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

Note by the Secretariat*

This Note introduces a proposal for a chapter in a draft Guide to Enactment of the UNCITRAL Model Law on Public Procurement that would explain changes made to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services, covering provisions of chapters III and IV and articles 46-48 of chapter V of the 1994 Model Law.

* This document was submitted less than ten weeks before the opening of the session due to the need to finalize consultations.



Guide to Enactment of the UNCITRAL Model Law on Public Procurement

Part III. Changes made to the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (*continued*)

1994 CHAPTER III. TENDERING PROCEEDINGS (2011 Chapter III. Open tendering)

1994 SECTION I. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY (2011 Section I. Solicitation of tenders)

A. Summary of changes made in this chapter

1. The changes in the title of the chapter reflect the change in the name of this procurement method: in the 2011 text it is referred to as open tendering. The change in the title of the chapter's first section reflects the consolidation of all provisions related to pre-qualification in a single article in chapter I of the 2011 Model Law (see article 18 of the 2011 Model Law). The title of the chapter in the 2011 text therefore reads "Open tendering" and the title of the section reads "Solicitation of tenders".
2. The main changes in the chapter itself are the removal of a number of provisions to chapter I, so as to make them applicable to all procurement methods, not only to tendering proceedings.

B. Article-by-article commentary

Domestic tendering (article 23)

3. The article has been deleted. Its provisions became the basis for exemptions to the rules of the Model Law on the issuer of tender securities (article 17(1)(b)), the international publication of an invitation to pre-qualify (article 18(2)) and the international publication of the solicitation in open tendering, two-stage tendering and procurement by means of an electronic reverse auction (article 33(4)).

Procedures for soliciting tenders or applications to pre-qualify (1994 article 24) (Procedures for soliciting tenders (2011 article 36))

4. The procedures for soliciting tenders have been moved from this chapter to 2011 chapter II (2011 article 33) and made applicable to open tendering, two-stage tendering and electronic reverse auctions (see article 33 of the 2011 Model Law and the commentary to that article [\[**hyperlink**\]](#)). The procedures for soliciting applications to pre-qualify have been moved to the article that regulates pre-qualification proceedings as a whole (see article 18 of the 2011 Model Law and the commentary to it [\[**hyperlinks**\]](#)).

5. The main substantive changes are: under the 2011 Model Law, it is for the procurement regulations to identify the publication where this type of information is to be published (the 1994 Model Law required the enacting State to specify the official publication in the Law); and the provision of greater flexibility as regards the manner of international publication. As regards the latter, the 2011 text sets out that international publication involves ensuring that the publication will be widely accessible to international suppliers or contractors. It replaces the 1994 requirement for publication “in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation”, which had been considered in practice to require the use of an unnecessarily restrictive English-language publication.

**Contents of invitation to tender and invitation to pre-qualify (1994 article 25)
(Contents of invitation to tender (2011 article 37))**

6. The change in the title of this article reflects the removal of the provisions related to the invitation to pre-qualify to article 18 in chapter I of the 2011 text, which regulates all aspects of pre-qualification proceedings (see that article and the commentary to it [**hyperlinks**]).

7. The list of information to be included in the invitation now includes an additional requirement to set out all relevant information as regards any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, and the manner of presenting tenders.

Provision of solicitation documents (1994 article 26; 2011 article 38)

8. The reference to the cost of printing has been deleted to reflect the technology-neutral nature of the 2011 text. The 2011 provisions refer to the costs of providing solicitation documents to suppliers or contractors.

Contents of solicitation documents (1994 article 27; 2011 article 39)

9. The following amendments have been made to the required contents of the solicitation documents:

(a) The information listed in subparagraphs (v) and (x) of the 1994 text has been deleted;

(b) Subparagraph (d) now refers to the “detailed description” of the subject matter of the procurement required by article 10 of the 2011 text [**hyperlink**];

(c) The information related to examination and evaluation of tenders (listed in subparagraphs (e) and (r) of the 1994 text) has been amended. Under those provisions in the 2011 Model Law, the procuring entity is required to disclose in the solicitation documents both the procedures and criteria that will be applied for examining and evaluating tenders;

(d) Subparagraph (p) of the 2011 text adds a reference to the manner of opening tenders, in addition to the place, date and time of the opening (as in subparagraph (q) of the 1994 text), reflecting the technology-neutral nature of the 2011 text, which enables both manual and automatic opening of tenders;

(e) The final proviso in subparagraph (t) of the 1994 text that the omission of any reference to applicable laws or regulations will not constitute grounds for review or give rise to liability on the part of the procuring entity has also been deleted; the 2011 text now includes additional references to the laws or regulations applicable to procurement involving classified information and to the place where all laws and regulations directly pertinent to the procurement in question may be found;

(f) Finally, the information listed in subparagraph (w) of the 1994 text, which has become subparagraph (v) of the 2011 text, has been supplemented by a requirement to include the duration of the applicable standstill period or, if none will apply, a statement to that effect and the reasons therefor.

