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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of electronic communications in public procurement

Note by the Secretariat

Addendum

The annex to the present note contains proposals for draft amendments to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which reflect the considerations set forth in documents A/CN.9/WG.I/WP.34 and addendum 1.



Annex

UNCITRAL Model Law on Procurement of Goods, Construction and Services

Proposed amendments to deal with electronic publication of procurement-related information and the use of electronic communications in the procurement process¹

Article 2. Definitions

...

“Electronic” relates to technology having electronic, optical, magnetic, or similar capabilities that may be used to send, receive or store information, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;²

“Publicly accessible electronic information system” means a system for generating, sending, receiving, storing or otherwise processing electronic communications which is generally accessible to persons making use of electronic devices.³

...

Article 5. Public accessibility of legal texts

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained, which may include simultaneous dissemination through publicly accessible electronic information systems.

...

Article 5 bis. Notice of procurement opportunities

Variant A

(1) [If so provided in regulations issued under article 4] [T]he procuring entity shall not later than [the enacting State specifies a time-limit] after the begin of a

¹ The underlined portions of the text are proposed additions to the present text of the Model Law.

² This definition draws on elements used in the notion of “data messages” in article 2 of the UNCITRAL Model Law on Electronic Commerce (see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I; also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I), and the definition of “electronic” in section 2(5) of the United States Uniform Electronic Transactions Act (UETA), drafted by the National Conference of Commissioners on Uniform State Laws and approved at its 108th annual conference meeting (Denver, Colorado, 23-30 July 1999) and section 1(a) of the Uniform Electronic Commerce Act of Canada.

³ This definition draws on elements used in the notion of “information system” in article 2 of the UNCITRAL Model Law on Electronic Commerce.

fiscal year publish notice of its expected procurement requirements for the following [the enacting State specifies a period].

Variant B

(1) Within [the enacting State specifies a time-limit] after the begin of a fiscal year, procuring entities may publish notice of its expected procurement requirements for the following [the enacting State specifies a period].

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1), which [may include publication in publicly accessible electronic information systems] [shall be done [primarily] by publication in publicly accessible electronic information systems].

(3) Paragraph (1) is not applicable where the anticipated value of procurement is less than [...].

...

Article 7. Prequalification proceedings

...

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(2) bis [Without prejudice to the right of a supplier or contractor to request and to receive a set of prequalification documents in paper form][T]he obligation to provide the prequalification documents may be met by transmitting them to suppliers or contractors in electronic form or by making the documents available to suppliers or contractors through publicly accessible electronic information systems, from which the documents may be downloaded or printed by interested parties.

...

Article 9. Form of communications

(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication, including by means of electronic communications and documents, where the solicitation documents so provide.

(1) bis [Without prejudice to the right of a supplier or contractor to request and to receive notices and documents in paper form] [W]here this law requires the procuring entity to provide notices or issue documents to suppliers or contractors, that requirement may be met by posting the notice or document in a publicly accessible electronic information system from which the notice or document can be downloaded or printed by the suppliers or contractors.

(1) Where the solicitation documents requires tenders to be submitted in electronic form, the procuring entity may provide that all communications with suppliers or contractors shall be conducted only in electronic form in accordance with the provisions in the solicitation documents.

...

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications. The means of communication chosen by the procuring entity shall not present an unreasonable barrier to participation in the procurement proceedings.

Article 10. Rules concerning documentary evidence provided by suppliers or contractors

(1) The prequalification or solicitation documents may provide that documentary evidence intended to demonstrate the suppliers' or contractors' qualifications may be submitted in the form of electronic documents that meet the technical requirements as to authenticity and integrity established [by the procuring entity] [in the prequalification or solicitation documents] provided that such technical requirement may not discriminate against or among suppliers or contractors or against categories thereof.

Article 11. Record of procurement proceedings

...

(5) The procuring entity may [be authorized to] maintain the record referred to in paragraph 1 of this article in electronic form provided that the following conditions are satisfied:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) Electronic information is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

(c) Such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

(6) The procurement regulations may establish procedures for maintaining and accessing electronic records, including measures to ensure the integrity, accessibility and, where appropriate, confidentiality of information.

...

Article 14. Public notice of procurement contract awards

(1) The procuring entity shall promptly publish notice of procurement contract awards.

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1), which may include publication in publicly accessible electronic information systems.

(3) Paragraph (1) is not applicable to awards where the contract price is less than [...].

...

Article 24. Procedures for soliciting tenders or applications to prequalify

(1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, *to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).*

(2) Invitations to tender or invitations to prequalify may also be published in publicly accessible electronic information systems [commonly used by procuring entities in the enacting State].

(3) A procuring entity may choose to publish invitations to tender or invitations to prequalify only in electronic form when it is satisfied that the method of publication chosen:

(a) does not represent an obstacle to access to the procurement process;

(b) is justified to promote economy and efficiency in the procurement process; and

(c) will not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition.

[(4) The record of the procurement proceedings shall contain a written declaration by the procuring entity that the conditions of paragraph (3) of this article are met.]

...

Article 25. Contents of invitation to tender and invitation to prequalify

(1) The invitation to tender shall contain, at a minimum, the following information:

...

(k) A statement by the procuring entity as to whether tenders [shall][may] be submitted in electronic form and, if so, the procedures and format for their submission and the electronic address to which they shall be transmitted. Unless otherwise stated in the invitation, suppliers or contractors have the right to submit written tenders in sealed envelopes in accordance with article

(2) An invitation to prequalify shall contain, at a minimum, the information referred to in paragraph (1) (a) to (e), (g), (h) and, if it is already known, (j), as well as the following information:

...

