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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 a section in the Guide that would discuss general issues arising from the use of electronic reverse auctions and a proposal for the Guide text to accompany article 30 on conditions for use of an electronic reverse auction and articles 52 and 53 of chapter VI (Electronic reverse auctions) of the UNCITRAL Model Law on Public Procurement.



GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

A. Provisions on electronic reverse auctions to be included in Part I of the Guide, preceding the article-by-article commentary, or in the article-by-article commentary as an introduction to chapter VI

1. An electronic reverse auction (“auction,” or “ERA”), as defined in article 2 of the Model Law, is an online, real-time purchasing technique utilized by a procuring entity to select the successful submission. It involves the presentation by suppliers or contractors (“bidders”) of successively lowered bids during a scheduled period of time and the automatic evaluation of those bids.

2. It has been observed that ERAs have many potential benefits. First, they can improve value for money through successive competition among bidders, using dynamic and real-time trading. The use of the Internet as the medium for holding the auction can also encourage wider participation and hence increased competition. Secondly, auctions can reduce the time required to conduct each procurement[, and enhance the efficient allocation of resources and reduce the administrative costs by comparison with the traditional open tendering procedure)].¹ Thirdly, they can enhance transparency in the procurement process as information on the successive results of the evaluation of bids at every stage of the auction and the final result of the auction are made known to all bidders instantaneously and simultaneously; the auction setting allows information on other bids to be made available and the outcome of the procedure to be visible to participants. Fourthly, the enhanced transparency and a fully automated evaluation process that limits human intervention assist in the prevention of abuse and corruption.

3. On the other hand, ERAs encourage a focus on price, rather than quality considerations. Whether this focus is appropriate will depend on the subject matter of the procurement. ERAs may also have an anti-competitive impact in the medium and longer-term, as they may be more vulnerable than other procurement processes to collusive behaviour by bidders because of the opportunity to present successive bids. Collusion occurs when two or more bidders work in tandem to manipulate and influence the price of an auction keeping it artificially high or share the market by artificially inflating bid prices or not presenting bids. Collusion will be a heightened risk particularly in projects characterized by a small number of bidders, or in repeated bidding in which the same group of bidders participates, or in any other auction where the anonymity of bidders is compromised. Issues of dumping can also arise: it has been reported that dumping is common in jurisdictions where the procuring entity is obligated by law to award the procurement contract to the

¹ The text in square brackets reflects the points raised at the Working Group’s sessions. It is to be reconsidered in the light of the statements made in paragraph 5 of this section below, to ensure consistency throughout the Guide. The provision of guidance to the Secretariat is requested.

winning bidder.² (For more discussion on these matters, see paragraphs ... of this Guide.)

4. It is common for third-party agencies to set up and administer auctions for procuring entities. This means that the relative ease of operation so far as procuring entities are concerned can lead to overuse and use of auctions in inappropriate situations. Procuring entities should also be aware of the possible issues arising from outsourcing³ decision-making beyond government, such as to third-party software and service providers.⁴ They should also be aware of issues arising in situations where third parties advise on procurement strategies. Such third parties may represent and have access to both procuring entities and bidders. The organizational conflicts of interest may pose a serious threat to competition in that the third parties will wish to maximize their returns by promoting ERAs, without necessarily considering whether they are the appropriate procurement technique.⁵ These issues arise also in other procurement techniques, such as framework agreements, and generally where outsourcing is concerned. Furthermore, in the ERA setting, the risk of bidders' gaining unauthorized access to competitors' commercially sensitive information may be elevated.⁶

5. The above factors may negatively affect the confidence of suppliers or contractors in procurement proceedings involving ERAs; if so, they may be less willing to participate. Procuring entities may therefore need to budget for overhead costs in training and facilitating suppliers or contractors in participating in ERAs. Otherwise, the procuring entity may face opportunity costs should suppliers or contractors abandon the government procurement market when operated through ERAs; the result may also be prices higher than those they would have obtained if other procurement techniques were used.

6. Recognizing both the potential benefits of ERAs and the concerns over their use, the Model Law enables ERAs subject to safeguards contained in article 30 on the conditions for use of ERAs, and in articles 52 to 56 setting out the procedural requirements. The following policy considerations are viewed as particularly important for the successful introduction and use of ERAs, and further guidance on

² It is to be considered whether the risks of collusion should be so highlighted only in the ERA context or whether the guidance should proceed on the basis that ERAs under the Model Law pose no greater risk of collusion than other methods. Collusion can only occur where the anonymity of bidders is not preserved. It is therefore to be considered whether the Guide should elaborate on how anonymity can be compromised and how to prevent this from happening. The provision of guidance to the Secretariat is requested.

³ It is to be considered whether concerns about outsourcing of government functions should be so highlighted only in the ERA context or in the context of public procurement generally in Part I of the Guide. The provision of guidance to the Secretariat is requested.