Clarifications and modifications of solicitation documents (1994 article 28; 2011 article 15)

10. This is a further set of provisions that has been moved to chapter I of the 2011 text and thus made applicable to all procurement proceedings, not only to tendering.

11. The provisions as they now appear in 2011 article 15 [\[**hyperlink**\]](#) remain substantially unamended, except:

(a) The requirement for the procuring entity to respond to the request for clarification “within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender” has been replaced with a requirement to respond “within a time period that will enable the supplier or contractor to present its submission in a timely fashion”; and

(b) A new paragraph (3) has been added obliging the procuring entity (i) to publish the amended information in the same manner and place in which the original information was published and (ii) to extend the deadline for presentation of submissions if, as a result of a clarification or modification, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate.

1994 SECTION II. SUBMISSION OF TENDERS (2011 Section II. Presentation of tenders)

Language of tenders (1994 article 29) (Rules concerning the language of documents (2011 article 13))

12. This is yet another set of provisions that has been moved to chapter I of the 2011 text and thus made applicable to all submissions, not only to tenders. As explained in paragraph ... above, the provisions have been consolidated with article 17 of the 1994 Model Law that deals with the language of the pre-qualification and solicitation documents. As a result, article 13 of the 2011 Model Law [\[**hyperlink**\]](#) regulates the language(s) of all documents in the procurement proceedings, regardless of whether the documents are prepared by the procuring entity or by suppliers or contractors.

Submission of tenders (1994 article 30) (Presentation of tenders (2011 article 40))

13. The provisions have been substantially revised. Paragraphs (1) to (4) have been removed to article 14 in chapter I of the 2011 Model Law (addressing the rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions [\[**hyperlink**\]](#)). Apart from making the provisions applicable not only to tenders but also to applications to pre-qualify, applications for pre-selection and to all submissions, the following substantive amendments have been made:

(a) Paragraph (1) in 2011 article 14 refers not only to the place and deadline but also to the manner for presenting the relevant documents, for the reasons provided in paragraph 9 (d) above;

(b) A new requirement has been included in paragraph (2) of 2011 article 14 that the deadlines fixed by the procuring entity must allow sufficient time for suppliers or contractors to prepare and present their applications or submissions, taking into account the reasonable needs of the procuring entity (in the 1994 text, such requirement was found only in the context of applications to pre-qualify (see 1994 article 7(3)(a)(iv) and paragraph ... above));

(c) Finally, paragraph (3) of 2011 article 14 requires the procuring entity to extend the deadline if, as a result of a clarification or modification, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate (reflecting corresponding changes made in provisions on clarifications and modifications of solicitation documents, see paragraph 11 (b) above).

14. The remaining provisions of article 30 of the 1994 Model Law have been reflected in 2011 article 40 and amended as follows:

(a) Paragraph (1) in 2011 article 40 opens with a new express requirement that tenders must be presented in the manner, at the place and by the deadline specified in the solicitation documents;

(b) Reflecting the new legal framework for the use of various means of communication, in particular that the procuring entity has the right to require the use of a particular means of communication or combination thereof (article 7 of the 2011 Model Law [\[**hyperlink**\]](#)), the right of the supplier or contractor to submit a tender in a paper form in a sealed envelope has been removed;

(c) The requirement on the procuring entity to ensure at least a similar degree of integrity if it requires an alternative to paper form of communication has been added to paragraph (2)(a)(ii) of 2011 article 40 (the 1994 text referred only to authenticity, security and confidentiality);

(d) Under paragraph (2)(b) of 2011 article 40, the procuring entity must provide to the supplier or contractor a receipt showing the date and time when its tender was received (the 1994 text required such a receipt only upon request);

(e) Under paragraph (2)(c) of 2011 article 40, the procuring entity is required to preserve the security, integrity and confidentiality of a tender and to ensure that the content of the tender is examined only after it is opened (there was no such requirement in the 1994 text);

(f) Paragraph (3) of 2011 article 40 emphasizes that a tender received by the procuring entity after the deadline for presenting tenders must be returned unopened to the supplier or contractor that presented it.

Period of effectiveness of tenders; modification and withdrawal of tenders (1994 article 31; 2011 article 41) remains substantively unchanged.

Tender securities (1994 article 32; 2011 article 17)

15. This is another set of provisions that has been moved to chapter I of the 2011 Model Law and thus made applicable to all procurement methods, not only to tendering. The term “tender securities” has nevertheless been retained in the 2011 Model Law to reflect that it is widely used and consistently understood. The guidance to these provisions (see the commentary to article 17 [\[**hyperlink**\]](#)) emphasizes that a tender security may nonetheless be requested in any other procurement method, if appropriate.

16. The amendments to the provisions as they are set out in 2011 article 17 are as follows: (i) paragraph (1)(b) includes the exception for domestic procurement found in article 23 of the 1994 Model Law (see paragraph 3 above); and (ii) in paragraph (1)(f)(ii) reference is made to a failure to sign a procurement contract if so required by the solicitation documents (not by the procuring entity as in the 1994 text), in line with the provisions of the Model Law obliging the procuring entity to include this type of requirement, when applicable, in the solicitation documents (see e.g. article 27(y) of the 1994 text and article 39(w) of the 2011 text).

