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Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

Note by the Secretariat

Addendum

This addendum sets out a proposal for the Guide text to accompany articles 7 (as continued from A/CN.9/731/Add.1) to 15 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

…

Part II. Article-by-article commentary

…

Article 7. Communications in procurement

[continued from A/CN.9/731/Add.1]

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

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

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

in a way that leaves trails for independent scrutiny and audit and in particular verifies what information has been transmitted or made available, by whom, to whom, and when, including the duration of the communication, and that the system can reconstitute the sequence of events. The system should provide adequate protection against unauthorized actions aimed at disrupting normal operation of public procurement process. Technologies to mitigate the risk of human and other disruptions must be in place. So as to enhance confidence and transparency in the procurement process, any protective measures that might affect the rights and obligations of potential suppliers and contractors should be specified to suppliers and contractors at the outset of procurement proceedings or should be made generally known to public. The system has to guarantee to suppliers and contractors the integrity and security of the data that they submit to the procuring entity, the confidentiality of information that should be treated as confidential and that information that they submit will not be used in any inappropriate manner. A further issue in relation to confidence is that of systems' ownership and support. Any involvement of third parties needs to be carefully addressed to ensure that the arrangements concerned do not undermine the confidence of suppliers and contractors and the public at large in procurement proceedings. (Further aspects relevant to the provisions of article 7 on the form and means of communication are discussed in the commentary to articles 39 and 41 of this Guide.)[1]

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

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

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[1] The above and commentary to other relevant provisions of the Model Law may need to be amended to reflect the most recent developments in the e-commerce field, in particular on the identity management, as may be brought to the attention of UNCITRAL.

[A list of all transparency requirements found in the Model Law, exception to which may be justified in the procurement involving classified information, is to be included.]

Article 8. Participation by suppliers or contractors

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

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

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

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

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

5. When any of the grounds in the procurement regulations or other provisions of law is invoked by the procuring entity as a justification for restricting participation in procurement proceedings, paragraph (3) requires the procuring entity to make declaration to such effect at the outset of the procurement proceedings. This declaration is to be published in the same place and manner in which the original information about the procurement proceedings, such as the invitation to participate in the procurement proceedings (e.g. invitation to pre-qualification or to tender) or the notice of the procurement under article 33, is published, and simultaneously with such information. To ensure fair and equitable treatment of suppliers or contractors, the declaration cannot be later altered.

6. Paragraph (4) and (5) contain other procedural safeguards. Under paragraph (4), the procuring entity will be required to put on the record the reasons and circumstances on which it relied to justify its decision, indicating in particular the legal source where the ground invoked to restrict participation is found. The same information is required to be provided to any member of the public upon request under paragraph (5) of the article.

(See also paragraphs … of Part I of the Guide.)

Article 9. Qualifications of suppliers and contractors

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

2. The article is also intended to prevent the qualification procedure from being misused to restrict market access through the use of hidden barriers to the market (whether at the domestic or international level). Requirements for particular licences, obscure diploma requirements, certificates requiring in-person attendance or adequate past experience may be legitimate for a given procurement, or may be an indication of an attempt to distort participation in favour of a particular supplier or contractor or group of suppliers or contractors. The provisions are therefore permissive in scope, and the risk of misuse is mitigated through the transparency provisions of paragraph (2), which enable the relevance of particular requirements to be evaluated. Of particular concern would be unnecessary requirements that discriminate directly or indirectly against overseas suppliers, used as a non-transparent manner of limiting their participation (where, for example, the permitted restriction under article 8 is not explicitly invoked, as further discussed in the commentary to paragraphs (2)(e) and (6), below).

3. As stated in paragraph (1) of the article, the provisions of the article may be applied at any stage of the procurement proceedings. Assessment of qualifications may take place: (i) at the outset of the procurement through pre-qualification in accordance with article 17 or preselection in accordance with article 48(3);

(ii) during the examination of submissions (see for example, that the grounds for rejection of a tender in article 42(3)(a) include that the supplier is unqualified); (iii) at any other time in the procurement proceedings when pre-qualified suppliers or contractors are requested to demonstrate again their qualifications (see paragraph (8)(d) of this article and the commentary in paragraph … below); and/or (iv) at the end of the procurement proceedings when the qualifications of only the winning supplier or contractor are assessed (see article 56(2)) or when that supplier or contractor is requested to demonstrate again its qualifications (article 42(6)).

