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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 527th MEETING

Held at Headquarters, New York,
on Friday, 3 June 1994, at 3 p.m.

Chairman: Mr. MORÁN (Spain)

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The meeting was called to order at 3.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

Draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (continued)

Article 41 bis (continued)

1. The CHAIRMAN said it seemed that the problem posed by paragraph 3 (c) might be resolved in accordance with the suggestions of the United States of America and Canada by incorporating in the text the idea that direct solicitation of proposals could be employed where confidentiality or the national interest so warranted. The drafting group would prepare a text that reflected that idea.

2. Ms. SABO (Canada) said that the drafting group would have to be given clear instructions about paragraph 3 (c). She also wondered whether the chapeau of paragraph 3 would still include a reference to paragraph 1 and whether there was a consensus in that regard. She also wondered whether the chapeau of paragraph 3 would include a reference to direct solicitation.

3. The CHAIRMAN said that if he heard no objections he would take it that the Commission wished to refer article 41 bis to the drafting group.

4. It was so decided.

Article 41 ter

5. The CHAIRMAN stressed the importance of the chapeau of the article, which specified that the request for proposals should include, at a minimum, certain information. That meant that the procuring entity could add other requirements and States could do the same when they incorporated that provision in their national legislation.

6. Mr. WALLACE (United States of America) said that he approved of the text of subparagraphs (j) and (k) of article 41 ter, which were similar in content to article 25, except that they referred to services. Article 41 sexies contained references to the so-called two-envelope method, in which one envelope contained technical and quality data and the other contained price data. The two envelopes could be examined at the same time or one after the other, depending on the method used. In that regard, the request for proposals for services should indicate the procedure for evaluating proposals that stated the price and those that did not. Article 41 sexies set out four procedures for evaluating such proposals (in paras. 2 (b) (i), 2 (b) (ii), 3 and 4).

7. The CHAIRMAN said that paragraph 1 of article 41 ter might help solve the problem raised by the representative of the United States of America.

8. Mr. CHATURVEDI (India) said that article 41 ter contained superfluous elements that did not refer specifically to services. A case in point was subparagraph (d), given that the right to reject proposals already appeared in

other articles. Subparagraph (e) should be deleted because the criteria and procedures mentioned did not have to be specified in the case of services. Subparagraphs (j) and (k) should be reworded because both stipulated "if referred to price as a relevant criterion". In subparagraph (k) the phrase "including a statement as to whether the price is to cover elements of even the cost of services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes" should be deleted. Such information should be provided by the supplier, not by the procuring entity. Subparagraph (r) should be deleted because it referred to the terms and conditions of contracts in general, whereas article 41 ter dealt specifically with services. Subparagraph (s) should also be deleted because it was up to the supplier to find out about any pertinent laws. Subparagraph (t) was superfluous because there was no need to notify the supplier that it had the right to appeal for review provided for in article 42.

9. The CHAIRMAN said that, while a supplier might be expected to be familiar with the legislation in force, it might perhaps be unaware of some of the lesser administrative regulations. It would therefore be helpful to let subparagraphs (r) and (s) stand. Moreover, since almost all solicitation notices included a mention of the right of review, it would be appropriate to retain subparagraph (t). With regard to subparagraph (d), the right to reject proposals also appeared in article 11 bis. The wording used in the latter article, however, was "if so specified in the solicitation documents", so that there was a difference between the two provisions. Moreover, the Working Group felt that there was majority agreement on those points, which should be taken as a minimum.

10. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 41 ter was perfectly adequate and contained alternative proposals that could serve as safeguards in the tendering process in the event that some of the methods specified were eliminated. With regard to subparagraphs (j) and (k), it would be very helpful if the Guide to Enactment indicated when price should be considered a relevant criterion and when it should not. Price should not be a relevant criterion when the services entailed a high degree of technical complexity or might have a substantial impact on the final product.

11. Mr. HUNJA (International Trade Law Branch) said that some delegations were concerned that subparagraphs (j) and (k) began with the phrase "if price is a relevant criterion" because it could be interpreted to mean that in most cases it was not. He therefore suggested that the two subparagraphs should be reworded to read: "information shall be provided as to the currency or currencies in which the proposal price is to be expressed and the manner in which the proposal price is to be expressed, unless price is not a relevant criterion".

12. Mr. JAMES (United Kingdom) added that, since the method described in article 41 ter was the most appropriate method for the procurement of services, it was fitting that it should incorporate the principles of openness and transparency characteristic of public tendering, which were reflected in the procuring entity's obligation to provide as much information as possible at the earliest possible stage of the tendering process. He was also convinced that

the procedure that was specified in the Model Law on Procurement of Goods and Construction should also be applied to services.