1994 SECTION III. EVALUATION AND COMPARISON OF TENDERS (2011 Section III. Evaluation of tenders)

17. The change in the title of the section reflects the deletion throughout the 2011 Model Law of references to “comparison” of tenders and other submissions. This change has been introduced to reflect that “evaluation” necessarily encompasses a comparison between submissions, unlike examination (which involves checking submissions against a single set of responsiveness criteria set out in the solicitation documents), and therefore the term “comparison” is superfluous.

Opening of tenders (1994 article 33; 2011 article 42)

18. The following amendments have been made to the provisions:

(a) In paragraph (1), the reference to the deadline specified in any extension of the deadline has been deleted; it was considered superfluous (the deadline is required to be specified in the solicitation documents, the 2011 definition of which includes any amendments thereto. The reference to the “deadline” in the 2011 text therefore encompasses any extension of the originally stipulated deadline (see, also, the commentary to article 15(3) of the 2011 Model Law as regards the consequences of extending the deadline [\[**hyperlink**\]](#));

(b) In paragraph (1), a reference has been added to the manner of opening of tenders, reflecting the technology-neutral nature of the 2011 text that enables manual and automatic opening of submissions;

(c) In paragraph (2), the words “to be present at the opening of tenders” have been replaced with the words “to participate in the opening of tenders”, to reflect that the role of suppliers or contractors or their representatives at the opening of tenders is not limited to those of passive observers: they may interact with the procuring entity, for example by pointing out any inconsistencies or improprieties that may be observed during the opening of tenders. This is true in physical as well as virtual meetings.

**Examination, evaluation and comparison of tenders (1994 article 34)
(Examination and evaluation of tenders (2011 article 43))**

19. The change in the title of the article reflects the deletion throughout the Model Law of references to “comparisons” of submissions, for the reasons provided in paragraph 17 above.

20. The article has been substantially revised. Some of its provisions have been removed and reflected in articles of chapter I of the 2011 Model Law, as follows:

(a) The provisions of paragraph (1) are reflected in the new 2011 article 16 [\[**hyperlink**\]](#) on clarification of qualification information and of submissions. They have been strengthened by an explicit prohibition of negotiations or making any change in price pursuant to a clarification sought, except in clearly listed cases (see article 16(3) and (4)) and by the requirement to include in the record of the procurement proceedings all communications generated in the context of clarifying qualification information or submissions (see article 16(6));

(b) Some provisions of paragraph (4)(b)(ii) and provisions of paragraphs (4)(c) and (4)(d) are reflected in the new 2011 article 11 on rules concerning evaluation criteria and procedures. 2011 article 11 has introduced many new elements to the rules concerning evaluation criteria and procedures, in particular:

(i) Unlike paragraph (4)(c) of 1994 article 34, which set out an exhaustive list of evaluation criteria for determining the lowest evaluated tender, paragraph (2) of 2011 article 11 provides for an illustrative list of evaluation criteria; paragraph (1) of that article establishes the general rule that all evaluation criteria must relate to the subject matter of the procurement;

(ii) A reference to environmental characteristics of the subject matter of the procurement has been added in the illustrative list in paragraph (2) of 2011 article 11, to reflect the observed increase of such criteria in practice;

(iii) Paragraph (3) of 2011 article 11 establishes a further general rule that for the procuring entity to be able to apply any evaluation criteria not relating to the subject matter of the procurement (such as socioeconomic criteria discussed in paragraphs ... of Part I (General remarks) of this Guide [\[**hyperlink**\]](#)), including a margin of preference, the procurement regulations or other provisions of law must require or authorize the procuring entity to do so;

(iv) The optional language for an ex ante approval of applying a margin of preference has been deleted; and paragraph (3)(b) of 2011 article 11 does not limit preferences to domestic suppliers or contractors or for domestically produced goods, but also allows any other preference (so that socioeconomic

criteria can also be provided for as preferences, as discussed in paragraphs ... of Part I (General remarks) of this Guide [\[**hyperlink**\]](#));

(v) The list of considerations found in paragraphs (4)(c)(iii) and (4)(c)(iv) of the 1994 Model Law has been deleted. It was considered that the rules on the evaluation criteria that do not relate to the subject matter of the procurement are drafted in sufficiently broad terms to accommodate the considerations of the enacting State referred to in the deleted paragraphs, and that some of the considerations set out in those paragraphs were no longer relevant or to be encouraged;

(vi) Paragraph (5) of 2011 article 11 sets out clear rules as regards the information about the evaluation criteria and procedures that must be included in the solicitation documents;

(vii) In addition to prohibiting the use of any criterion or procedure not set out in the solicitation documents, paragraph (6) of 2011 article 11 explicitly requires the procuring entity in evaluating submissions and determining the successful submission to use only those criteria and procedures that have been set out in the solicitation documents and to apply them only in the manner that has been disclosed in those solicitation documents;

(c) The provisions of 1994 paragraph (8) have been reflected in the new 2011 article 24 on confidentiality and in 2011 article 25 on the documentary record of procurement proceedings.