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

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

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

7. The reference in paragraph (2)(b) to "other standards" is intended to indicate that the procuring entity should be entitled to satisfy itself, for example, that suppliers or contractors have all the required insurances, and to impose security clearances or consider environmental aspects where necessary. Since environmental standards in particular may have the effect of excluding foreign suppliers (where regional environmental standards vary), the enacting State may wish to issue rules and/or guidance on the use of environmental standards to ensure that procuring entities may apply such standards without risk of disruptive challenge procedures. These standards relate to the standards and processes followed by suppliers or contractors generally, rather than to the environmental characteristics of the subject

matter of the procurement (which are addressed in the commentary to articles 10 and 11 below).[3]

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

9. Paragraph (2)(f) of article 9 refers to the disqualification of suppliers and contractors pursuant to administrative suspension or debarment proceedings. Such administrative proceedings — in which alleged wrongdoers should be accorded due process rights such as an opportunity to refute the charges — are commonly used to suspend or debar suppliers and contractors found guilty of wrongdoing such as issuing false or misleading accounting statements or committing fraud. It may be noted that the Model Law leaves it to the enacting State to determine the period of time for which a criminal offence of the type referred to in paragraph (2)(f) should disqualify a supplier or contractor from being considered for a procurement contract.[4]

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

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[3] The discussion of set-aside programs may need to be added in the commentary here, including that they are considered less effective than preferences since they do not encourage local development. The relevant considerations are raised in draft Part I of the Guide (see in particular paragraphs 97-103 of A/CN.9/WG.I/WP.77/Add.2).

[4] It was suggested at the seventeenth session of the Working Group that the accompanying Guide text should refer to the World Bank's guidelines on debarment procedures (A/CN.9/687, para. 50). This suggestion is to be considered in the light of the deliberations at the Working Group's twentieth session as regards the desirable extent and context of reference in the Guide to regulation by multilateral developments banks of various procurement-related matters.

11. Paragraph (4) requires all criteria and requirements as regards assessment of qualifications of suppliers or contractors to be set out in any pre-qualification or preselection document and in the solicitation documents. In some jurisdictions, standard qualification requirements are found in procurement regulations, and the pre-qualification/preselection/solicitation documents may simply cross-refer to those regulations. For reasons of transparency and equal treatment, the Model Law requires all requirements to be set out in the relevant documents; however, the requirements of paragraph (4) may be satisfied where the documents refer to the qualification requirements in legal sources that are transparent and readily available (such as by using hyperlinks).

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

13. In order to facilitate participation by foreign suppliers and contractors, paragraph (7) bars the imposition of any requirement for the legalization[5] of documentary evidence provided by suppliers and contractors as to their qualifications other than by the supplier or contractor presenting the successful submission. Those requirements must be provided for in the laws of the enacting State relating to the legalization of documents of the type in question. The article does not require that all documents provided by the winning supplier or contractor are to be legalized. Rather, it recognizes that States have laws concerning the legalization of documents and establishes the principle that no additional formalities specific to procurement proceedings should be imposed.

14. The purpose of paragraph (8)(d) is to provide for reconfirmation, at a later stage of the procurement proceedings, such as at the time of examination of submissions, of the qualifications of suppliers or contractors that have been pre-qualified. This intends to permit the procuring entity to ascertain whether the qualification information submitted by a supplier or a contractor at the time of pre-qualification remains valid and accurate. The procedural requirements are designed to safeguard both the interests of suppliers and contractors in receiving fair treatment and the interest of the procuring entity in entering into procurement contracts only with qualified suppliers and contractors. In most procurement (with the exception perhaps of complex and time-consuming multi-stage procurement), the application of these provisions should be limited to the supplier or contractor presenting the successful submission as envisaged in articles 42(6) and (7) and 56 (2) of the Model Law.

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[5] The need for adding here an explanation of the term “legalization” is to be considered.

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement[6]

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

2. The minimum requirements referred to in paragraph (1) are intended also to cover the thresholds referred to in the provisions regulating request for proposals proceedings. The reference in paragraph (4) to the relevant technical and quality characteristics or the performance characteristics may also cover characteristics relevant to environment protection or other socio-economic policies of the enacting State.[7]

3. In accordance with paragraph (4) of the article, a brand name should be called for in a solicitation only where absolutely necessary, and if a brand name is referred to, the solicitation should specify the salient features of the subject matter being

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[6] The commentary to this article may need to be expanded, to include in particular discussion of the following issues: the term “or equivalent”; the use of performance specifications in request for proposals as opposed to technical specifications in tendering-based procurement methods, and their advantages and disadvantages; and how to achieve objective comparative evaluation for example when alternative designs are offered.