⁴ The text reflects the results of experts' consultations. However, concerns raised in the sentence may require further explanation in the Guide, especially in the light of automated evaluation processes during the auction. The provision of guidance to the Secretariat is requested.

⁵ The text reflects the results of experts' consultations. However, concern about organizational conflicts of interest may require elaboration in the Guide. The provision of guidance to the Secretariat is requested.

⁶ The text reflects the results of experts' consultations. However, concern about the elevated risk of unauthorized access to competitors' commercially sensitive information in ERAs may require elaboration in the Guide. The provision of guidance to the Secretariat is requested.

them and the various aspects of the provisions in the Model Law is set out in the article-by-article commentary below:

(a) Type of auction: auctions are used to select the winning supplier or contractor. Although there are other models in use, the Model Law's approach to auctions is that the ERA itself is to be the final stage in the procurement proceedings in which the winner is selected, and the winning terms and conditions is to figure in the contract. This approach is considered the most transparent and at lowest risk of abuse, and reflects the general prohibition of negotiations after the selection of the successful supplier or contractor throughout the Model Law;

(b) Transparency: clear description of the subject matter of the procurement and other terms and conditions of procurement must be established and made known to suppliers or contractors at the outset of procurement, together with all information regarding how the auction will be conducted, in particular the timing of the opening and criteria governing the closing of the auction;

(c) A competitive market: a sufficient number of bidders is important not only to ensure competition but also to preserve the anonymity of bidders, to avoid collusion, dumping and other improper behaviour;

(d) Anonymity: the maintenance of anonymity is critical if there are not to be higher risks of collusion in ERAs than in other procurement methods. ERAs are therefore not suitable in markets with only a limited number of potentially qualified and independent suppliers or contractors, or in markets dominated by one or two major players, since such markets are especially vulnerable to price manipulation or other anti-competitive behaviour; repeated use of auctions with the same participants may also jeopardize anonymity;

(e) Appropriate use of auctions:

(i) ERAs are suitable for commonly used goods and services, for which there is a competitive market, in which price is the determining, or a significant determining, evaluation criterion. Types of procurement where non-quantifiable factors prevail over price and quantity considerations are not suitable for ERAs. It would therefore be inappropriate to use auctions in procurement of works or services entailing intellectual performance, such as design works, and other quality-based procurement. In addition, in order for an ERA to function correctly in eliciting low but realistic prices, it is important for bidders to be fully aware of their cost structures, which is unlikely to be the case where there are layers of sub-contractors, common in complex procurement, such as construction works;

(ii) The greater the number of criteria to be auctioned, the more difficult it is for both procuring entity and suppliers or contractors to understand how varying one element will impact on the overall ranking. Thus, where there are many variables, the auction will be less appropriate. In addition, there will be no meaningful competition where the auction effectively ceases to be based on a common description of the subject matter of the procurement. Such risk is higher where many variables related to technical, quality and performance characteristics of the subject matter are involved;

(iii) Non-price evaluation criteria used must be quantifiable and capable of being expressed in monetary terms (such criteria could include delivery times

and warranty periods) so as to be factored in the automated mathematical formula that will identify the winning bid at each successive stage of the auction. During the auction, each revised bid results in a ranking or re-ranking of bidders using these automated techniques;

(f) Appropriate guidance on the use of auctions: depending on the circumstances prevailing in an enacting State, including the level of experience with ERAs, an enacting State may choose to restrict the use of ERAs to procurement of goods. Some jurisdictions maintain lists identifying specific goods, construction or services that may suitably be procured through ERAs. Enacting States should be aware that maintaining such lists could prove cumbersome in practice, since it requires periodic updating as new commodities or other relevant items appear. If lists are intended to be used, it is preferable to develop illustrative lists of items suitable for acquisition through ERAs or, alternatively, to list generic characteristics that render a particular item suitable or not suitable for acquisition through this procurement technique;

(g) Phased introduction of auctions: it is recommended that enacting States lacking experience with the use of ERAs should introduce them in a staged fashion as experience with the technique evolves; that is, to commence by allowing price-only auctions, where price only is to be used in determining the successful submission, and subsequently, if appropriate, to proceed to the use of more complex auctions, where award criteria include non-price criteria. The latter type of auctions would require an advanced level of expertise and experience on the part of procuring entities, such as the capacity properly to factor any non-price criteria to a mathematical formula. Such experience and expertise in the procuring entity is necessary even if the procuring entity outsources the conduct of the auction to third-party service providers, because the procuring entity must still be able to supervise activities of such third-party providers;

(h) As discussed in paragraphs ... above, the Model Law discourages charging fees for the use of procurement systems. If there were to be any entry fee for the auction, consistent with the principles and objectives of the Model Law, at a minimum it must be disclosed at the outset of the procurement;

(i) Capacity-building: in order to derive maximum benefits from the use of ERAs, both procuring entities and suppliers and contractors must have confidence in the process and its results in terms of achieving the government's objectives in procurement, and must be able to operate ERAs effectively. To that end, States should be prepared to invest sufficient resources in awareness and training programmes at an early stage:

(i) Procuring entities will need to learn new skills and undergo orientation in ERAs, so as to understand the benefits and potential concerns, the conditions for use of ERAs, the circumstances in which ERAs are appropriate, and the risks of using them even in situations when they are appropriate;

(ii) Suppliers and contractors, especially SMEs, will need to be aware and understand the changes involved in doing business with the government through an ERA and what impact these changes will have on their businesses. Otherwise, a marketplace where procurement was previously handled successfully through other procurement techniques may be abandoned, and the government investment in the ERA system may fail;

- (iii) The public at large should understand benefits of introducing the new procurement technique and be confident that it will contribute to achieving the government's objectives in procurement.

An awareness and training programme can be delivered through various channels and means, many of which may already be in place, such as regular briefings, newsletters, case studies, regular advice, help desk, easy-to-follow and readily accessible guides, simulated auctions, induction and orientation courses. The awareness and training program should include collection and analysis of feedback from all concerned, which in turn should lead to necessary adjustments in the ERA processes.

7. ERAs under the Model Law may be conducted either as a procurement method ("stand-alone ERAs") or as the final phase preceding the award of the procurement contract in other procurement methods (or under framework agreements with second-stage competition, "ERAs as a phase"), as and where appropriate. The two types of ERAs require different provisions to some extent; enacting States may choose to provide for both types of ERAs, or only one.

8. The circumstances in which stand-alone ERAs are appropriate are where the procuring entity's needs are relatively straightforward, such as commodities and standardized items that can be purchased off-the-shelf. Where such purchases are likely to be repeated, procuring entities may wish to combine them with open framework agreements (guidance as to the use of which is found in paragraphs ... below). ERAs as a phase are suitable where successive bidding follows more detailed initial steps in the procedure (such as assessing qualifications and responsiveness, and perhaps ranking), and are normally better suited to less simple procurement. Where auctions are used in more complex procurement, there is a risk of a concentrated market, but where it is assessed that even relatively few players will compete aggressively, the technique can still be used effectively in such situations.⁷ The provisions in chapter VI are drafted to allow for either option to be exercised without significant drafting amendments to the Model Law's provisions.

B. Provisions on electronic reverse auctions to be included in the article-by-article commentary

Article 30. Conditions for use of an electronic reverse auction

1. The purpose of the article is to set out exhaustive conditions for the use of ERAs, either as stand-alone ERAs or ERAs as a phase. These conditions are necessary to mitigate risks of improper use or overuse of ERAs.

2. Paragraph (1) sets out conditions for use of stand-alone ERAs. They are based on the notion that stand-alone ERAs are primarily intended to satisfy the needs of a procuring entity for standardized, simple and generally available goods that arise repeatedly, such as for off-the-shelf products (e.g., office supplies, commodities, standard information technology equipment, and primary building products). In

⁷ The Guide may need to explain further points to be considered when the choice is made between stand-alone ERAs and ERAs as a phase. The provision of guidance to the Secretariat is requested.

these types of procurement, the determining factor is price⁸ or quantity; a complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated.

3. The requirement for detailed and precise description of the subject matter of the procurement found in paragraph (1)(a) will preclude the use of this procurement technique in procurement of most services and construction, unless they are of a highly simple nature and are in reality quantifiable (for example, straightforward road maintenance works).

4. In formulating detailed and precise description of the subject matter of the procurement and other terms and conditions of the procurement, procuring entities will need to set out clearly the objective technical and quality characteristics of the goods, construction and services procured, as required in article 10 of the Model Law, so as to ensure that bidders will bid on a common basis. The use of a common procurement vocabulary to identify goods, construction or services by codes or by reference to general market-defined standards is therefore desirable.

5. Paragraph (1)(b) is aimed at mitigating the risks of collusion and ensuring an optimal outcome of the auction through rigorous competition. It requires that there must be a competitive market of suppliers or contractors anticipated to be qualified to participate in the ERA. (For concerns regarding compromising anonymity and collusion, see paragraphs ... above.) Paragraph (1)(b) is supplemented by article 54 (2) under which the procuring entity has the right to cancel the auction if the number of suppliers or contractors registered to participate in the auction is insufficient to ensure effective competition during the auction (see paragraphs ... of this Guide for the guidance on the relevant provisions of article 54 (2)).

6. The reference in paragraph (1)(b) to suppliers or contractors that are anticipated to be qualified to participate in the ERA should not be interpreted as implying that pre-qualification will necessarily be involved in procurement through ERAs. It may be the case that, in order to expedite the process and save costs, the qualifications of the winning bidder only are assessed after the auction. See paragraphs ... of this Guide for guidance on the relevant provisions of article 56.

