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Twenty-seventh session

SUMMARY RECORD OF THE 529th MEETING

Held at Headquarters, New York,
on Monday, 6 June 1994, at 3 p.m.

Chairman: Mr. MORAN (Spain)

CONTENTS

The meeting was called to order at 3.05 p.m.

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

Article 41 sexies (continued)

1. Mr. CHATURVEDI (India) said that he did not agree with the proposal made by the representative of Canada to delete the words "and whose proposals have not been rejected" from paragraph 3 (a).

2. Mr. WALSER (Observer for the World Bank) said that, even though he favoured the deletion of paragraph 3, he recognized that most members supported its retention, in which case he sought a number of clarifications with respect to procedure. The provisions of subparagraphs (a), (b) and (c) were satisfactory, but subparagraph (d) did not clearly set out the manner in which the final evaluation should be made. The norm referred to the proposal which "best meets the needs of the procuring entity", which was correct in principle but lacked the clarity that ought to characterize procurement transactions. He wondered, in fact, whether the procedure provided for in subparagraph (d) was not the same as the one provided for in paragraph 2; he therefore proposed that it should simply state that, upon receipt of the suppliers' best and final offers, the offers would be evaluated in accordance with the procedures established in paragraph 2.

3. The CHAIRMAN said that the text of subparagraph (d) was sufficiently clear, if account was taken of the fact that article 41 quater gave the procuring entity the right to determine which proposal was best suited to its needs. He was therefore in favour of retaining the current wording of subparagraph (d), a view which most delegations appeared to share.

4. Mr. CHATURVEDI (India) said that he, too, was in favour of retaining the current wording of paragraph 3 (d).

5. Mr. WALLACE (United States of America) said that, with regard to the comments made by the observer for the World Bank, the wording of subparagraph (d) was identical to that of article 38. Moreover, if it was correctly applied, the wording of subparagraph (d) would be satisfactory, since it mentioned the relative weight and the manner of application of those criteria, although it was true that the criteria were not rigorous.

6. In the wording of paragraph 3 (a) proposed by the representative of Canada at the previous meeting, the words "acceptable proposals" had been suggested to replace "and whose proposals have not been rejected". In the practice of the United States of America, the words "technically acceptable" were used to make it clear that criteria other than price were also taken into account. That was crucial, since in the area of services, price was considered in second place or not at all. If the Commission decided to use that term, not only in paragraph 3 (a) but also in paragraphs 2 and 4, it would clarify the question of a "threshold", since otherwise it would seem that the procedures were the same, which was probably not the Commission's intention. As the representative of the United Kingdom had noted, citing the relevant report (A/CN.9/392), the Working

Group had not compared that procedure to the use of a threshold. However, he wondered whether it would not be better to make such a comparison, since the procedures were very similar. In essence, what was meant was that certain proposals would fail to meet the minimum requirements and would therefore be rejected; there would be no negotiations with such suppliers under paragraphs 3 and 4 and they could not be declared winners under paragraph 2, even though they might have offered the lowest bid. The concepts were identical, although they could be applied in different ways. Thus, if the wording proposed by Canada was further refined, it might be possible to bring all those norms into line with one another.

7. The CHAIRMAN agreed that the insertion of the word "technically" could make the article easier to understand.

8. Mr. AL-NASSER (Saudi Arabia), requesting clarification of paragraphs 2, 3 and 4, asked which norms would apply if the procuring entity did not use the procedures provided for in those paragraphs. It appeared that if the procuring entity did not use any of the three methods, there would be a legal vacuum.

9. The CHAIRMAN said that, in his view, the use of the conditional phrase "If ..." at the beginning of paragraphs 2, 3 and 4 was in keeping with the very structure of the provision, which allowed any of those three methods to be used, as indicated in paragraph 1 (a). It was a factual assumption of a conditional nature which had an objective legal effect.

10. Mr. WALLACE (United States of America), supported by Mr. WALSER (Observer for the World Bank), said that norms provided a coherent system. In accordance with article 16, chapter IV set out the preferred (although not necessarily the only) method to be used in the procurement of services. Consequently, if it was decided to use the commonly preferred method, reference would have to be made to chapter IV bis, in which case article 41 sexies would definitely have to be applied in the context of that chapter, given that paragraph 1 (a) of that article stipulated that the procuring entity would use the procedure provided for in paragraphs 2, 3 or 4 that had been notified in the request for proposals. Thus, the request for proposals would have indicated which of the three procedures was to be used by the procuring entity. Depending on the method selected, the entity must proceed in accordance with the provisions of the relevant paragraph.