21. The remaining provisions of 1994 article 34 have been reflected in 2011 article 43 and amended as follows:

(a) Paragraph 1(a) requires the procuring entity to regard the tender as responsive if it conforms to all responsiveness requirements set out in the solicitation documents in accordance with article 10 of the Law (amending in this respect 1994 paragraph (2)(a));

(b) To avoid confusion with the acceptance of the successful tender in accordance with article 22 of the 2011 text [\[**hyperlink**\]](#) after the evaluation of tenders, references to (non)acceptance of tenders in paragraphs (3) and (4) of the 1994 text have been replaced with references to (non)rejection of tenders in paragraphs (2) and (3) of the 2011 text;

(c) Paragraph 3(a) prohibits the procuring entity from applying any procedure not set out in the solicitation documents (expanding the reference to criteria that was found in 1994 article 34(4)(a); this approach is in conformity with the corresponding provisions of article 11 of the 2011 Model Law [\[**hyperlink**\]](#) (see paragraph 20(b)(vii) above));

(d) Amending the provisions of 1994 article 34(4)(b), 2011 paragraph 3(b) expressly notes that, where price is the only award criterion, the lowest priced tender is the successful one, and where there are award criteria in addition to the price, the successful tender is the most advantageous tender ascertained not only on the basis of the criteria (as in the 1994 text) but also applying the procedures for evaluating tenders specified in the solicitation documents. The term “the most advantageous tender” has replaced the term “the lowest evaluated tender” that was used in this context in the 1994 Model Law, to reflect (i) the evolution of

procurement practices and terminology since that date, notably that providing for quality criteria has become increasingly common and more broadly accepted, and (ii) to align in this respect the Model Law with other international texts on public procurement;

(e) Paragraph 4 requires the procuring entity to convert the tender prices of all tenders to the currency specified in the solicitation documents, according to the rate set out in those documents (thus amending 1994 article 34(5)).

Prohibition of negotiations with suppliers or contractors (1994 article 35; 2011 article 44) remains substantively unchanged.

Acceptance of tender and entry into force of procurement contract (article 36) (Acceptance of the successful submission and entry into force of the procurement contract (2011 article 22))

22. This is a further set of provisions that have been moved to chapter I of the 2011 Model Law and thus made applicable to all procurement methods, not only to tendering; the expanded scope is reflected in the title change.

23. The article has been substantially revised as a result of the introduction of provisions regulating a standstill period. In addition, it has been restructured to ensure a more logical flow in the provisions. Paragraph (1) of 2011 article 22 expressly requires the procuring entity to accept the successful submission (a provision designed to avoid abuse), unless one of the listed circumstances justifying non-acceptance of the successful submission is satisfied. Paragraph (2) then sets out the general rule on the application of a standstill period; paragraph (3) addresses the exceptions to that rule; and paragraph (4) contains the rules on the dispatch of the notice of acceptance of the successful submission. Paragraphs (5)-(10) establish the general rule on the entry into force of the procurement contract (upon dispatch of the notice of acceptance), special rules on the entry into force of the procurement contract (a written procurement contract, its signature and/or approval by another authority), rules on exceptional circumstances justifying selection of the next successful submission (failure to sign a procurement contract or to provide a contract performance security), the general rule about the time point when notices under the article are considered to be dispatched, and finally rules on notifying other suppliers or contractors about the procurement contract that entered into force.

CHAPTER IV. PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES

A. Summary of changes made in this chapter

24. There is no chapter with the above name in the 2011 Model Law since, as explained in paragraph ... above, there is no longer any dedicated procurement method for the procurement of services as opposed to goods or construction. The appropriate procurement method is to be selected by the procuring entity not on the basis of whether it is goods, construction or services that are to be procured but in order to accommodate the circumstances of the given procurement (in particular, the complexity of the subject matter) and to seek to maximize competition to the extent

practicable (article 28 of the 2011 Model Law [\[**hyperlink**\]](#); for a fuller discussion of these issues, see the commentary to that article [\[**hyperlink**\]](#)).

25. Most provisions in 1994 chapter IV have been at least partially reflected in the 2011 Model Law in the provisions governing request-for-proposals proceedings (as explained in paragraph ... above, the 2011 Model Law regulates three types of request-for-proposals proceedings: request for proposals without negotiation, request for proposals with dialogue and request for proposals with consecutive negotiations), and some have been included and made of general application in chapter I; details of this restructuring are provided below.

B. Article-by-article commentary

Notice of solicitation of proposals (1994 article 37; subsumed in 2011 articles 18, 35, 47 and 49)

26. The provisions of paragraphs (1) and (2) of 1994 article 37 are now reflected in article 35(1) and paragraph (2) of articles 47 and 49 of the 2011 Model Law [\[**hyperlinks**\]](#), except for the provisions governing pre-qualification, which in the 2011 Model Law are all found in article 18 [\[**hyperlink**\]](#), as noted in paragraph 1 above.