7. The article is intended to apply to procurement where the award of contracts is based on either the price or the price and other criteria that are specified in the beginning of the procurement proceedings. The notion of an auction is that price is a significant (if not the only) determining award criterion: as mentioned in paragraph ... above, ERAs are not suitable for complex procurement, in which value judgements on the relative importance of evaluation criteria are involved, and where there may be many such criteria. When non-price criteria are involved in the determination of the successful submission, paragraph (1)(c) requires that such criteria must be quantifiable and capable of expression in monetary terms (e.g., figures, percentages). While all criteria can in theory be expressed in such terms, an optimal result will arise where it makes sense in practice to express the evaluation criteria in such terms.

⁸ The guidance on what constitutes price as compared to non-price criteria, including near-price criteria (such as the warranty period) expressed as a percentage to the total price, is to be found in the commentary to article 11.

8. Whether price alone or price and other award criteria are permitted to be factored into procurement by ERAs is to be decided by an enacting State in accordance with the prevailing circumstances on the ground, including the level of experience of its procuring entities and suppliers or contractors with ERAs, and in which sector of the economy the use of ERAs is envisaged. See paragraph ... above for the general policy considerations arising in the use of non-price award criteria.

9. The provisions of the Model Law should not be interpreted as implying that ERAs will be appropriate and should always be used even if all the conditions of paragraph (1) are met. Enacting States may wish to provide, for example in the procurement regulations and supporting guidance, further conditions for the use of ERAs, such as consolidating purchases to amortize the costs of setting up the system for holding auctions, including those of third-party software and service providers, and guidance on the concept of “price” criteria drawing on the relevant provisions of article 11 and commentary thereto.

10. Paragraph (2) addresses the use of ERAs as a phase. Such ERAs may be particularly suitable for second-stage competition in framework agreements, where there are limited numbers of variables to auction.⁹ Using ERAs as a phase in all procurement methods envisaged under the Model Law may not, on the other hand, be always appropriate. Since an ERA presupposes fully automated processes, including automated evaluation through the use of a mathematical formula, the procuring entity must establish that the criteria to be used in determining the successful submission are quantifiable and capable of being expressed in monetary terms (paragraphs (1)(c) and (2)) if an ERA as a phase in other procurement methods is to be appropriate. Some procurement methods presuppose a focus on quality and involve more complex evaluation of quality aspects than through establishing pass/fail criteria for ascertainment of responsiveness of submissions. In such cases, it may often be impossible or inappropriate to evaluate the quality aspects through the auction. Since the Model Law requires the auction to be the final stage before the award of a procurement contract, auctions cannot be used where quality aspects are to be evaluated after the auction (on all these issues, see paragraphs ... above).¹⁰

⁹ The text reflects the points made in the Working Group and during expert group consultations. The Guide may need elaborate further on difficulties of preserving anonymity of bidders and of ensuring genuine competition among them where ERAs are used as a phase, in particular in closed framework agreements. The provision of guidance to the Secretariat is requested.

¹⁰ The following suggestions were made at the Working Group’s eleventh session (A/CN.9/623, paras. 57 and 74-76): (i) the guidance would recognize difficulties with introducing and regulating ERAs as a phase in some procurement methods; (ii) alert enacting States about the lack of practical experience with regulation and use of ERAs in this manner; and (iii) it would explain whether and if so how ERAs might be incorporated in various procurement methods envisaged by the Model Law, and which modifications of traditional characteristics of those procurement methods where ERAs might be incorporated would be needed. The Guide would note, with relevant cross-references, that the use of ERAs in tendering proceedings would be inappropriate due to the particular characteristics of the latter (such as prohibition of substantive modification of tenders after their submission) and whether, in other procurement methods, provisions of the Model Law would have to be amended to allow repetitive submission of offers or quotations so that to accommodate the use of ERAs in them. The appropriate guidance on the suggestions still considered current is to be included. The provision of guidance to the Secretariat is requested.

Article 52. Procedures for soliciting participation in procurement by means of an electronic reverse auction