11. The CHAIRMAN said that, if he heard no objection, he would take it the Commission wished to refer article 41 sexies, paragraph 3, to the drafting group.

12. It was so decided.

13. Mr. WALLACE (United States of America), referring to paragraph 4 (d), wondered whether it might not be useful to include that notion in the other methods (paras. 2 and 3) as well. He noted that subparagraph (e) referred to "face-to-face" negotiations. Under that method, if negotiations with the supplier that had made the best offer did not lead to an agreement on price, the procuring entity would move on to the next supplier and so on. If no agreement had been concluded by the time the final supplier was reached, the temptation to

resume negotiations with the first supplier might arise. Some members of the Working Group had firmly rejected that option, since it would be tantamount to making the procedure into an auction. In the case of services for which tendering was not possible, a balance must be struck between quality and price, since none of the procedures provided for, not even the procedure set out in paragraph 2 (b) (i), allowed the procuring entity simply to choose the lowest price, since the offer had to be technically acceptable. Consequently, it must be made clear that the procuring entity could not resume negotiations with the best supplier in an attempt to obtain a better price.

14. Mr. WALSER (Observer for the World Bank) said that, at the World Bank, engineers preferred the procedure set out in paragraph 4 because they considered that the selection should be made solely on the basis of the proposal's technical merits, without considering the price, and that afterwards the procuring entity must negotiate an acceptable price with the best supplier. The World Bank had always proceeded in that way. Nevertheless, he himself and other staff of the World Bank firmly believed that price must be taken into account, which was why they preferred the wording of paragraph 2. He recognized, however, that the World Bank accepted the method contained in paragraph 4 and that it currently used both the procedure in paragraph 2 and the procedure in paragraph 4. The problem posed by paragraph 4 was how to determine, in accordance with subparagraph (e), that negotiations would not result in a contract. Although the Bank had experience with what might constitute an acceptable price for specific types of engineering projects or management services, it was still not clear where the line should be drawn. The norm did not give the procuring entity clear guidelines for determining that the fees demanded by the best supplier were outrageous and that, consequently, it was time to reject that offer and move on to the next supplier. Greater clarity was needed on that point; once the first supplier had been rejected and negotiations begun with the second, it should not be possible to go back.

15. The CHAIRMAN said that, with respect to paragraph 4 (d), the Commission had to choose between promoting transparency, in which case the obligation set out in that paragraph must also be reflected in paragraphs 2 and 3, and ensuring that the procuring entity was not overwhelmed, in which case subparagraph (b) should be deleted.

16. Mr. CHATURVEDI (India) said that paragraph 4 was acceptable, with the exception of subparagraph (e), which should be deleted in order for the text to be consistent.

17. Mr. LEVY (Canada) said that no other provision of the draft Model Law contained the obligation provided for in paragraph 4 (d). Moreover, it should be borne in mind that the procurement method provided for in chapter IV bis was not the same as the others. For example, the question did not arise in respect of tendering, since the draft Model Law provided that the parties should be present when the proposals were opened. Further, paragraph 4 (d) was not analogous to chapter IV, article 35, paragraph 6, in that the latter dealt with the duty of the procuring authority to give notice of entry into force of the contract with one tenderer to the others. In any event paragraph 4 (d) was acceptable.

18. The CHAIRMAN said that article 11 ter included an obligation similar to that provided for in paragraph 4 (d).

19. Mr. WALLACE (United States of America) agreed that paragraph 4 (d) imposed a responsibility on the procuring entity, but saw nothing wrong with that. In fact the aim of the draft Model Law was to promote transparency, competition and fairness and to encourage enacting States to modify their procurement practices. In other words, the paragraph imposed a responsibility on procuring entities, but the responsibility was useful and could even be expanded by, for example, also indicating that the procuring entity must explain to suppliers why they had not attained the required threshold level. In any event, the obligation provided for in the paragraph should also be included in paragraphs 2 and 3.

20. With respect to paragraph 4 (e), he agreed that it would be useful to explain to the procuring entity the procedure for determining when it was appropriate to discard the proposal from the supplier or contractor with the highest rating and consider the proposal in second or third place. Under no circumstances must the procuring entity reconsider a proposal which it had already discarded, since that would result in a kind of competitive tendering process which did not correspond to the spirit of the strict method provided for in chapter IV bis.