13. Mr. LEVY (Canada) urged that the wording of article 41 ter should be left as it was.

14. Mr. TUVAYANOND (Thailand) said that while he had no problem with the article, he wished to have clarification of two of its provisions. First, with regard to subparagraph (n), he pointed out that wide fluctuations in exchange rates were the norm, which made that subparagraph unnecessary. Secondly, with regard to subparagraph (t), if one assumed that everyone knew the law, the subparagraph seemed superfluous, particularly since article 42 did provide for the possibility of filing an appeal for review.

15. The CHAIRMAN said that fluctuations in exchange rates were precisely why subparagraph (n) had been included. Proposals should indicate not only the currency in which the price should be expressed, but also the exchange rate that would be used to convert it; failing that, reference should be made to an exchange rate published by a financial institution - a bank, for example - on a specified date. With regard to subparagraph (t), he pointed out that, at least under legal systems based on Roman law, in any public solicitation held pursuant to law, a public authority was required to indicate what recourse was available to the parties involved in the solicitation process or what exemptions they were entitled to under the law.

16. Mr. LEVY (Canada) reminded the Commission that the Working Group's intention was to ensure that suppliers and contractors had alternative ways of setting their prices, whether they involved exchange rates, with reference to World Bank special drawing rights (SDRs) or European Currency Units (ECUs) of the European Community, or a statement that the rate of exchange set by a bank or financial institution on a given date would be applied. The purpose of subparagraph (t), meanwhile, was to ensure transparency by facilitating the procurement process and making it unnecessary for suppliers or contractors to have to find out for themselves what recourse was available to them.

17. Mr. CHATURVEDI (India) agreed that information on the right of review provided by law was highly important, but he was not clear which party should bear the burden of providing or obtaining such information. According to subparagraph (s), the procuring entity was not liable if it omitted the references to the relevant laws or regulations, yet that entity was certainly in the best position to know what regulations were applicable.

18. With respect to subparagraph (j), he wondered if there were any situations in which price was not a relevant criterion. He had serious misgivings about the wording of that paragraph.

19. With regard to subparagraph (k), he believed that it was up to the supplier or contractor and not the procuring entity to state whether items other than the cost of the services were to be included in the price. He also pointed out that, according to the chapeau of article 41 ter, the request for proposals should include "at a minimum" the information listed in that article, which consisted of no less than 22 subparagraphs. The minimum requirements could be

covered by subparagraphs (a), (b), (c) and a few others; otherwise there were too many superfluous paragraphs, which placed an undue burden on one of the parties.

20. With reference to the observation by the representative of Thailand regarding ignorance of the law, he felt that it was up to the supplier or contractor to find out what laws applied.

21. With regard to subparagraph (n), currency conversion was always an option and it was not necessary to mention it explicitly. What should not be done was to require the supplier to set a rate of exchange that would fluctuate widely; he could only accept establishing in principle that an exchange rate set by a particular financial institution should be used.

22. The CHAIRMAN said that there did not appear to be a consensus within the Commission to delete so many subparagraphs; consequently, if he heard no objections, he would take it that the Commission wished to approve article 41 ter in so far as substance was concerned and to refer it to the drafting group for consideration of the proposed changes.

23. It was so decided.

Article 41 quater

24. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the word "only" in paragraph 1 was too restrictive; it was conceivable that some other important criteria might have been left out. He suggested that the chapeau should conclude with the words "and may concern principally the following".

25. He then pointed out that there were three basic criteria for the evaluation of proposals. The first was the qualifications and experience of the particular supplying or contracting firm; the second was the methodology that the company intended to employ in the assignment; and the third and most important, because it was given greater weight, was the professional competence of the personnel the company intended to assign to the project. He therefore suggested that paragraph 1 (a) should be changed to read:

> "(a) The qualifications, experience in the field of assignment, reputation, reliability and professional and managerial competence of the supplier or contractor and of the key personnel which the supplier or contractor proposes to employ in the assignment;".

26. With reference to paragraph 1 (c) and to the comments made previously by the representative of India with respect to the relevance of price as a criterion, he noted that the World Bank had compiled statistics on proposals for which price was not a relevant criterion, either because the projects were too complex or because the quality of the final product was critical, and had found that they constituted 35 to 40 per cent of all such projects. He also noted that in paragraph 1 the word "may" was used, a term that did not imply an obligation. Subparagraph (c) would be improved if it began with the words "the

proposal price, it if is to be a criterion, and the manner in which it is to be taken into account"; the rest would remain the same.

