f) To use consistently the term "suppliers or contractors" or to define the term "suppliers" in the Guide as including contractors.

Fair and equitable treatment

128. The Secretariat was requested:

(a) To shorten paragraph 29, in particular by reconsidering the need for the text after the second sentence;

(b) In what would become the remaining text of paragraph 29, to emphasize the exceptional circumstances that were under discussion;

(c) To revise paragraph 30 by (i) explaining and illustrating appropriately equal and equitable treatment, highlighting the differences between the two terms, (ii) deleting the references to free trade agreements, and (iii) removing the reference to reciprocity in the end of the paragraph.

Concluding remarks

129. In concluding its discussion of Part I of the draft Guide, the Working Group requested the text to be as factual and concise as possible. In this regard, the view was expressed that providing detailed guidance on the objectives of the revised Model Law should be reconsidered.

Proposals for the Guide as regards sections addressing the selection of procurement methods

130. It was suggested that Part I should include the following wording under section II. Main features of the Model Law:

> "1. The revised Model Law contains a greater variety of procurement methods than were provided in the 1994 Model Law. These methods, whether revised or new, reflect developments in the field and evolving government procurement practice in the years since the 1994 Model Law was adopted. The number of procurement methods provided reflects the view of the Commission that the objectives of the Model Law are best served by providing States with a varied menu of options from which to choose in order to address different procurement situations, provided that the conditions for use of the particular method are met. The availability of multiple procurement methods allows States to tailor the procurement procedures according to the subject matter of the procurement and the needs of the procuring entity. This in turn permits the procuring entity to maximize economy and efficiency in the procurement while promoting competition.
>
> 2. Enacting States are cautioned, however, that many of these methods are complex, and consideration should be given to the capacity of procuring entities to administer certain procurement methods effectively."

131. Opposition was expressed to the proposed wording in paragraph 2, in that it implied that some procurement methods were simpler to conduct than others, without adequate explanation, and might indicate that some methods were less acceptable than others. In support of the proposal, it was stated that it conveyed in concrete terms the issues covered by the relevant provisions of the revised Model Law.

132. In addition, the following wording was proposed for consideration by the Secretariat for inclusion in the commentary to articles 26 and 27:

> "Article 26. Methods of Procurement in the revised Model Law contains a footnote (as appears in the 1994 Model Law) advising enacting States that they 'may choose not to incorporate all the methods of procurement listed in this article into their national legislation.' The new footnote adds that 'an appropriate range of options, including open tendering, should be always provided for.'
>
> As an additional safeguard, in its provisions on conditions for use, the 1994 Model Law included, for each method of procurement other than tendering, the following optional language for enacting States to consider: 'Subject to approval by … (the enacting State designates an organ to issue the approval)'. In the revised Model Law, the Commission decided to remove that optional language from the individual provisions on conditions for use of procurement methods and instead to address the concern more globally in the footnote to article 26. That footnote now includes the following: 'States may consider whether, for certain methods of procurement, to include a requirement of a high-level approval by a designated organ.'"

133. The Working Group had before it in addition the following proposal:

> "Historically, the rules of some multilateral development banks have not included procurement methods equivalent to request for proposals with dialogue or competitive negotiations as provided for in the Model Law, and have included methods with features of request for proposals without negotiation and request for proposals with consecutive negotiations as provided for in the Model Law only for the procurement of advisory services. Aware of this, UNCITRAL has nevertheless decided not to base the selection of procurement method on whether it is goods, works or services that are procured, but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 27 (2)) (for the relevant guidance, see paragraphs …). UNCITRAL wishes to note that the model law should reflect the fact that policies and practices evolve over time."

134. Support was expressed for the substance of the text in paragraph 133 above, subject to clarification of the scope of the term "advisory services". An alternative view was that the text should be shortened to state generally that potential borrowers from the MDBs should check the applicable public procurement policies.

135. The understanding was that the proposed wording in paragraph 133 above should be included in the commentary to article 26 and an introductory statement should also appear in Part I outlining the general approaches of the revised Model Law and MDBs and providing a cross-reference to the guidance to article 26.

136. It was proposed that an introductory statement for Part I on this subject might be added in section II.B. Scope of the Model Law under the heading "Methods of procurement" and should reflect the provisions reproduced in paragraph 130 above and the following concepts: (a) that enacting States should give consideration to the capacity of procuring entities to administer procurement methods effectively; and (b) that enacting States that considered receiving financing from MDBs might wish to consult the relevant MDBs, as noted above. While support was expressed for the substance of the proposal, the point was made that items (a) and (b) raised unrelated issues and should be discussed separately.

V. Future work

137. The Working Group noted the need to consider more expeditious ways to reform the revised Model Law in the future, to ensure that it accurately reflected evolving practices and regulations.

138. The Working Group discussed possible topics for future work in public procurement and related areas, including updating the UNCITRAL instruments addressing privately financed infrastructure projects, to reflect the revised Model Law and developments in the use of public-private partnerships (PPPs). Possible issues included methods of selection and post-contract dispute resolution. A review of developments in the regulation of PPPs and a study on the feasibility and desirability of work by the Commission in that field were considered potentially useful. Other areas of work mentioned included procurement planning and contract administration.

139. The point was also made that there might be topics in non-procurement-related areas, such as those relating to property rights, worth considering for possible future work by UNCITRAL.