1. The article sets out the procedures for soliciting participation in procurement by means of a stand-alone ERA, i.e. where an ERA is used as a procurement method rather than a final phase before the award of a procurement contract in other procurement methods or under framework agreements. Although there are core procedures that will cover all stand-alone ERAs, the procedures for each procurement will depend on the complexity of the ERA at hand. Some ERAs may be very simple, not even requiring the bidders' qualifications and responsiveness to be ascertained before the auction, while other may be more complex and involve pre-qualification, examination and evaluation of initial bids. The subject matter of the procurement, the examination and evaluation criteria to be used, and whether qualifications are to be assessed before the auction (or, as allowed under article 56 (2), only those of the winner are to be assessed after the auction) will determine the complexity of the procedures.
2. For example, for the procurement of off-the-shelf products, there is almost no risk that bids will turn out to be unresponsive or bidders unqualified, and so the need for pre-auction checks is correspondingly low. In such cases, a simple declaration by suppliers or contractors before the auction may be sufficient (for example, that they possess the required qualifications and they understand the nature of, and can provide, the subject matter of the procurement). In other cases, ascertaining responsiveness before the auction may be necessary (for example, when only those suppliers or contractors capable of delivering cars with a pre-determined maximum level of emissions are to be admitted to the auction), and initial bids will therefore be required. In some such cases, the procuring entity may wish to rank suppliers or contractors submitting responsive initial bids before the auction (in the given example, suppliers or contractors whose initial bids pass the established threshold will be ranked on the basis of the emissions levels), so as to indicate their relative position and the extent of improvement that their bids may need during the auction in order to increase a chance to win the auction. In such cases, the auction must be preceded by an evaluation of the initial bids. The article has been drafted to accommodate all these different options.
3. Paragraph (1) regulates the solicitation of bids in stand-alone ERAs. By cross-referring to the provisions of article 32, it requires open solicitation, reflecting one of the conditions for the use of ERAs as a stand-alone procurement method — the existence of a competitive market (see article 30 (1)(b)). By additionally requiring international solicitation as an application of the default rule under the Model Law, the provisions aim at achieving as wide participation in an ERA as possible. The limited exceptions to international solicitation are those that apply to other procurement methods requiring open solicitation and are listed in article 32 (4) (domestic procurement in accordance with article 8 and cases of low-value procurement. See the guidance to article 32 (4) in paragraphs ... above). Where the auction is preceded by pre-qualification, the provisions of article 17 will apply to the pre-qualification proceedings and to the solicitation of bids from those that have been pre-qualified (noting that those provisions have also been designed to ensure open international solicitation as the default rule).
4. The provisions on solicitation have been designed to fulfil one of the essential conditions for use of stand-alone ERAs — effective competition during the auction

(article 30 (1)(b)). Effective competition can only be present in the absence of collusion, which in turn requires the anonymity of bidders. The importance of fulfilling that condition is reiterated in some other provisions of this chapter: for example by the requirement in article 52 that the minimum number of suppliers or contractors required to register for the auction must be specified in the invitation to the auction (paragraph (1)(j)), and by requiring the cancellation of the auction if the specified minimum of registered suppliers or contractors is not reached. In addition, in accordance with article 54 (2), the procuring entity may cancel the auction even if the required minimum has been reached but the procuring entity still considers that the number of registered suppliers or contractors is not sufficient to ensure competition.

5. Paragraph (1) in addition lists all information that must be included in the invitation to the auction. Since in simple auctions no further information may be provided as the invitation is followed by the auction itself, the list is intended to cover exhaustively all information that must be provided to suppliers or contractors before the auction. The aim is to enable them to determine whether they are interested and eligible to participate in the procurement proceedings, and if so, how they can participate. The information requirements are similar to those applicable to an invitation to tender (article 36) and contents of solicitation documents in open tendering proceedings (article 38). As in those cases, the procuring entity may omit information about the currency of payment and about language (subparagraphs (i) and (p)) in domestic procurement if it would be unnecessary in the circumstances; however, an indication of the language or languages may still be important in some multilingual countries even in the context of domestic procurement.

6. Additional information has been included in the list (as compared to the open tendering list) reflecting the procedural particularities of this procurement method, in particular that it is held online and involves the automatic evaluation of bids during the auction. Subparagraph (g) specifically highlights the need to provide to potential suppliers or contractors, alongside the evaluation criteria and procedures, the mathematical formula that will be used in the evaluation procedure during the auction. The automatic evaluation of bids using a mathematical formula, one of the distinct features of ERAs, is possible only where the evaluation criteria are quantifiable and expressed in monetary terms (as required by article 30 (1)(c)). Providing the mathematical formula from the outset of the procurement ensures that bids will be evaluated on a transparent and equal basis. This information, coupled with the requirement in paragraph (4)(c) to provide suppliers or contractors submitting initial bids with the result of any pre-auction evaluation, and the requirement in article 55 (2) to keep bidders informed of the progress of the auction, allows bidders to establish their status during the auction transparently and independently from the procuring entity and the system. They can thus verify the integrity of the evaluation process.

7. The information to be provided in subparagraph (j) to (p) is also particular to ERAs. Subparagraph (j) refers to the minimum number of suppliers or contractors required to register for the auction to be held. The importance of such information for ensuring effective competition during the auction is highlighted in paragraph 4 above. No single minimum can be stated in the Model Law itself (unlike for other procurement methods, such as request for quotations, where reference is made to a minimum of three quotations). This is because in some ERAs, a minimum of three

bidders may fulfil the requirement of ensuring effective competition and may ensure the anonymity of bidders and the avoidance of collusion, while in other cases it may not. The circumstances of each procurement will guide the procuring entity in specifying the appropriate minimum number. To avoid collusion, the minimum should be set as at a high a level as possible, taking into account however that the procuring entity will be obliged to cancel the auction if the minimum is not reached (while it may, under article 54 (2), cancel the auction even if the minimum has been reached, for example if collusion among registered suppliers or contractors is suspected or genuine competition even with the established minimum cannot be achieved (see the relevant commentary to article 54 (2) in paragraph ... below)). Issues of objectivity and fairness of treatment of suppliers or contractors should not be overlooked in this context.

