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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**

### **Comparative study of practical experience with the use of electronic (reverse) auctions in public procurement**

#### **Note by the Secretariat**

*[Chapters I through III (sections A and B) are published in document  
A/CN.9/WG.I/WP.35]*

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### **III. The regulatory framework and practice with respect to the use of ERAs in public procurement: comparative study**

#### **C. Procedural aspects of ERAs**

1. The extent to which the procedural aspects of ERAs are regulated depends on how ERAs stand in relation to other methods of procurement. While little difference is found in the regulations of the auction phase, stages before and after it are regulated differently depending on whether ERA is an optional additional phase in other procurement methods (“optional phase”) or a distinct procurement method (“distinct method”) (see A/CN.9/WG.I/WP.35, paras. 26 and 27). In the former case, most of the procedural aspects of the procurement proceedings before and after the ERA, such as giving notice of auction, identification and selection of bidders and qualification processes, are regulated in the context of the relevant procurement method in general, rather than in the more narrow context of the ERA itself. If the ERA is used as a distinct method, while some general procurement rules may still apply, most of the aspects are subject to separate regulations. The sections below address aspects of pre-auction, auction and post-auction stages commonly regulated by ERA specific provisions of existing regulations.

##### **1. Pre-auction stage**

2. Whether ERA is an optional phase or a distinct method, a decision on the use of ERA in procurement proceedings is to be made at the procurement planning stage since it has to be reflected in the procurement notice (see below, para. 7). In some systems, an online tool has been developed that assists procuring entities to assess the suitability of ERA for an individual procurement.<sup>1</sup>

3. If the procuring entity decides to hold the ERA, it: (a) gives notice of the ERA with usually simultaneous provision of solicitation documents; (b) identifies, selects and invites potential participants to the ERA; (c) clarifies solicitation documents and assists otherwise potential participants in their preparation for the ERA; (d) evaluates potential participants’ initial proposals; and (e) takes other steps towards holding the ERA (for example, secures services of a third-party ERA service provider).

##### *ERA service providers*

4. The ERA process may be conducted by the procuring entity itself,<sup>2</sup> using licensed software, or outsourced to a third party ERA service provider. Such a third party may be a private firm selected through a competitive process, as for instance in Australia and the United Kingdom,<sup>3</sup> or a centralized purchasing agency, as in the United States, offering ERA services to other United States agencies.<sup>4</sup> A third party ERA service provider usually charges a commission for its services. The form of the commission varies and may include: (a) a percentage of the successful auction price; (b) a flat percentage agreed in advance; and (c) a flat fee. The commission may be payable by the procuring entity, the successful bidder or a combination of both. The commission fee usually covers all charges such as advertising, insurance, administrative fees, connection time costs and miscellaneous charges.

5. The countries surveyed appear not to have developed specific regulation of the conduct of third-party ERA service providers, apart from a general requirement that an external provider has to carry out the procurement function on behalf of a government agency in accordance with existing procurement procedures, process and requirements. In at least one jurisdiction, delegating strategically important decisions to an external provider is explicitly prohibited.<sup>5</sup> Responsibilities outsourced are usually of a procedural nature, such as setting up necessary systems and procedures for conducting ERAs, providing assistance and training to suppliers, ensuring safety and security and availability of back-up options, and maintaining and managing appropriate reporting system and electronic records.<sup>6</sup>

6. In Brazil, ERAs can be conducted only by the reverse auctioneers<sup>7</sup> who are employees of a procuring entity, accredited after special training.<sup>8</sup>

*Notice of ERA, its content and means of dissemination*

7. It is generally required that the decision on holding an ERA be made known to potential participants in the procurement notice.<sup>9</sup> In the systems that recognize ERAs as an optional phase, general rules on the content and means of providing such a notice apply. In addition, under the new EU directives, the following ERA-specific data is to be included in the specifications: (a) the features, the value for which will be the subject of the ERA; (b) any limits on the values which may be submitted; (c) the information which will be made available to bidders in the course of the ERA; (d) the relevant information concerning the ERA process; (e) the conditions under which the bidders will be able to bid, in particular the minimum differences; and (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.<sup>10</sup>

8. In the systems that recognize ERAs as a distinct method, the notice of an ERA is usually given through the Internet on the dedicated website of the central government registry for procurement opportunities and/or of the procuring entity, as well as on the website of any third-party ERA service provider.<sup>11</sup> In addition, suppliers registered in a central registry may receive an e-mail notification.<sup>12</sup> Notice of an ERA is to contain all the details necessary for interested parties to judge whether to participate in the auction.<sup>13</sup> Basic information usually included in the invitation to tender is usually provided, such as the identity of the procuring entity, the nature of the object of the procurement, contractual terms,<sup>14</sup> and quality and performance standards.<sup>15</sup> When participation in the ERA is subject to prior registration or pre-qualification, this fact is stated and formalities as well as the manner in which compliance with those formalities is to be demonstrated or certified by applicants are described. More specific information will depend on the complexity of the procurement. At a minimum, it includes: (a) the date, time and modality of opening and termination of ERA; (b) the address of the website where ERA will be held and at which the auction rules, the tender documents as well as other auction related documents will be accessible; (c) requirements for registration and identification of bidders at the opening of the ERA; (d) the number and/or name that identify the procurement; (e) technical requirements as to information technology equipment to be utilized in conducting the ERA; (f) information about auction procedure, including which auction model will be utilized, whether there will be only a single stage, or multiple stages, and, in the latter case, the number of stages and the duration of each stage; (g) the minimum increment between bids; and