21. Mr. JAMES (United Kingdom) said that the Working Group had included paragraph 4 in the draft since it had been convinced that it was important to inform suppliers or contractors that they were above the threshold level. That consideration was less important in the cases covered under paragraphs 2 and 3. In any event, the aim of the draft Model Law was to promote fairness and justice and ensure that the parties concerned were aware of what had happened to their tenders or proposals. It might thus be appropriate to indicate in article 11 that a register should be kept of all suppliers or contractors whose proposals were above the required threshold level. Such a solution would promote transparency without imposing an excessive burden on the procuring entity.

22. Mr. LEVY (Canada) said that he had no substantive reservations with respect to paragraph 4 (d), although it could be merged with paragraph 4 (c). In any event he agreed that paragraph 4 was not analogous to paragraphs 2 and 3.

23. With regard to paragraph 4 (e), he agreed that it must be made clear that once a procuring entity had discarded one or more proposals it must not subsequently reconsider them. It was also important, however, to avoid formulas that were so strict that they deprived the procuring entity of the discretion necessary for it to act in accordance with the national interest.

24. Mr. WALLACE (United States of America), supported by Mr. CHATURVEDI (India), endorsed the proposal to resolve the question of paragraph 4 (d) by rewording article 11 along the lines proposed by the representative of the United Kingdom, as well as the comments of the representative of Canada on paragraph 4 (e), the current wording of which could be retained.

25. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve article 41 sexies as currently worded, subject to

the reservation that the drafting group might reconsider paragraph 4 (d), should it deem it necessary.

26. It was so decided.

Article 41 septies

27. Mr. CHATURVEDI (India) said that he did not agree with the first sentence of article 41 septies, by which the procuring entity must not disclose the contents of proposals to competing suppliers or contractors. Article 40 provided for the holding of negotiations, during which it might be useful to reveal the contents of proposals.

28. Mr. HUNJA (International Trade Law Branch) recalled that the Working Group had thought it important to maintain confidentiality, particularly where there were negotiations between suppliers and the procuring entity to discuss aspects of the proposals. The aim was to maintain the integrity of the procurement proceedings and to protect any trade or other secrets contained in the proposal that suppliers or contractors would not wish to have disclosed to their competitors. The procuring entity could discuss any details of a proposal with the supplier or contractor that had submitted it and could seek clarification, but must avoid discussion of the terms of each proposal with other suppliers or contractors. Article 39, paragraph 3, contained a similar provision, and the drafting group might consider whether the provision under consideration was clear.

29. Mr. CHATURVEDI (India) said that, if the point was to protect trade secrets, it would have to be made clear that the matter could be discussed with the party submitting the proposal. It was understandable that the contents of a proposal should not be made known to other parties in tendering proceedings, but in the case of services there should be no limitation on negotiation by the procuring entity of the price or other relevant factors.

30. Mr. WALLACE (United States of America) said that the question was extremely delicate, and it would be preferable for the report not to reflect the existence of doubts on the matter. The provision was taken from article 38, paragraph 6, relating to requests for proposals, which provided for confidentiality. It was true that article 38, paragraph 5, provided for the possibility of modification or clarification, but in that case negotiations would take place with various suppliers simultaneously and there would be no question of setting some against others. Article 39, paragraph 3, also stated that negotiations should be confidential, and paragraph 2 referred to clarifications. The structure of the Model Law was thus coherent.

31. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve article 41 septies.

32. It was so decided.

33. Mr. SHI Zhaoyu (China) said he wished to raise three points in connection with the structure of chapter IV bis. Firstly, in his view, the title was inappropriate; it should clearly reflect the aim of the chapter as well as its

relationship to other chapters and provisions of the Model Law. The drafting group should make the necessary changes in that regard. Secondly, the chapter contained only one article, and it should be divided so that its provisions were clearer. Lastly, under article 16, the procuring entity, with certain specific exceptions, was supposed to apply chapter IV bis, but that provision also indicated that, in similar circumstances, the methods provided for in articles 17 to 20 could be applied. Article 17 dealt with two-stage tendering, requests for proposals or competitive negotiation, whereas article 38 contained specific rules relating to requests for proposals. Actually, in the procurement of services the provisions of chapter IV bis and of article 38 were not identical, but both used the criterion of a threshold. He asked what the relationship was between chapter IV bis and article 38, and reserved the right to speak again on chapter IV bis.