27. Unlike 1994 article 37, the 2011 request-for-proposals provisions do not use the term “a notice seeking expression of interest;” rather, the term “invitation to participate” is used in 2011 articles 35(1), 47(1) and 49(1). See further on this point paragraph 56 below.

28. Amending paragraphs (1) and (2) of 1994 article 37, article 35(1) of the 2011 Model Law on solicitation in request-for-proposals proceedings establishes the place where the invitation is to be published — this general rule is the same as that applicable to tendering and similar methods (see paragraph 5 above). The paragraph then lists exceptions to the general rule. It also implements the approach to the manner of publication set out in paragraph 5 above [\[**hyperlink**\]](#).

29. The information that must be included in the invitation, set out in articles 47(2) and 49(2) of the 2011 Model Law, is considerably broader than that contained in article 37(1) of the 1994 Model Law.

30. 1994 article 37(3) is reflected in article 35(2) of the 2011 Model Law. The optional language for an ex ante approval of direct solicitation in request-for-proposals proceedings has been deleted. For the reasons explained in paragraph ... above, the reference to “reasons of economy and efficiency” to justify direct solicitation have been deleted from the chapeau provisions. 1994 article 37(3)(b) has been subsumed into 2011 article 35(2)(b) that requires the procuring to select the suppliers or contractors from which to solicit proposals in a non-discriminatory manner (on the practical implications of this provision see, further, the commentary in the introduction to chapter IV procurement methods and to articles 34 and 35 [\[**hyperlinks**\]](#)). 1994 article 37(3)(c) has been subsumed into the broader reference to procurement involving classified information in 2011 article 35(2)(c).

31. As regards the general strengthening of the provisions on direct solicitation in request for proposals proceedings in the 2011 Model Law (such as record requirements, ex ante notices of the procurement and their contents), see the commentary in the introduction to chapter IV procurement methods and to articles 34 and 35 [\[**hyperlinks**\]](#).

32. 1994 article 37(4) has been reflected in article 47(3) and 49(4) of the 2011 Model Law. As in the case of the corresponding provisions applicable to tendering, the reference to costs of printing has been deleted in the 2011 text (see paragraph 8 above).

Contents of requests for proposals for services (1994 article 38; subsumed in 2011 articles 47(4) and 49(5))

33. The provisions of 1994 article 38 have been reflected in articles 47(4) and 49(5) of the 2011 Model Law. The list of information to be included in the request for proposals has been amended: (a) the information listed in subparagraphs (d), (h), (l) and (o) has been deleted, as it was not relevant; (b) the remaining provisions have been amended to reflect the changes to the equivalent provisions regulating the contents of the solicitation documents in open tendering (see paragraph 9 above), and some related information has been grouped together for ease of reference; and (c) additional information has been included (in particular, regarding minimum responsiveness criteria, details of procedures, and (in request for proposals with dialogue) any elements that will not be the subject of dialogue and the minimum and maximum number of, and how to select, the suppliers or contractors to be invited to the dialogue).

Criteria for the evaluation of proposals (1994 article 39; subsumed in 2011 article 11)

34. The provisions of the article have been reflected in article 11 of the 2011 Model Law (on the rules concerning evaluation criteria and procedures). 2011 article 11(2)(c) lists certain evaluation criteria that may be particularly relevant in request-for-proposals proceedings, such as the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement.

35. Article 11 of the 2011 text does not refer to qualifications and reputation (which were included in subparagraph (a) of the 1994 text), nor the criteria listed in subparagraph (1)(b) of the 1994 text. Both these types of criteria have been deleted, as they were considered to be excessively subjective. For the reasons explained in paragraph 20(b)(v) above, the criteria listed in subparagraphs (d) and (e) have also been deleted. Finally, the provisions of paragraph (2) on margins of preference have been amended, for the reasons explained in paragraph 20(b)(iii) and (iv) above.

Clarification and modification of requests for proposals (1994 article 40; subsumed into 2011 article 15)

36. The provisions of the article have been reflected in article 15 of the 2011 Model Law (on clarification and modification of solicitation documents). For the changes made to the 1994 provisions, see paragraphs 10 and 11 above.

Choice of selection procedure (article 41)

37. There are no equivalent provisions in the 2011 Model Law.

Selection procedure without negotiation (1994 article 42; subsumed into 2011 article 47)

38. The provisions of the article have been reflected in article 47 of the 2011 Model Law (on request for proposals without negotiation). Substantial changes have been made to those procedures, each stage of which is now regulated in the 2011 Model Law in some detail.

39. Unlike the 1994 text, the 2011 text explicitly regulates the submission of proposals in two envelopes: one containing the financial aspects of the proposals and the other containing the technical, quality and performance characteristics of the proposals. The latter envelopes are opened first. The procuring entity is allowed to open envelopes containing the financial aspects of the proposals of only those suppliers whose proposals' technical, quality and performance characteristics proved to be responsive. It thus evaluates the financial aspects of the proposals after the completion of the evaluation of technical, quality and performance characteristics of the proposals. The method in the 2011 text always presupposes that the successful proposal will be the proposal with the best combined evaluation in terms of: (a) the criteria other than price specified in the request for proposals; and (b) the price.