8. Subparagraph (k) is an optional provision (accordingly presented in brackets) permitting a maximum number of bidders to be set, and setting out the procedure and criteria that are to be followed in selecting the maximum. As the accompanying footnote explains, the provision should not be enacted by States where local technical conditions do not so require, and in any event should be complemented with paragraph (2) of this article, so as to provide essential safeguards against abuse. UNCITRAL has permitted this measure in ERAs to allow for technical capacity limitations constraining access to the systems concerned (e.g. the software acquired for holding ERAs may accommodate only a certain maximum number of bidders). However, enacting States should be aware that such capacity constraints are declining at a rapid rate, and the provision should become obsolete within a short period.

9. Establishing a maximum contradicts the Model Law's general principle of full and open competition; it is therefore permitted only in the exceptional circumstances prescribed. The concept is to limit the number of participants for practical reasons but not the principle of competition, and the restriction is permissible only to the extent justified by the actual technical capacity constraints. Selection of the participants is to be carried out only in accordance with pre-disclosed criteria and procedures, which must conform to the provisions of the Model Law. The procuring entity may resort to random selection or "first come first served", as in restricted tendering used on the ground of article 28 (1)(b) (see paragraph ... above), to limit the number on an objective basis (reflecting that where there is a sufficient number of participants, there will be sufficient market homogeneity to allow the best market offers to be elicited). It may alternatively resort to pre-selection, as in request for proposals with dialogue (see paragraphs ... above).¹¹ As explained in paragraphs ... above, neither pre-qualification nor examination of initial bids (which involve pass/fail tests) permit the selection of a pre-determined number of best-qualified suppliers or contractors or best-ranked bids.

10. Subparagraphs (l) to (p) list information about the technical aspects of the auction that must be provided to accommodate its on-line features and to ensure transparency and predictability in the process (such as specifications for connection,

¹¹ It is to be considered whether reference to pre-selection and methods of selection in restricted tendering proceedings are appropriate in the context of ERAs. The provision of guidance to the Secretariat is requested.

the equipment being used, the website, any particular software, technical features and, if relevant, capacity). The Model Law lists only those minimum functional requirements crucial for the proper handling of ERAs, and they are expressed in technologically neutral terms. These requirements should be supplemented by detailed regulations. As an example, regulations must spell out the criteria governing the closing of the auction referred to in subparagraph (o), such as: (i) when the date and time specified for the closing of the auction has passed; (ii) when the procuring entity, within a specified period of time, receives no more new and valid prices or values that improve on the top-ranked bid; or (iii) when the number of stages in the auction, fixed in the notice of the ERA, has been completed. The regulations should also make it clear that each of these criteria may entail the prior provision of additional specific information. For example, item (ii) above would require the specification of the time that will be allowed to elapse after receiving the last bid before the auction closes. Item (iii) above would require the prior provision of information on whether there will be only a single stage of the auction, or multiple stages (in the latter case, the information provided should cover the number of stages and the duration of each stage, and what the end of each stage entails, such as whether the exclusion of bidders at the end of each stage is envisaged).

11. With reference to subparagraph (p), the regulations should also require the disclosure of: (i) the procedures to be followed in the case of any failure, malfunction, or breakdown of the system used during the auction process; (ii) how and when the information in the course of the auction will be made available to the bidders (at a minimum, and to ensure equal treatment, the same information should be provided simultaneously to all bidders); and (iii) as regards the conditions under which the bidders will be able to bid, any minimum improvements in price or other values in any new bid during the auction or limits on such improvements. In the latter, case, the information must explain the limits (which may be inherent in the technical characteristics of the items to be procured).

12. This detailed information may be provided in the notice of the ERA itself or, by reference, in the rules for the conduct of the auction, provided that all relevant information is made known to all suppliers or contractors sufficiently in advance before the auction, to allow them to properly prepare for participation in the auction. It should be acknowledged that it may not always be possible to provide all relevant information in the invitation. For example, the deadline for registration to the auction (subparagraph (m)) and the date and time of the opening of auction (subparagraph (n)) in complex auctions involving the examination or evaluation of initial bids (see paragraphs 16-21 below) may not be known with certainty before the examination or evaluation is completed. The criteria for closing the auction may need to be determined when the number of suppliers or contractors registered for the auction and other information that affects the structure of the auction (whether it would be held in one round or several subsequent rounds) are known. Where it is not possible to provide all relevant information in precise terms, the invitation must set out at a minimum the general criteria, leaving specific criteria to be defined later in the process but in no case later than the commencement of the auction.