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

sought, and should state specifically that the brand name item "or equivalent" may be offered.

4. In some jurisdictions, practices that require including in any pre-qualification or preselection documents and in the solicitation documents a reference source for technical terms used (such as the European Common Procurement Vocabulary) have proved to be useful.

Article 11. Rules concerning evaluation criteria and procedures

1. The purpose of the article is to set out the requirements governing the formulation, disclosure and application by the procuring entity of evaluation criteria. The main rules as reflected in paragraphs (1) and (6) of the article are that, with a few exceptions listed in paragraph (4) of the article, all evaluation criteria applied by the procuring entity must relate to the subject matter of the procurement (see paragraph (1)). This requirement is intended to ensure objectivity in the process, and to avoid the misuse of the procedure through invoking criteria intended to favour a particular supplier or contractor or group of suppliers or contractors. The provisions are permissive (they do not set out an exhaustive list of criteria),[8] to allow the procuring entity the flexibility to design the criteria to suit the circumstances of the given procurement. As was described above regarding qualification criteria, the transparency mechanisms that accompany the substantive requirement — that only those evaluation criteria and procedures that are set out in the solicitation documents may be applied in evaluating submissions and determining the successful submission — are designed to allow the objectivity of the process to be evaluated and, where necessary, challenged.[9]

2. The principle in paragraph (1) that evaluation criteria must relate to the subject matter of the procurement is a cornerstone to ensure best value for money and to curb abuse. This principle also assists in differentiating criteria that are to be applied under paragraph (2) of the article from the exceptional criteria that may be applied only in accordance with paragraph (4) of the article, as explained in paragraph … below.

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

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

[9] The paragraph may need to be expanded, in particular by providing examples.

4. Depending on the circumstances of the given procurement, evaluation criteria may vary from the very straightforward, such as price and closely related criteria ("near-price criteria", for example, quantities, warranty period or time of delivery) to very complex (including socio-economic considerations, such as characteristics of the subject matter of procurement relevant to environment protection). Although ascertaining the successful submission on the basis of the price alone provides the greatest objectivity and predictability, in some proceedings the procuring entity cannot select a successful submission purely on the basis of the price factor, or so doing may not be the appropriate course. Accordingly, the Model Law enables the procuring entity to select the "most advantageous submission", i.e., one that is selected on the basis of criteria in addition to price. Paragraph (2)(b) and (c) provides illustrations for such additional criteria. (Other permissible criteria that do not relate to the subject matter of the procurement are to be found in paragraph (4), as further discussed in paragraph … below.) The criteria set out in paragraph (2)(c) (the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel involved in providing the subject matter of the procurement) would be applicable only in request for proposals proceedings. This is because request for proposals proceedings have traditionally been used for procurement of "intellectual type of services" (such as architectural, legal, medical, engineering) where experience, reliability and professional and managerial competence of persons delivering the service is of the essence. It is important to note that these criteria are evaluation criteria and not qualification criteria — while the same types of characteristics may be described as both qualification and evaluation criteria, qualification criteria represent minimum standards. Evaluation criteria describe the advantages that the procuring entity will assess on a competitive basis in awarding the contract.

5. Requiring in paragraph (3) that the non-price criteria must, to the extent practicable, be objective, quantifiable and expressed in quantifiable terms is aimed at enabling submissions to be evaluated objectively and compared on a common basis. This reduces the scope for arbitrary decisions. The wording "to the extent practicable" has been included in recognition that in some procurement proceedings, such as in the request for proposals with dialogue proceedings (article 48 of the Model Law), expressing all non-price evaluation criteria in monetary terms would not be practicable or appropriate. The enacting State may wish to spell out in the procurement regulations how factors are to be quantified in monetary terms where practicable.