34. Mr. GRIFFITH (Observer for Australia) said that the time had come to review what had been done so far in connection with the text modifying the Model Law on Procurement of Goods and Construction. Chapter IV bis was supposed to be the principal text in connection with services, but it contained elements and procedures that referred not only to tendering but also to other methods of procurement. The draft added a series of options on the procurement of goods and construction and of services, and it was not always easy to understand the relationship between them or their differences. The most radical means of simplifying the text would be simply to delete chapter IV bis entirely, adopt the text on goods and construction and add appropriate provisions on the procurement of services, particularly in connection with the principal method. In any event, he wished to suggest three other possibilities. The first would be to delete article 16, paragraph 3 (b), so that articles 17 to 20 would not be considered part of the text relating to services, thereby emphasizing that chapter IV bis was the basic provision relating to the procurement of services. The second would be to delete article 16, paragraph 3 (b), but indicate in a footnote that a State party so wishing could adopt provisions similar to those set forth in the paragraph, with the consequent amendments to articles 17 to 20. Lastly, article 16, paragraph 3 (b), could remain in brackets, with the consequent amendments to articles 17 to 20, but with the addition of a note to the effect that States that did not wish to have so many options could refrain from enacting the provisions in brackets. In view of the importance of the matter, the Commission must anticipate the criticisms that States might reasonably formulate later on.

The meeting was suspended at 4.40 p.m. and resumed at 5.05 p.m.

35. Mr. WALLACE (United States of America), referring to the proposal made by the representative of China, said that it would be necessary to change not only the title of chapter IV bis, but also its place, so that it came after chapter III, which dealt with tendering. The new title could be "Preferred method for services". The title of the current chapter IV could also be changed to "Alternatives".

36. Although his delegation would accept any of the proposals made by the observer for Australia, the references in articles 19 and 20 to quotations and to single-source procurement should not be deleted.

37. The CHAIRMAN recalled that the drafting group had already decided to leave chapter IV bis after the chapter on tendering proceedings.

38. Mr. JAMES (United Kingdom) said that he agreed with China and Australia on the need to simplify and streamline the text of the Model Law. However, if chapter IV bis was deleted, it would be necessary to make the wording of article 16 more specific, since it was possible to use tendering as a method of procurement for many services. It would also be necessary to specify which methods should be used in cases in which tendering was not appropriate.

39. To solve those problems, either chapter IV bis or article 17 should be bracketed. In any case, the references in articles 19 and 20 to request for quotations and to single-source procurement should not be deleted. There was broad acceptance of the method of request for quotations in the procurement of services on a small scale.

40. The Model Law represented a compromise solution; while not ideal, it was acceptable and, rather than introducing substantive changes, its contents should be clarified in the commentary.

41. Mr. LEVY (Canada) said that the question raised by China had been resolved by the Working Group and that the solution proposed by Australia was simplistic. As he had indicated, it was necessary to provide for a system of request for quotations and single-source procurement of services. However, not all systems of procurement had been covered in chapter IV bis. He did not share the view that articles 38 and 39 were unnecessary because they were covered in chapter IV bis. Rather, they provided for methods that were much simpler than those in chapter IV bis and should therefore be retained. His delegation would not accept the Model Law if articles 38 and 39 were deleted.

42. In order to avoid any confusion that might arise if chapter IV bis was left in its current place after chapter III, the necessary clarifications should be given and a footnote inserted to explain that the principal methods of procurement were tendering, in the case of goods and construction, and requests for proposals, in the case of services. It could also be noted that other methods existed which States could use at their discretion.

43. Paragraph 3 (b) of article 16 should not be made into a footnote. If it was, all of chapter IV bis would have to be bracketed and an asterisk would also probably be required after the title of the chapter to explain that States could choose not to incorporate the corresponding articles into their domestic legislation. As the representative of the United Kingdom had said, it would be better to make as few changes as possible to the text under consideration.

44. Mr. WALSER (Observer for the World Bank) said that he agreed with the three solutions proposed by Australia. Moreover, articles 38 and 39 were unnecessary, since they were covered under chapter IV bis, which was well drafted, particularly paragraph 2 of article 41 sexies, which described the best method of procuring services outside of tendering.

45. Mr. CHATURVEDI (India) said that he could accept any of the methods proposed by Australia, although the best solution would be to place article 16, paragraph 3 (b), in brackets.