13. Some information listed in paragraph (1) must be interpreted by reference to other provisions of this chapter. For example, subparagraph (f), referring to the criteria and procedure for the examination of bids against the description of the

subject matter of the procurement, should be read together with the provisions of article 56 (2) that allow the examination of the winning bid after the auction in very simple auctions. Subparagraph (f) also includes any criteria that cannot be varied during the auction (such as minimum technical requirements). Subparagraph (s), referring to the name, functional title and address of contact person(s) in the procuring entity for direct communication with suppliers or contractors “in connection with the procurement proceedings before and after the auction”, has to be read together with the provisions of article 55 (2)(d) that prohibits any communication between the procuring entity and bidders during the auction.

14. Some information required to be provided for other procurement methods is not appropriate in the context of ERAs, and so does not appear in paragraph (1). For example, bids for a portion or portions of the subject matter of the procurement are not permitted (otherwise, separate auctions within the same procurement proceedings would be required). There is no provision permitting a meeting of suppliers or contractors, in order to ensure that the anonymity of bidders is preserved. Subparagraph (x) on post-auction formalities does not include any reference to approval by an external authority, both to reflect the conditions for the use of stand-alone ERAs and the type of the subject matter envisaged to be procured through such ERAs under article 30 (1) of the Model Law. The execution of a written procurement contract under article 21 of this Law is, however, provided for, and specific formalities in the context of ERAs, such as possibility of assessing qualifications or responsiveness after the auction, have been included.¹²

15. Paragraph (2) dealing with the imposition of a maximum number of suppliers or contractors that can be registered for the auction has been discussed in connection with paragraph (1) (k) of the article (see paragraph 8 above). Notably, the procuring entity may impose such a maximum number only to the extent that technical capacity limitations in its communication system so require. As is also the case with open framework agreements, enacting States should be aware that technical developments are likely to make this provision obsolete in the short to medium term.

16. Paragraphs (3) and (4) establish additional requirements for the contents of the invitation to the auction and other pre-auction stages in stand-alone ERAs involving initial bids. Although it would normally be the case that a price-only auction does not require initial bids and other pre-auction procedures, the provisions are flexible enough to allow for this eventuality (where, for example, the procuring entity considers that minimum technical requirements are critical). The enacting State may omit these two paragraphs if it decides to provide in its national public procurement law only for very simple auctions, not involving any pre-auction stages beyond the invitation and registration for the auction.

17. In more complex auctions involving initial bids, the procuring entity must include information in the invitation to the auction as specified in paragraph (3), i.e. additional to that listed in paragraph (1). In such cases, the procuring entity must both request initial bids and provide sufficiently detailed instructions for preparing them, including the scope of the initial bids, the language in which they are to be

¹² It may be considered that more detail of the policy considerations should be included. If so, the provision of guidance on those policy considerations to the Secretariat is requested.

prepared and the manner, place and deadline for presenting them. Paragraphs (1) (f) and (g) as regards the criteria for examination and evaluation of bids will also be applicable to initial bids, and the information to be provided under those paragraphs will therefore need to cover examination or evaluation of bids before and during the auction. Since an overlap will exist between the information to be provided about the initial bids and bids during the auction, the procuring entity must correctly identify which information is relevant to which stage, to avoid confusion (in particular as regards the manner, place and deadline for presenting initial bids as opposed to the manner of accessing the auction and the manner and deadline for registering to the auction, different evaluation criteria and procedures and so on). The information provided as regards preparation, examination or evaluation of initial bids must be carefully drafted to allow suppliers or contractors to prepare initial bids and assure them that their initial bids will be examined or evaluated on an equal basis.

18. Paragraph (4) regulates additional pre-auction steps that are required for an examination or evaluation of initial bids. To allow effective challenge by aggrieved suppliers or contractors, a notice of rejection of any initial bid together with the reasons for rejection must be promptly communicated to the supplier or contractor concerned. The provisions of paragraph (4) do not regulate the reasons for rejection but provisions of chapter I of the Model Law will apply, such as article 9 setting reasons for disqualification, article 10 that set out responsiveness criteria, article 19 on rejection of abnormally low submissions, and article 20 on exclusion of a supplier or contractor on the ground of inducements, conflicts of interest or unfair competitive advantage. For ease of reference, the enacting State may wish to consider listing all grounds for rejection of initial bids in the procurement regulations.

19. All suppliers or contractors submitting responsive initial bids must be invited to the auction unless the provisions of paragraphs (1) (k) and (2) have been enacted and the number of suppliers or contractors submitting responsive initial bids to be invited to the auction has been limited by the procuring entity in accordance with those provisions. If so, the procuring entity can reject bids in accordance with the criteria and procedure specified in the invitation to the auction for the selection of the maximum number. If the pool of suppliers or contractors submitting responsive initial bids will turn out to be below the minimum established in accordance with paragraph (1) (j), the procuring entity must cancel the auction; if the pool turns out to be above the minimum but still insufficiently large to ensure effective competition during the auction, the procuring entity may decide to cancel the auction, in accordance with article 54 (2) (see the relevant commentary to article 54 (2)).