6. A special group of non-price criteria comprise those in paragraph (4). Through them the enacting State pursues its socio-economic policies (see the relevant definition in article 2(n) of the Model Law and commentary thereto in … above). Since paragraph (4) refers to criteria arising from general policies of the State, there may be no discretion on the part of the procuring entity in deciding whether or not to consider them. The wording in paragraph (4) (authorized or required) intends therefore to encompass two situations: when the procurement regulations or other provisions of law of the enacting State provide for the discretionary power to consider the relevant criteria and when such sources mandate the procuring entity to do so. These criteria are of general application and are unlikely to be permitted as evaluation criteria under paragraph (2) in that they will ordinarily not relate to the subject matter of the procurement. Examples may include the manner in which the

procuring entity may dispose of by-products of a manufacturing process, may offset carbon emissions from the production of the goods or services at issue, and so on.[10]

7. The criteria are therefore listed separately from the criteria set out in paragraph (2). They will be less objective and more discretionary than those referred to in paragraph (2) (although some of them, such as a margin of preference referred to in paragraph (4)(b), may be quantifiable and expressed in monetary terms as required under paragraph (3) of the article). For these reasons, these criteria should be treated as exceptional, as recognized by the requirement that their application be subject to a distinct requirement — that they must be authorized or required for application under the procurement regulations or other provisions of law of the enacting State. In addition, in the case of margins of preference, the procurement regulations must provide for a method of their calculation. [That method of calculation may envisage applying a margin of preference to price or the quality factors alone or to the overall ranking of the submission when applicable.][11] The envisaged procurement regulations setting out rules concerning the calculation and application of a margin of preference could also establish criteria for identifying a "domestic" supplier or contractor and for qualifying goods as "domestically produced" (e.g., that they contain a minimum domestic content or value added) and fix the amount of the margin of preference, which might be different for different subject matters of procurement (goods, construction and services). As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the submission prices of all submissions import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting submission prices, other than those that are to benefit from the margin of preference, the amount of the margin of preference or the actual import duty, whichever is less.[12]

8. The use of the criteria of the type envisaged in paragraph (4)(a) and margins of preference referred to in paragraph (4)(b) in evaluating submissions should be considered exceptional since it could impair competition and economy in procurement, and reduce confidence in the procurement process. Caution is advisable in providing a broad list of non-price criteria in paragraph (4)(a) or

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[10] The guidance may need to be expanded to elaborate in particular on differentiating the use of socio-economic policies as evaluation criteria from their use in imposing restrictions on participation in the procurement proceedings article 8 or their use as qualifications criteria under article 9 or their use as responsiveness criteria under article 10 (in all of the latter cases, ability to meet socio-economic policies will be assessed on a pass/fail basis rather than by assigning points in comparative analysis of submissions). The provision of examples to the Secretariat is requested. Another point that may need to be elaborated is the achievement of the longer-term competition policy through evaluation criteria, and how framework agreements in particular might compromise it through concentrating the market (for example, the fact of the award of the last contract under the framework could become an evaluation criterion as a result).

[11] The text in square brackets may need to be reworded depending on the final wording of the relevant provisions in the Model Law. For example, if the margin of preference is applied to the entire submission, including price, its effect on quality is lower than if it is applied to the quality "basket".

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

circumstances in which a margin of preference referred in paragraph (4)(b) may be applied, in view of the risk that such other criteria may pose to the objectives of good procurement practice. In specifying such criteria references to broad categories, such as environmental considerations, should be avoided. For example, as already envisaged in paragraph (2)(b) of the article, some environmental considerations, such as the level of carbon emissions of the subject matter of procurement (e.g. cars), are linked to the subject matter of the procurement and the procuring entity could therefore consider them under paragraph (2)(b) even through such considerations may not be specifically authorized or required to be taken into account under procurement regulations or other provisions of law of the enacting State. When however they are not so linked, they could still be considered but under the conditions of paragraph (4) of the article. The procurement regulations or other rules or guidance should not only provide for the criteria but also regulate or guide how the criteria under paragraph (4) should be applied in individual procurements to ensure that they are applied in an objective and transparent manner.

9. As with any other evaluation criteria, the use of any criteria in accordance with paragraph (4)(a) or the margin of preference in accordance with paragraph (4)(b) and the manner of their application are required to be pre-disclosed in the solicitation documents under paragraphs (5) and (6) of the article. In addition, the use of any socio-economic criterion or margins of preference is to be reflected in the record of the procurement proceedings together with the manner in which they were applied (see article 24(1)(i) and (t)). These transparency provisions are essential to allow the appropriate use of the flexibility conferred in these articles to be evaluated; another benefit is that the overall costs of pursuing socio-economic considerations can potentially be compared with their benefits. (See paragraph … of Part I of the Guide concerning the reasons for using a margin of preference as a technique for achieving national economic objectives while still preserving competition. See further paragraphs … of Part I of the Guide on restrictions imposed by some international and regional treaties on States parties to such treaties as regards application of socio-economic criteria in the procurement proceedings, in particular with the aim to accord preferential treatment.)