40. The 2011 Model Law provides for essential safeguards against abuse, not expressly set out in the 1994 Model Law. For example, there are explicit requirements: to notify each supplier or contractor of the results of examination of technical, quality and performance characteristics of their proposals; to include the results of examination and evaluation immediately in the record of the procurement proceedings; to return unopened the envelopes containing the financial aspects of the non-responsive proposals to the suppliers of contractors concerned; to notify each supplier or contractor with a responsive proposal the score assigned to them; to invite each such supplier or contractor to the opening of the envelopes containing the financial aspects of their proposals; and to read out, at the opening of those envelopes, the score assigned to each such supplier or contractor together with the respective financial aspects of their proposals.

Selection procedure with simultaneous negotiations (1994 article 43; subsumed in 2011 article 49)

41. The provisions of the article and those of article 48 of the 1994 Model Law have both been reflected in article 49 of the 2011 Model Law (on request for proposals with dialogue). There is no longer any requirement in the evaluation of proposals to consider the price of a proposal separately, after completion of the technical evaluation (such a requirement was found in paragraph (3) of the 1994 text).

42. The 2011 text introduced the possibility of (a) holding a pre-selection procedure for the purpose of limiting the number of suppliers or contractors from which to request proposals and (b) establishing a maximum number of suppliers or contractors that can be invited to participate in the dialogue. The 2011 Model Law

regulates each stage of the procedure in detail, to avoid abuse and to ensure transparency in the use of the method.

43. To ensure transparency, the 2011 text requires a notice of the results of any pre-selection and of the examination of proposals against minimum responsiveness criteria to be provided to each supplier or contractor (the 1994 text was silent on these points). To ensure the equal treatment of suppliers or contractors during the procedures, the 2011 text requires that the dialogue must be conducted by the same representatives of the procuring entity on a concurrent basis, and that the relevant information must be distributed among participating suppliers or contractors on an equal basis (the 1994 text was silent on the former point while on the latter it contained a similar requirement in the context of competitive negotiations in article 49(2) but not in article 43 or 48).

44. Additional safeguards, not found in the 1994 text, include: a requirement on the procuring entity to ensure that the number of suppliers or contractors invited to participate in the dialogue (at least three, if possible) is sufficient to ensure effective competition; and prohibition of negotiations on best and final offers and of modification of the subject matter of the procurement, any qualification or evaluation criterion, any minimum requirements, any element of the description of the subject matter of the procurement or any term or condition of the procurement contract that is not subject to the dialogue. (See further paragraphs 53-65 below and the commentary to article 49 [\[**hyperlink**\]](#)).

Selection procedure with consecutive negotiations (1994 article 44; subsumed in 2011 article 50)

45. The provisions of the article have been reflected in 2011 article 50 (on request for proposals with consecutive negotiations). In the 2011 text, all stages preceding the negotiations on the financial aspects of the proposals are the same as in request for proposals without negotiation (2011 article 50 cross-refers therefore to the relevant provisions of 2011 article 47). The provisions regulating the stage of negotiations reflect the main elements of 1994 article 44, with the following modifications:

(a) There is an explicit requirement on the procuring entity to rank each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals and to promptly communicate to each supplier or contractor presenting a responsive proposal the score of the technical, quality and performance characteristics of its respective proposal and its ranking;

(b) There is an explicit prohibition of modification of the subject matter of the procurement, any qualification, examination or evaluation criterion, including any established minimum requirements, any element of the description of the subject matter of the procurement, or term or condition of the procurement contract, other than the financial aspects of proposals that are the subject of the negotiations;

(c) There is also an explicit prohibition of reopening negotiations with any supplier or contractor with which the procuring entity has terminated negotiations.

Confidentiality (1994 article 45; subsumed in 2011 article 24)

46. The provisions of the article have been reflected in article 24(2) and (3) of the 2011 Model Law, with the following modifications:

(a) The 1994 requirement to treat proposals in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors has been expanded to prohibit such disclosure also to any other person not authorized to have access to this type of information;

(b) This general prohibition applies not only to the content of proposals but also to the content of applications to pre-qualify, of applications for pre-selection and of any submissions;

(c) This general prohibition does not apply to information required to be provided or published in accordance with the provisions of the Model Law;

(d) The 1994 prohibition on a party to the negotiations of disclosure to any other person of any technical, price or other information relating to the negotiations without the consent of that other party has been expanded to encompass not only parties to negotiations but also parties to any discussions, communications or dialogue between the procuring entity and a supplier or contractor in two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement proceedings;

(e) The latter prohibition may be waived only by the requirement of law or order of the court or other competent organ designated by the enacting State.

47. 2011 article 24, on confidentiality, in addition contains a general prohibition on the procuring entity, in its communications with suppliers or contractors or with any person, of disclosure any information if its non-disclosure is necessary for the protection of essential security interests of the State or if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition. This prohibition may be waived only upon an order of the court or other competent organ, and subject to the conditions of that order. In the 1994 Model Law, similar provisions were found only in the context of disclosure of information from the record of procurement proceedings and in the context of review proceedings (see 1994 articles 11(3) and 55(3), respectively). 2011 article 24 also envisages the possibility that the procuring entity may take additional measures to protect classified information. See further the commentary to article 24 [**hyperlink**]).