27. Mr. WALLACE (United States of America) agreed with the suggestions made by the previous speaker regarding subparagraphs (a) and (c). The reference to personnel in subparagraph (a) could be made even more explicit if the adjective "relevant" was inserted in front of the word "qualifications".

28. The comments of the observer from the Inter-American Development Bank concerning subparagraph (c) applied also to what the representative of the Secretariat had said concerning subparagraphs (j) and (k) of article 41 ter. It was certainly true that subparagraph (c) had to be worded very carefully, given that price was not a very important criterion for many categories of services that were the object of procurement. In any event, the wording of the subparagraph was acceptable, since it was to be read in conjunction with paragraph 1, which not only used the term "may" but also included the phrase "and the manner in which they are to be applied".

29. He did not agree, however, with the suggestion that the word "only" should be replaced by "principally" in paragraph 1. He recalled that the Working Group had deliberately used that wording to maintain the parallelism with the wording of article 32, paragraph 4 (c), even while recognizing that the latter referred to a different procedure, the intention being to make the practice of procurement as systematic and uniform as possible. On the other hand, subparagraph (e) provided greater flexibility in the use of social policy criteria by using the language "national defence and security considerations".

30. Mr. JAMES (United Kingdom) said that the Working Group had in fact debated at length the question of whether the use of any or all of the evaluation criteria listed in the Model Law should be mandatory or optional (A/CN.9/392, para. 67). The word "may" had been considered necessary to give the procuring entity discretion in choosing the criteria it wished to employ. On the other hand, it had been felt that, in keeping with the spirit and provisions of the Model Law, certain limits had to be placed on the criteria that the procuring entity could take into account in the case of tendering, the preferred method for the procurement of goods and construction, and in the case of a request for proposals, the preferred method for the procurement of services.

31. The purpose of the Model Law was to establish norms that would serve as guidelines for framers of national legislation on the subject. In his view, then, the criteria included in article 41 quater were appropriate, and the procuring entity was free to use them to whatever extent it wished.

32. Mr. CHATURVEDI (India) said that he disagreed with the content of the second sentence of paragraph 1 for three reasons. In the first place, it would be impractical for the procuring entity to act in the manner described there in cases where it only needed to procure the services of one or two persons. In the second place, he did not see why the procuring entity should have to notify the suppliers and contractors of the evaluation criteria in every case. In the third place, according to the end of the sentence, those criteria could "concern only" matters that did not include the criteria of confidentiality and national interest, discussed in connection with the previous article, or technology

transfer and export promotion, two criteria of vital importance to developing countries that ought to have been included in paragraph 1 (d).

33. The CHAIRMAN observed that confidentiality bore no relation to the article in question and that technology transfer and export promotion were implicitly included in paragraph 1 (d). Furthermore, that paragraph authorized the procuring entity to establish its own evaluation criteria, so that if a State ascribed importance to the above-mentioned issues, it was free to state that it would take them into account when reaching a decision. The paragraph could not be interpreted to mean that the criteria could relate to any subject whatsoever, since there would then be no point in including the article in the draft.

34. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the article ignored one important technical aspect of the question. While he was not opposed to a listing of basic evaluation criteria, he felt it was essential that they should be able to be applied with flexibility and adapted to specific situations, given the very nature of services, especially highly specialized services.

35. Mr. WALLACE (United States of America) supported the Chairman's view that the text of article 41 quater accommodated the concern of the representative of India, since it recognized that the procuring entity was free to evaluate proposals according to the criteria that it considered appropriate; that was clear from paragraph 68 of document A/CN.9/392, from the words in brackets at the end of paragraph 1 (d) of article 41 quater, and from paragraph 1 (b) of the same article. India was correct in observing that that provision was not appropriate in cases where a limited number of persons were to be hired. In such cases, the method of solicitation of quotations might be used.

36. However, he did not agree with the remark made by the observer for the Inter-American Development Bank. Subparagraphs (a), (b) and (c) were important, particularly the first two. The procuring entity would explain as specifically as possible the requirements suppliers and contractors were expected to meet and how it would apply the evaluation criteria, which would be adapted when the request for proposals was drawn up. The request could accommodate whatever variations circumstances required. In other words, the subparagraphs were worded so as to give ample room for flexibility while avoiding arbitrariness in the evaluation of proposals.