(f) A statement by the procuring entity as to whether applications to prequalify [shall][may] be submitted in electronic form and, if so, the procedures and format for their submission and the electronic address to which they shall be transmitted. Unless otherwise stated in the invitation, suppliers or contractors have the right to submit applications [in writing][in paper form].

Article 26. Provision of solicitation documents

...

(2) [Without prejudice to the right of a supplier or contractor to receive a set of solicitation documents in paper form][T]he obligation to provide the solicitation documents may be met by transmitting the documents to suppliers or contractors in electronic form or making the documents available to suppliers or contractors through publicly accessible electronic information systems, from which the documents may be downloaded or printed by interested parties.

...

Article 28. Clarifications and modifications of solicitation documents

...

(3) bis The procuring entity may convene a meeting of suppliers or contractors by electronic means of communication [, such as on-line exchange of electronic messages, videoconferencing or similar technology.] when it is satisfied that all suppliers or contractors whom the procuring entity should invite for a meeting pursuant to paragraph 1 of this article have access to the required technical and other means and that the means of communication chosen by the procuring entity do not present an unreasonable barrier to participation in the meeting.

...

Article 30. Submission of tenders

...

(5) (a) A tender shall be submitted in writing, signed and in a sealed envelope or in any other form specified in the solicitation documents that comply with article 30 bis;

~~(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality;~~

(b) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

Article 30 bis. Security measures in communications and in the treatment of tenders

(1) The procuring entity shall take the necessary measures and establish appropriate procedures to ensure that:

(a) The origin and authenticity of communications, documents and tenders received from suppliers or contractors can be established;

(b) The integrity of communications, documents and tenders received from suppliers or contractors can be preserved;

(c) The date and time of dispatch and receipt of communications, documents and tenders can be determined;

(d) Communications, documents and tenders are not accessed by the procuring entity or other persons prior to any deadline;

(e) Any unauthorized access or attempt to access communications, documents and tenders prior to the deadline referred to in paragraph 1(d) is detectable;

(f) The confidentiality of communications, documents and tenders received from or relating to other suppliers or contractors is maintained.

(2) The ... (the enacting State designates an organ or authority) may provide in regulations for specific provisions to comply with this article, in particular as regards electronic communications of tenders, proposals or quotations submitted by electronic means.

...

Article 33. Opening of tenders

...

(4) Where the procurement proceedings were conducted solely electronically in accordance with articles 9(1) ter, 25(1)(k), 25(2)(f) or [insert provisions dealing with reverse auctions and other fully automated procedures, if any], suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are allowed to follow the opening of the tenders through electronic means of communication [, such as on-line exchange of electronic messages, videoconferencing or similar technology,] used by the procuring entity provided that all suppliers or contractors that have submitted tenders have access to the required technical and other means of communication used by the procuring entity and that those means do not present an unreasonable barrier to participation in the session.

...

Article 36. Acceptance of tender and entry into force of procurement contract

...

(7) Where a written procurement contract is required to be signed pursuant to this article, that requirement is met by the use of electronic communications or documents that are signed with an electronic signature that complies with any requirements established by the procuring entity.

...

Article 37. Notice of solicitation of proposals

...

(2) bis The notice may also be published in publicly accessible electronic information systems [commonly used by procuring entities in the enacting State]. A procuring entity may choose to publish the notice in electronic form only when it is satisfied that the method of publication chosen:

(a) does not represent an obstacle to access to the procurement process;

(b) is justified to promote economy and efficiency in the procurement process; and

(c) will not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition.

[(2) ter The record of the procurement proceeding shall contain a written declaration by the procuring entity that the conditions of paragraph (2) bis of this article are met.]

...

...

(4) bis [Without prejudice to the right of a supplier or contractor to receive the request for proposals, or prequalification documents, in paper form][T]he obligation to provide the request for proposals, or prequalification documents, may be met by transmitting the documents to suppliers or contractors in electronic form or making the documents available to suppliers or contractors through publicly accessible electronic information systems, from which the documents may be downloaded or printed by interested parties.

...

Article 40. Clarification and modification of requests for proposals

...

(3) bis The procuring entity may convene a meeting of suppliers or contractors by electronic means, such as on-line exchange of electronic messages, videoconferencing or similar technology, when it is satisfied that all suppliers or contractors whom the procuring entity should invite for a meeting pursuant to paragraph 1 of this article have access to the required technical and other means and that the means of communication chosen by the procuring entity do not present an unreasonable barrier to participation in the meeting.

...

Article 47. Restricted tendering

...

(2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting

State specifies the official gazette or other official publication in which the notice is to be published).

(2) bis The notice may also be published in publicly accessible electronic information systems [commonly used by procuring entities in the enacting State]. A procuring entity may choose to publish the notice in electronic form only when it is satisfied that the method of publication chosen:

- (a) does not represent an obstacle to access to the procurement process;
- (b) is justified to promote economy and efficiency in the procurement process; and
- (c) will not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition.

[(2) ter The record of the procurement proceedings shall contain a written declaration by the procuring entity that the conditions of paragraph (2) bis of this article are met.]

...

Article 48. Request for proposals

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(2) bis The notice may also be published in publicly accessible electronic information systems [commonly used by procuring entities in the enacting State]. A procuring entity may choose to publish the notice in electronic form only when it is satisfied that the method of publication chosen:

- (a) does not represent an obstacle to access to the procurement process;
- (b) is justified to promote economy and efficiency in the procurement process; and
- (c) will not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition.

[(2) ter The record of the procurement proceeding shall contain a written declaration by the procuring entity that the conditions of paragraph (2) bis of this article are met.]

...