10. Paragraph (5) sets out information about the evaluation criteria and procedures that must be specified, at a minimum, in the solicitation documents. This minimum information comprises: (i) the basis for selecting the successful submission (the lowest priced submission (where the award is to the lowest priced submission) or the most advantageous submission (where price in combination with other criteria are to be evaluated in selecting the successful submission)); (ii) the evaluation criteria themselves; and (iii) the manner of application of each criterion, including a relative weight given to each criterion, or where that is not possible or relevant (such as in request for proposals with dialogue proceedings under article 48 where it is often not possible to establish the relative weight of evaluation criteria at the outset of the procurement), descending order of importance of the evaluation criteria. This provision is intended to ensure full transparency, so that suppliers or contractors will be able to see how their submissions will be evaluated. A basket of non-price criteria will normally include some quantifiable and objective criteria (such as maintenance costs) and some subjective elements (for example, the relative value that the procuring entity places on speedy delivery or green production lines), amalgamated into an overall quality ranking. Thus for procurement not involving negotiations, the procuring entity has to disclose both how the non-price basket

factors will weigh, and how the basket will weigh against price. The importance of setting out the appropriate level of detail of the evaluation criteria is reiterated by the corresponding provisions in the articles regulating the contents of solicitation documents in the context of each procurement method (see articles 38, 46 and 48).

Article 12. Rules concerning estimation of the value of procurement

1. The purpose of the article is to prevent manipulation by the procuring entity in estimation of the value of procurement by artificially reducing the value of procurement for the purpose of limiting competition and avoiding other obligations under the Model Law. For example, article 21(3)(b) exempts the procuring entity from the obligation to apply a standstill period in procurement where the contract price is less than the threshold established by the enacting State (i.e. low-value procurement). Under article 22, the procuring entity will not be obliged to publish an individual public notice of award in this type of procurement. Articles 17(2) and 32(4) allow the procuring entity not to issue an international advertisement of the invitation to participate in procurement proceedings where it decides, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions. In addition, under some provisions of the Model Law, the value of procurement may have a direct impact on the selection of a method of procurement. For example, one of the grounds justifying the use of restricted tendering as opposed to open tendering is that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement (see article 28(1)(b)). The use of request for quotations under article 28(2) is justified in procurement of readily available goods or services where their value is below the threshold amount set out in the procurement regulations. In all such cases, the method selected by the procuring entity for estimation of the value of procurement will determine the value of the procurement, which may turn out to be below or above the established threshold. Without such provisions, the procuring entity might alternatively choose to divide the procurement into lots instead of consolidating purchases, with the aim of avoiding transparency requirements or the obligation to use more competitive methods of procurement.

2. To avoid subjectivity in the calculation of the value of procurement and anti-competitive and non-transparent behaviour on the part of the procuring entity, paragraph (1) sets out the basic principle that neither division of the procurement can take place nor any valuation method can be used for the purpose of limiting competition or avoiding obligations under the Law. The prohibition is therefore directed at both (i) any division of a procurement contract that is not justified by objective considerations, and (ii) any valuation method that artificially reduces the value of procurement.

3. Paragraph (2) requires the inclusion in the estimated value of the maximum total value of the procurement contract over its entire duration whether awarded to one or more suppliers or contractors, and of taking into account all forms of remuneration (including premiums, fees, commissions and interest receivable). In case of framework agreements, one would therefore refer to the maximum total value of all procurement contracts envisaged under a framework agreement. In

procurement that provides for the possibility of option clauses, the estimated value under the article will refer to the estimated maximum total value of the procurement, inclusive of optional purchases.

4. Estimates are to be used primarily for internal purposes of the procuring entity. The procuring entity should exercise caution in revealing this information to potential suppliers or contractors because it runs the risk of not obtaining the best price (if the estimate is higher than market prices, suppliers or contractors might tend to price submissions as close to the estimated value of the procurement as possible and so competition is compromised; if the estimate is below market prices, good suppliers may choose not to compete, and quality may be compromised). A blanket prohibition of revealing such estimates to suppliers or contractors may, however, be unjustifiable. For example, providing an estimated value of procurement during the entire duration of the framework agreement may be necessary to allow suppliers or contractors parties to the framework agreement to stock the subject matter of the framework agreement accordingly to ensure security of supply.