37. Mr. TUVAYANOND (Thailand) said that while the article provided some flexibility, it was also restrictive. He wished to know whether environmental issues, primarily pollution, were covered. If not, changes would need to be made to include them. The article must also take into account the fact that certain countries applied exchange controls, which sometimes made it impossible to repatriate the entire agreed price at one time, particularly in cases where the services had been rendered in the territory of the procuring State.

38. Mr. LEVY (Canada), supported by Mr. WESTPHAL (Germany), said that environmental questions could be addressed in the description of services provided for in article 41 ter, subparagraph (g), and that proposals from suppliers and contractors could also be evaluated from that perspective under

article 41 quater, paragraph 1 (d). Questions relating to currency exchange were already dealt with, for example, in article 41 ter, subparagraph (s).

39. Mr. CHATURVEDI (India) said that it was currently impossible to undertake a major procurement project without the approval of the environmental protection authorities and that, in view of the importance of the issue, it should be included in article 41 quater, paragraph 1 (d). He also agreed with the United States representative that the transfer of technology and export promotion could be dealt with in that paragraph. Nevertheless, it would have been preferable to make a specific reference to those criteria. He therefore proposed that the word "only" should be deleted from the chapeau of paragraph 1. As for the suggestion by the representative of the United States of America to add the word "relevant" to paragraph 1 (a), he did not feel that that term should be used to qualify the reputation and reliability of the supplier or contractor.

40. The CHAIRMAN said that although environmental issues were becoming increasingly important, there were few cases in which the rendering of specific services was likely to have an impact on the environment. In any case, the procuring entity could include that factor in the evaluation criteria under article 41 quater, paragraph 1 (d), or article 41 ter, where the minimum contents of requests for proposals for services was discussed.

The meeting was suspended at 4.40 p.m. and resumed at 5 p.m.

41. Mr. WALLACE (United States of America), supported by Mr. JAMES (United Kingdom), said that the need to ensure that the draft law reflected concern for environmental protection must be borne in mind. At the same time, the list of criteria in paragraph 1 (d) could not be endless. If the environment was to be mentioned, it would also be necessary to refer to the effects of services on income distribution, health, science and technology and many other factors. There must be a limit to the list of criteria, particularly since effects on the environment were many and varied. There was no doubt that that impact would be far more significant in the case of goods and construction than in that of services. In any event, the draft left ample room in which to deal with that issue, since both article 32, paragraph 4 (c) (iii), and article 41 quater, paragraph 1 (d), specified that "the enacting State may expand subparagraph (d) by including additional criteria". Furthermore, from the standpoint of the structure and wording of the draft law, it would be inappropriate to include anything in article 41 quater, paragraph 1 (d), that did not appear in article 32.

42. Mr. LOBSIGER (Observer for Switzerland) said that environmental considerations should not lead to the adoption of more protectionist practices than did the other criteria mentioned in paragraph 1 (d). In any case, the environmental impact of a service must certainly be mentioned, and the place to do so was in article 41 ter rather than article 41 quater.

43. Mr. TUVAYANOND (Thailand) noted that his country had already applied environmental criteria in a case of procurement involving a proposal for services, and had opted for a more expensive proposal because it entailed less risk of pollution. Paragraph 1 (d) already gave Member States an opportunity to

take that criterion into account, which might be decisive in the evaluation of proposals.

44. Mr. CHOUKRI SBAI (Morocco) noted that the Arabic version of the chapeau of article 41 quater did not contain the word "only". The French version read "ne peuvent concerner que", which was equivalent to a negative construction, whereas the Arabic used a positive construction which seemed to leave room for discretion, in deciding whether or not to inform suppliers and contractors of the criteria.

45. Mr. CHATURVEDI (India) said that it would be inappropriate to take a decision on the use of a positive or a negative construction, since that would imply that one text was more authentic than the other. As for the question of whether or not to include a provision relating to the environment in the text, he noted that the article referred primarily to services, although not exclusively, since it could also be applied to goods and construction. The term "services" was very broad, and there were cases where the question of the environment did not arise. Moreover, legal instruments containing obligatory and detailed provisions on the environment had already been adopted and were entering into force. There was therefore no need to refer to the environment in the Model Law.

46. Mr. GOH (Singapore) suggested that, in order to meet the concerns raised by the representative of Thailand, the words "may concern only" should be replaced by the words "shall include the following", which would give the procuring entity flexibility.