1994 CHAPTER V. PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT (2011 chapters IV to VII)**A. Summary of changes made in this chapter**

48. The procedures for “alternative” methods of procurement (i.e. alternative to open tendering) and other procurement techniques (electronic reverse auctions and framework agreements) are found in the 2011 Model Law in several chapters:

chapter IV (which groups procedures for restricted tendering, request for quotations and request for proposals without negotiation); chapter V (which groups procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement); chapter VI (which addresses electronic reverse auctions); and chapter VII (which addresses framework agreements procedures).

49. The procurement methods in chapters IV and V have been grouped together on the basis of whether a procurement method envisages some type of discussion, dialogue or negotiation between the procuring entity and supplier(s) or contractor(s): chapter IV methods do not allow any such interaction while chapter V methods do. The commentary in the introduction to chapter IV and V procurement methods, and on the relevant conditions for use, [**hyperlinks**] explains the main features of each method and their typical uses.

B. Article-by-article commentary

Two-stage tendering (1994 article 46; 2011 article 48)

50. Paragraph (2) has been amended in the 2011 text to refer to “performance characteristics” instead of “other characteristics”, to reflect changes made in the article on description of the subject matter of the procurement (2011 article 10 [**hyperlinks**]). Substantive revisions, aimed at enhancing precision and strengthening safeguards against abuse in this procurement method, have been made in paragraph (3) and (4) of the article:

(a) The 2011 text refers to “discussions” instead of “negotiations” in paragraph (3), for the purpose of stressing that no bargaining type of negotiations (unlike in competitive negotiations or single-source procurement) takes place in the context of this procurement method;

(b) For the purpose of precision, the 2011 text refers in the same paragraph to “initial tenders” instead of “tenders”;

(c) Paragraph (3) also imposes a new requirement on the procuring entity, when it engages in discussions with any supplier or contractor, to extend an equal opportunity to participate in discussions to all suppliers or contractors;

(d) Paragraph (4) has been substantially revised. In the 2011 Model Law, it is split into five subparagraphs:

(i) The first subparagraph, drawing on the first sentence of paragraph (4) of the 1994 text, requires the procuring entity to invite all suppliers or contractors whose initial tenders were not rejected in the first stage to present final tenders with prices in response to a revised set of terms and conditions of the procurement. Thus, unlike the 1994 text that refers in this context to a single set of specifications, the 2011 text refers to “a revised set of terms and conditions of the procurement” throughout paragraph (4);

(ii) The second subparagraph replaces the second sentence of paragraph (4) of the 1994 text. First, it expressly prohibits the procuring entity from modifying the subject matter of the procurement. The procuring entity may only refine aspects of the description of the subject matter by deleting or

modifying any aspect of the technical, quality or performance characteristics of the subject matter of the procurement initially provided and adding any new characteristics that conform to the requirements of the Model Law. The procuring entity is also authorized to delete or modify any criterion for examining or evaluating tenders initially provided and add any new criterion that conforms to the requirements of the Model Law, but only to the extent that such deletion, modification or addition is required as a result of changes made in the technical, quality or performance characteristics of the subject matter of the procurement;

(iii) The third, fourth and fifth subparagraphs reproduce the provisions of the third, fourth and fifth sentences of paragraph (4) of the 1994 text, respectively.

Restricted tendering (1994 article 47; 2011 articles 34 and 45)

51. The provisions of paragraphs (1) and (2) of the article have been reflected in article 34(1) and (5) of the 2011 Model Law, respectively, on solicitation in restricted tendering. Substantive modifications made in those provisions relate to the minimum content of the notice of restricted tendering and the place of publication of such notice (thus amending paragraph (2) of the 1994 text). Article 34(5) of the 2011 Model Law expressly requires that an advance notice is to be published before direct solicitation is made, and lists the minimum information to be included in such notice (for the implications of such a notice, and any responses thereto, see the commentary to article 34 [\[**hyperlink**\]](#)). Unlike the 1994 Model Law that required an enacting State to specify in the procurement law itself the official publication where the notice was to be published, the 2011 Model Law defers the specification of the place of publication to the procurement regulations.

52. The provisions of 1994 paragraph (3) have been reflected in 2011 article 45 and modified by stating expressly that the provisions of chapter III of this Law apply to restricted tendering except for those that regulate the procedures for soliciting tenders, the contents of the invitation to tender and the provision of the solicitation documents in open tendering (the excluded provisions are either irrelevant or cumbersome in the context of direct solicitation, which is an inherent feature of this procurement method).

Request for proposals (article 48)

53. As noted in paragraph ... above, the 2011 Model Law provides for three types of request-for-proposals proceedings (request for proposals without negotiation, request for proposals with dialogue and request for proposals with consecutive negotiations). Article 48 and article 43 of the 1994 Model Law (on the latter, see paragraphs 41-44 above) have together been reflected in article 49 of the 2011 Model Law (on request for proposals with dialogue).