46. Mr. LOBSIGER (Observer for Switzerland) agreed that chapter IV bis should retain its position after chapter III in order to regulate in succession the two principal methods - tendering (in respect of goods and construction) and requests for proposals (in respect of services). The text of article 16, paragraph 3 (b), should not prevent national legislation from considering other methods. The legislation which countries adopted should be simple and easy for officials to implement; consequently, it would be counterproductive to resort to placing brackets and asterisks in article 16. He supported the proposals of Australia concerning the principal methods, which should be retained.

47. Mr. MELAIN (France) said that, although the text of the Model Law was complicated and should be simplified, the Commission should not go to the extreme of deleting chapter IV bis. The important thing was to try to overcome the problems in dealing with the many procedures provided for in the Model Law. In his delegation's view, it was essential to have recourse to the methods for the procurement of services set out in article 17 and the articles that followed even though chapter IV bis provided for other procedures. In some cases, that chapter contained the preferred method used in the market for services. He would have no objection if article 16, paragraph 3 (b), was made into a footnote, although it was essential to retain the current wording. He did not question the need to provide guidelines or to assist those countries that wished to adopt the Model Law, but it seemed unlikely that a way could be found to simplify the various methods available to the procuring entity. He was not in favour of reducing the scope of article 16, but supported the proposal of the United Kingdom and Canada to place chapter IV bis in brackets.

48. Mr. WESTPHAL (Germany) said that the Model Law was very complex and offered the procuring entity too many options. Many members had spoken in favour of deleting chapter IV bis, but in the light of the recent discussion, it seemed unlikely that such a solution would be adopted. He agreed with the representative of France that the possibility of using the traditional method, single-source procurement, should be kept open, yet he wondered whether chapter IV bis was not sufficiently complex to fulfil all needs and whether it might not be adequate by itself. As a compromise solution, he would be inclined to retain chapter IV bis and to exclude other methods for the procurement of services.

49. Mr. TUVAYANOND (Thailand) said that he was firmly opposed to the deletion of chapter IV bis and to a reopening of the debate on issues on which agreement had already been reached. At the same time, he wished to reiterate his position that the draft Model Law should clearly indicate, either in footnotes in the text or in the Guide to Enactment, that a State was free to use those methods of procurement that were best suited to its situation, circumstances and particularities. Finally, the wording of article 16, paragraph 3 (d), should appear in the text and not in a footnote.

50. Mr. WALLACE (United States of America) said that he was prepared to accept the use of footnotes and brackets in the text, for which there were precedents.

Most members of the Commission were of the view that article 16, paragraph 3 (b), should be placed in brackets rather than chapter IV bis, since the Commission was required not only to set forth existing law, but also to harmonize it, unify it and even perfect it. As indicated in paragraphs 11 and 14 of its report (A/CN.9/392), the Working Group had carefully considered the matter and had decided that the draft should include a chapter along the lines of chapter IV bis. Moreover, the range of services which could be procured was very broad and many of them could not be dealt with by means of tendering.

51. The CHAIRMAN said that the Commission seemed to prefer the inclusion of a note in the text, probably in article 16, to indicate to States that, on the basis of that provision, the draft was presenting a set of options. However complicated the draft might be, it must be borne in mind that complexity was inevitable, since the text needed to reflect the administrative and regulatory traditions and practices of the entire world.

52. Mr. GRIFFITH (Observer for Australia) said that in formulating his proposal he had never dreamed it would cause such controversy. He nevertheless believed that there was a consensus that the drafting group should be requested to settle the issue by drafting a note, which would probably be inserted in article 16, stating that the enacting State could limit the number of methods for the procurement of services by limiting the application of article 16, paragraph 3 (b), exclusively to certain of articles 17 to 20. The necessary amendments would have to be made to the articles that were excluded.

53. Mr. SHI Zhaoyu (China) said it was not his intention that chapter IV bis should be deleted, since it had been the result of lengthy negotiations, nor should any of the provisions on which agreement had been reached be deleted; he was not seeking to undermine the structure of the Model Law. The Model Law should be clearer so that the procuring entity and suppliers and contractors would have better guidelines for the provisions to be applied to the different areas. As to how the structure of the Model Law might be improved, he agreed in principle with the suggestion by Australia, although the deletion of article 16, paragraph 3 (b), would pose a number of problems. Naturally, under article 16, the procedures provided for in articles 17 and 20 were not applicable to services, despite the reference to them, and ought to be. However, it was not clear how those articles could be applied to the procurement of services; thus if article 16, paragraph 3 (b), was deleted, it would also be necessary to change the proceedings governing the procurement of services in articles 17 to 20 and to make a number of changes in article 38.

The meeting rose at 6.10 p.m.