47. The CHAIRMAN reminded the Committee that most delegations had preferred the word "only".

48. Mr. KLEIN (Observer for the Inter-American Development Bank), speaking on behalf of the World Bank and of his own institution, raised the issue of margin of preference. While the hiring of national consultants should be encouraged, the best way of doing so would be to refer to the real advantages of such recruitment, such as the consultants' familiarity with the local setting or language, for example. Such a reference could be added to the Model Law so as to allow or require foreign companies to work with national companies, provided that mandatory quotas or percentages were not set and that there was no requirement to work with specific companies. That was a much more effective solution than assigning national companies a certain weight merely because they belonged to the country procuring the service. What actually happened when services were sold was that knowledge was sold, and if the quality of the services declined everyone lost. Finally, the introduction of a margin of preference, which was uncommon in the case of services, could result in double counting, since a certain number of points was being awarded for familiarity with the milieu or the language on the one hand while preference was being given to nationality on the other. Although the objective was, clearly, to assist national consultants, care must be taken to ensure it was done in the manner that was most beneficial to all the parties concerned.

49. The CHAIRMAN said that the question raised was particularly appropriate for inclusion in the Guide to Enactment, since the latter could indicate the

problems that were coming up in most countries. In the system of joint ventures or temporary partnerships, the challenge was to provide a service by identifying the most suitable national contractor. That method was far better than fixing percentages. It would be useful if the Guide referred to the need to resolve those questions.

50. Mr. CHATURVEDI (India) said that his country was not in favour of placing any limit, even indirectly, on the percentage of the margin of preference for companies and national consultants. On the contrary, that practice should be encouraged.

51. The CHAIRMAN agreed with that position; it was necessary to respect a tradition that was not only observed in a number of countries and legislations but which was also set forth in the General Agreement on Tariffs and Trade (GATT). One way to promote development was to provide for a margin of preference for national contractors. In the light of the comments made, however, the draft text could be referred to the drafting group.

52. It was so decided.

Article 41 quinquies

53. Mr. TUVAYANOND (Thailand) said that he would prefer to delete from paragraph 1 the requirement that the procuring entity should communicate the clarification to all suppliers or contractors, since some of them would probably not need such clarification and the requirement merely placed an additional burden on the procuring entity. Clarifications should be communicated only to those who requested them. The same comment applied to paragraph 3, since not all suppliers or contractors might be interested in the minutes of the meeting containing the requests for clarification and the responses to those requests. In particular, the Model Law did not need to specify how the information should be used and thus should not say "so as to enable".

54. The CHAIRMAN said that all contractors had an equal right to know what response had been given to a request for clarification which might throw light on the contract or on the inclinations of the procuring entity. What was important was for the supplier to have that information in order to prevent any irregularities when the contract was awarded.

55. If he heard no objections, he would take it that the Commission wished to approve article 41 quinquies as currently worded.

56. It was so decided.

Article 41 sexies

57. Mr. WALLACE (United States of America) said that he was in general agreement with the wording of the article but would welcome clarification of a few minor points. With regard to paragraph 3 (a), he wished to know what the criteria were for rejecting proposals and whether those criteria were related to the threshold level referred to in paragraph 2 (a). In paragraph 3 (c), the word "normally" could be inserted before the words "be considered". As for

paragraph 1 (c), the commentary should indicate whether the impartial panel of experts would provide advisory services or whether it could also take decisions.

58. The Guide should indicate when the criteria set out in paragraphs 2 (b) (i), 2 (b) (ii), or 4 should be used. It should also explain how each of those methods should be applied, since the Model Law said nothing on that subject.

59. Mr. WESTPHAL (Germany), referring to paragraph 2 (a), said he agreed with the idea of rating each of the proposals. However, he wished to know what the threshold level was and what criteria were used in determining it.

60. Mr. LOBSIGER (Observer for Switzerland) said that paragraph 1 (c) was missing from the French version.

61. Mr. HUNJA (International Trade Law Branch) said that paragraph 2 did not give the procuring entity any guidelines for determining the threshold level; at the previous session of the Commission, the representative of the United States of America had suggested in relation to another matter that guidelines should be included in the Model Law. However, the Working Group had been somewhat reluctant to do so, and it had expressly decided that it would not be appropriate to include such guidelines in the Model Law, although they might perhaps be included in the Guide.

62. In order to clarify the meaning of paragraph 2, a basic procedure for establishing the threshold could be the following: in the case of the procurement of intellectual services, for example, the procuring entity would decide that, with respect to the technical, or non-price, aspects of the proposal, it would establish a rating system based on a set scale, and it would do the same to rate the competence of project personnel and the time spent in providing such services.

The meeting rose at 6.05 p.m.