54. The requirement in paragraph (1) of the 1994 text that the request for proposals must be addressed to as many suppliers or contractors as practicable, but at least to three, if possible, has been replaced with provisions requiring the request for proposals to be issued: to each supplier or contractor responding to the open invitation; following pre-qualification, to each pre-qualified supplier or contractor; following pre-selection proceedings, to each pre-selected supplier or contractor; and

in the case of direct solicitation, to each supplier or contractor selected by the procuring entity. For the avoidance of doubt, this stage of the procurement proceedings can be the first stage only in cases of direct solicitation; in all other cases, the request for proposals is issued after another process (e.g. open solicitation under article 35(1) of the 2011 Model Law, pre-qualification or pre-selection).

55. The requirement for at least three suppliers or contractors if possible has been retained in the 2011 Model Law in the context of the possible minimum and maximum number of suppliers or contractors to be invited to the dialogue phase (see paragraphs (5)(g) and (7) of article 49 of the 2011 Model Law [\[**hyperlink**\]](#)).

56. The provisions of paragraph (2) regulating the publication of a notice seeking expressions of interest are not found in the 2011 Model Law in the context of any request-for-proposals proceedings. They are reflected in 2011 article 6 (on the publication of information on possible forthcoming procurement) that encourages appropriate information to be published for proper planning by both the procuring entity and suppliers and contractors, without imposing legal consequences for the issue of the information concerned (see the commentary to 2011 article 6 [\[**hyperlinks**\]](#)).

57. The first stage in the request-for-proposals proceedings in the 2011 Model Law is regulated in article 35 (on solicitation in request-for-proposals proceedings) where several options for solicitation are provided. The default method — the publication of an invitation to participate — constitutes the solicitation, and it thus obliges the procuring entity to take appropriate steps with respect to all suppliers or contractors that responded to such invitation. (This is to be contrasted with a notice seeking expressions of interest in 1994 article 48(2).)

58. Reasons justifying exceptions to the default method are also spelled out in article 35 of the 2011 Model Law. The reasons found in the 1994 text — economy or efficiency — have been replaced with three specific reasons, the drafting of which draw on provisions of article 37(3)(a) to (c) of the 1994 Model Law, for the reasons explained in paragraph ... above.

59. The provisions of the 2011 Model Law regulating request-for-proposals proceedings do not include any specific provisions on evaluation criteria (unlike paragraph (3) of the 1994 text). Article 11 regulates this matter for all procurement methods, including request for proposals, as explained in the commentary to that article [\[**hyperlink**\]](#). Thus the aspects covered in the chapeau and subparagraphs (a) and (c) of paragraph (3) of the 1994 text were no longer necessary; in addition, the highly subjective criteria listed in 1994 subparagraph (b) do not appear in the 2011 text. As noted in paragraphs 34-35 above, certain provisions of article 11 of the 2011 text have been drafted to accommodate the special features of request-for-proposals proceedings, such as the need to take into account the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement.

60. The minimum information to be included in the request for proposals found in paragraph (4) of the 1994 list has been considerably expanded in its 2011 counterpart (see article 49(5) [\[**hyperlink**\]](#) and the commentary thereto [\[**hyperlink**\]](#)).

61. The provisions of paragraph (5) have been reflected in the new 2011 article 15 (on clarifications and modifications of solicitation documents), discussed in paragraphs 10 and 11 above.
62. The provisions of paragraphs (6) and (7)(a) and (b) have been reflected in the new 2011 article 24(2) and (3) (on confidentiality), discussed in paragraphs 46 and 47 above.
63. The provisions of paragraph (7)(c), which provided for an equal opportunity to all participating suppliers or contractors to participate in negotiations, should be read in the context of the relevant modifications made in the 2011 Model Law (article 49(6)) as regards the reasons for rejection of submitted proposals. While the 1994 Model Law was silent on this point, the 2011 Model Law in article 49(5)(g), (6)(b) and (7) have introduced an explicit provision allowing the procuring entity to limit the number of suppliers or contractors that it will invite to participate in the dialogue (see the commentary to the relevant provisions of article 49 [\[**hyperlink**\]](#)).
64. The provisions of paragraphs (8) and (10) have been reflected in article 49(11) and (13) of the 2011 Model Law, respectively. The principle contained in paragraph (9)(a) of 1994 article 48 that only the criteria set out in the request for proposals could be considered in the evaluation of proposals is reflected in 2011 article 11(6) as applicable *mutatis mutandis* to all procurement methods.
65. Procedures envisaging evaluation of the price separately from the evaluation of the effectiveness of a proposal, and only after completion of the technical evaluation (see subparagraphs (b) and (c) of paragraph (9) of the 1994 text) do not appear in the 2011 text. UNCITRAL considered that it would be unreasonable to impose these types of restrictions on the procuring entity that may find itself in various circumstances when using the request-for-proposals-with-dialogue procurement method. Simultaneous evaluation of all relevant considerations may be required in order to be able to select the offer that best meets the needs of the procuring entity.
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