20. As stated in paragraph 2 above, some complex auctions may involve an examination and all initial bids that meet the minimum threshold are admitted to the auction. In some other complex auctions, in addition, there is an evaluation of the initial bids and they may be ranked. In the latter case, the ranking of suppliers or contractors submitting responsive bids and other information about the outcome of the evaluation must be communicated to them, under paragraph (4)(c), before the auction can commence. The information to be communicated may vary from auction to auction; in all cases, it should be sufficient to allow those suppliers or contractors to determine their status vis-à-vis their competitors in the auction before the auction

so that to allow meaningful and responsible bidding during the auction. Together with the mathematical formula to be used during the auction, as disclosed in the invitation to the auction in accordance with paragraph (1)(g), this information should allow suppliers or contractors to independently assess their chances to succeed in the auction and identify which aspects of their bids they should and could vary and by how much, in order to improve their ranking.¹³

21. The provisions of paragraph (4) have been designed with a view to preserving the anonymity of bidders and the confidentiality of information about their initial bids and the results of any examination or evaluation. Only information relevant to the supplier or contractor's initial bid is provided to each supplier or contractor. To ensure fair and equitable treatment of suppliers and contractors, the information must be dispatched promptly and concurrently to all of them.¹⁴

Article 53. Procedures for soliciting participation in procurement proceedings involving an electronic reverse auction as a phase preceding the award of the procurement contract

1. This article regulates the procedures for soliciting participation in procurement proceedings involving an ERA as a phase. The conditions for use of such ERAs are discussed in the guidance to article 30, at paragraphs ... above.

2. Paragraph (1) refers to the minimum information that must be included when the procuring entity first solicits participation of suppliers or contractors in such procurement proceedings. The provisions of paragraph (1) require that, in addition to all the other information required to be provided to suppliers or contractors, the procuring entity must specify that an ERA will be held, must provide the mathematical formula to be used during the auction and must disclose all other information necessary for participation in the auction. The disclosure of this

¹³ The Guide may need to provide further guidance as regards the extent of information on the outcome of the full evaluation that should be provided to suppliers or contractors presenting initial bids. See paragraph 3 of the guidance to article 55 for similar considerations. The provision of the guidance to the Secretariat on this issue is requested.

¹⁴ The location of the following wording that was suggested in the Working Group to be included in the Guide is to be considered: "In complex auctions, the procuring entity may receive initial bids that significantly exceed the minimum requirements, particularly where suppliers would be permitted to offer items with different technical merits and correspondingly different price levels." Another issue for consideration is the question of tender securities and whether or not they would be used in stand-alone ERAs. For simple auctions, the answer is presumably not (whether they are stand-alone or a phase); for complex auctions, the situation may be different and tender securities might be appropriate. If they are to be required, how will the requirements work in practice? What could permit the forfeiture of the tender security? Will the failure to register for the auction under article 54 permit the forfeiture on the ground that participating in the auction has been identified as a term of the procurement? In this case, the aim is to avoid situations where the procuring entity is prevented from holding the auction because one or two suppliers have failed to register for the auction. In practice, however, bidders cannot be obliged to change any aspects of their bids and can simply abstain from the bidding, so the tender security may in fact be worthless. It should be recalled that the Working Group has decided that there should be no provisions requiring bidding during the auction and excluding from the auction inactive bidders because such provisions would be worthless, especially in the light of the tendency in auctions to actively bid at last moment. The guidance on tender securities in the context of this chapter should be aligned with the commentary to article 16 on tender securities where similar issues are raised.

minimum information at the outset of the procurement is essential in order to allow suppliers or contractors to determine not only their interest but also their ability to participate in the procurement. Suppliers or contractors may decide against participation in procurement involving ERAs, for example because of the lack of technical capacity, information technology literacy or confidence in the process (for the latter, and suggested confidence-building measures, see paragraphs ... above).

3. Once announced, the ERA will be the method of selecting the successful supplier or contractor, unless the number of suppliers or contractors participating is insufficient to ensure effective competition. In this case, and in accordance with article 54 (2), the procuring entity has the right to cancel the ERA. It also has a separate right under article 18 to cancel the procurement proceedings. This right may in particular be exercised if it is become known to the procuring entity that the anonymity of bidders has been compromised at earlier stages of the procurement proceedings and there is a risk of collusion.

4. Paragraph (2) refers to the stage immediately preceding the holding of the auction, after all other steps required to be taken in the procurement concerned have been completed (such as pre-qualification, examination or evaluation of initial bids) and the only remaining step is to determine the successful bid through the auction. The procuring entity must provide the remaining participants with detailed information about the auction: the deadline by which they must register for the auction, the date and time of the opening of the auction, identification requirements and all applicable rules for the conduct of the auction. The provisions of articles 52 and 53 have been drafted to ensure that equivalent information is provided to participants in stand-alone ERAs and ERAs as a phase. Further discussion of the required information is found in the guidance to article 52 (see paragraphs ... above).