Article 13. Rules concerning the language of documents

1. The purpose of the article is to establish certainty as regards the language of documents and communication in procurement proceedings in the enacting State. This provision is especially valuable for foreign suppliers or contractors that by reading the procurement law of the enacting State would be able to determine which additional costs (translation and interpretation) may be involved if they decide to participate in procurement proceedings in the enacting State.

2. Paragraph (1) provides for the general rule that documents issued by the procuring entity in the procurement proceedings are to be in the official language(s) of the enacting State. An enacting State whose official language is not the one customarily used in international trade has the option to require, by retaining in the article the words in the second set of brackets, that the documents in addition be issued as a general rule in a language customarily used in international trade. This requirement would facilitate the participation of foreign suppliers or contractors in procurement proceedings by helping to make the documents issued by the procuring entity understandable to them. If this wording is retained, the procuring entity would be able to lift the additional requirement only in the case of domestic procurement or where it decides, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in participating in the procurement proceedings.

3. In States in which solicitation documents are issued in more than one language, it would be advisable to include in the procurement law, or in the procurement regulations, a rule to the effect that a supplier or contractor should be able to base its rights and obligations on either language version. The procuring entity might also be called upon to make it clear in the solicitation documents that both or all language versions are of equal weight.

4. The basic rule, as reflected in paragraph (2) of the article, is that the language of documents presented by suppliers or contractors in response to the documents issued by the procuring entity during any given procurement must correspond to the

language or any of the languages of such latter documents. However, the provisions do not exclude situations where the documents issued by the procuring entity may permit presenting the documents in another language specified in those documents.

Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for preselection or for presenting submissions

1. The purpose of the article is to ensure certainty as regards the manner, place and deadline for the submission of the main documents in the procurement process by suppliers and contractors. The significant legal consequences may arise out of non-compliance by suppliers or contractors with the procuring entity's requirements (such as the obligation on the procuring entity to return a submission presented late or that otherwise do not comply with the manner or place requirements (see for example article 39(3)). The article in paragraph (1) therefore provides important safeguards that ensure that equal requirements on the manner, place and deadline for submission of documents to the procuring entity apply to all suppliers or contractors, and that they are specified at the outset of the procurement proceedings in the pre-qualification, preselection or solicitation documents, as applicable. If such information is to be changed subsequently, changes must be brought to the attention of suppliers or contractors to which the documents affected by changes were originally provided. If such documents were provided to an unknown group of suppliers or contractors (e.g. through a download from a website), information on the changes made must at a minimum appear in the same place where the download was made possible.

2. An important element in fostering participation and competition is granting to suppliers and contractors a sufficient period of time to prepare their applications or submissions. Paragraph (2) recognizes that the length of that period of time may vary from case to case, depending upon a variety of factors such as the complexity of the procurement, the extent of subcontracting anticipated, and the time needed for transmitting applications or submissions. Thus, it is left up to the procuring entity to fix the deadline by which applications or submissions must be presented, taking into account the circumstances of the given procurement. An enacting State may wish to establish in the procurement regulations minimum periods of time that the procuring entity must allow for presenting applications or submissions (particularly where its international commitments require it to do so). These minimum periods should be established in the light of each procurement method, means of communication used and whether procurement domestic or international. Such a period must be sufficiently long in international and complex procurement, especially those not envisaging the use of electronic means of communication for transmission of information, to allow suppliers or contractors reasonable time to prepare their submissions.

3. In order to promote competition and fairness, paragraph (3) requires the procuring entity to extend the deadline in certain circumstances: first, where clarifications or modifications, or minutes of a meeting of suppliers or contractors are provided shortly before the submission deadline, so that it is necessary to extend the deadline in order to allow suppliers or contractors to take the relevant information into account in their applications or submissions; and secondly, in the

cases stipulated in article 15(3) when a material change in the information originally published occurred. Changes as regards the manner, place and deadline for submission of documents will always constitute material changes, which would oblige the procuring entity to extend the originally specified deadline.

4. Paragraph (4) permits, but does not compel, the procuring entity to extend the deadline for presenting submissions in other cases, i.e., when one or more suppliers or contractors is or are unable to present their submissions on time due to any circumstances beyond their control.[13] This is designed to protect the level of competition when a potentially important element of that competition would otherwise be precluded from participation.

5. The Model Law does not address the issue of potential liability of a procuring entity should its automatic systems fail. Failures in automatic systems inevitably occur; where a failure occurs, the procuring entity will have to determine whether the system can be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for presenting submissions is necessary. Paragraphs (3) and (4) of the article give sufficient flexibility to procuring entities to extend the deadlines in such cases. Alternatively, the procuring entity may determine that a failure in the system is of such a nature that it will be prevented from proceeding with the procurement and the procurement proceedings will therefore need to be cancelled. The procurement regulations or other rules and guidance may provide further details on the issues of failures in electronic presentation of submissions and the allocation of risks. The procuring entity should bear in mind that failures occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of its automatic systems, including on an extension of the applicable deadline, could give rise to a right of challenge by aggrieved suppliers and contractors under chapter VIII of the Model Law.

Article 15. Clarifications and modifications of solicitation documents

1. The purpose of article 15 is to establish procedures for clarification and modification of the solicitation documents in a manner that will foster the efficient, fair and successful conduct of procurement proceedings. The right of the procuring entity to modify the solicitation documents is important in order to enable the procuring entity effectively to ensure that its needs will be met through procurement. Article 15 provides that clarifications, together with the questions that gave rise to the clarifications, and modifications must be communicated by the procuring entity to all suppliers or contractors to whom the procuring entity provided the solicitation documents. It would not be sufficient to simply permit them to have access to clarifications upon request since they would have no independent way of discovering that a clarification had been made. If, however, the solicitation documents were provided to an unidentified group of suppliers or contractors (e.g. through the download of documents from a publicly available website), the clarifications and modification must at a minimum appear in the place

[13] The provision of guidance to the Secretariat is requested on how to avoid abuse of this discretion, in particular favouritism.

where the download was facilitated. An obligation of the procuring entity to inform individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors are known to the procuring entity.

2. The rule governing clarifications is meant to ensure that the procuring entity responds to a timely request for clarification in time for the clarification to be taken into account in the preparation and presentation of submissions. Prompt communication of clarifications and modifications also enables suppliers or contractors to exercise their right, for example under article 40(3), to modify or withdraw their tenders prior to the deadline for presenting submissions, unless that right has been removed in the solicitation documents. Similarly, minutes of meetings of suppliers or contractors convened by the procuring entity must be communicated to them promptly, so that those minutes too can be taken into account in the preparation of submissions.

3. Paragraph (3) deals with the situations in which, as a result of clarifications and modifications of the originally issued solicitation documents, the originally published information becomes materially inaccurate. The provisions oblige the procuring entity in such cases promptly to publish the amended information in the same place where the original information appeared. This publication requirement is in addition to the requirement contained in paragraph (2) to notify of the changes individually each supplier or contractor to which the original set of solicitation documents was provided, where applicable. The provisions of paragraph (3) also reiterate the obligation on the procuring entity in such cases to extend the deadline for presentation of submissions (see article 14(3)).

4. Situations in which as a result of clarifications and modifications of the solicitation documents the original information becomes materially inaccurate should be differentiated from situations in which a material change in the procurement takes place. For example, as stated in the commentary to article 14, changes as regards the manner, place and the deadline for presenting submissions would always make the original information materially inaccurate without necessarily causing a material change in the procurement. However, if as a result of such changes, the pool of potential suppliers or contractors is affected (for example, as a result of changing the manner of presenting submissions from paper to electronic in societies where electronic means of communication are not widespread), it may be concluded that a "material change" has taken place in the procurement. In such a case, the measures envisaged in paragraph (3) of the article would not be sufficient — the procuring entity would be required to cancel the procurement and commence new procurement proceedings. A "material change" is also highly likely to arise when, as a result of clarifications and modifications of the original solicitation documents, the subject matter of the procurement has changed so significantly that the original documents no longer put prospective suppliers or contractors fairly on notice of the true requirements of the procuring entity.

5. Although, in paragraph (4), a reference is made to "requests submitted at the meeting", nothing under the Model Law prevents the procuring entity from also reflecting during a meeting of suppliers or contractors any requests for clarification of the solicitation documents submitted to it before the meeting, and its responses thereto. The obligation to preserve the anonymity of the source of the request will also apply to such requests.