(h) the type of information to be provided to participants during the course of the auction.<sup>16</sup>

9. Other information, such as the starting price in the ERA<sup>17</sup> or information about a third-party ERA service provider, is also usually provided. In Brazil, the procuring entity is required to indicate that the auction will be held electronically, and to provide contact details of call center/help desk, and the name and qualifications of the reverse auctioneer in charge.<sup>18</sup> In Australia, it is recommended that the notice state that the procuring entity is not bound by the results of the ERA.

*Provision of solicitation documents*

10. In the systems that recognize ERAs as an optional phase, general procurement rules address the provision of solicitation documents. In the systems that recognize ERAs as a distinct method, the bidding documents are provided at the time when the notice of the ERA is given.<sup>19</sup>

*Identification and selection of potential participants*

11. In the systems that recognize ERAs as an optional phase, suppliers register and qualify to participate in procurement in the usual way applicable to the chosen method of procurement and no additional qualification or registration requirements are found for participating specifically in the ERA. Only those participants that submitted admissible tenders after an initial evaluation of the tenders will be admitted to ERAs.<sup>20</sup> Generally, the law requires that the number of bidders admitted to an ERA shall ensure effective competition.<sup>21</sup> In practice, those admitted to ERA may be required to take additional procedural steps before the auction, such as acquiring security codes to access the system.

12. The systems that recognize ERAs as a distinct method require, at a minimum, registration of prospective participants that involves, in particular, assigning an identification code and password to allow the participants to log in to the system to participate in ERA. In some systems, pre-qualification is also required.<sup>22</sup> Other systems give the procuring entity the option of including, in addition to registration, a pre-qualification step.<sup>23</sup>

13. A registration-only requirement is found in Brazil and China. In Brazil, ERAs are open to all suppliers registered in the centralized contractor/supplier register (SICAF).<sup>24</sup> Bidders interested in a particular ERA have to register for it by expressing an interest at least 3 days prior to its opening date.<sup>25</sup> Qualifications of bidders are not evaluated at this stage,<sup>26</sup> but rather after the auction and only with respect to the winner.<sup>27</sup> In China, ERAs are open only to members of the local online public procurement bidding system maintained by local public procurement centres.<sup>28</sup> Membership is free of charge and available to all interested applicants upon proof of a minimum set of qualifications, which usually include legal capacity and compliance, good tax, credit and financial standing, ability to provide quality after-sale service, a minimum amount of the charter capital and access to the Internet.<sup>29</sup> Once a member, a bidder can participate in any ERA advertised through that system without any additional registration or pre-qualification.

14. In Austria, two types of ERAs are envisaged: with unlimited and a limited number of participants.<sup>30</sup> The decision as to the number of bidders is within the procuring entity's discretion but there must be at least ten participants in auctions

with a limited number of participants. In both types of ERAs, an unlimited number of participants is publicly invited to submit an application to participate in the ERA. Applicants are subject to pre-qualification or pre-selection which serves two purposes: to ascertain that applicants meet the minimum requirements for performance of the contract and, if the number of qualified suppliers exceeds the number that the entity wishes to invite to the auction, to choose which of the qualified suppliers should receive such an invitation.<sup>31</sup> If more applications are received than a procuring entity had determined, it has to select the best applicants in accordance with the selection criteria (which are to be objective and non-discriminating, published in advance, and must take into account the special requirements of the object of the auction). If a smaller number than anticipated is received, and if no effective competition can be expected, a procuring entity has to withdraw the ERA.<sup>32</sup>

#### *Participation by foreign bidders*

15. The question of access to ERAs by foreign bidders is generally dealt with under the existing principles related to public procurement.<sup>33</sup> However, it has been observed that the manner in which ERA systems operate in a number of countries may de facto discriminate against foreign bidders. In particular, ERAs generally operate in local languages, and no multi-lingual versions are currently in place (although some countries are exploring the possibility of introducing multilingual versions). Registration requirements may also hinder the participation of foreign bidders in ERAs as they often impose local conditions.

#### *Invitation to auction*

16. Where pre-qualification or selection of participants for ERA is involved, the invitation to the auction is sent to those pre-qualified or selected.<sup>34</sup> In the systems that recognize ERAs as an optional phase, all tenderers who submitted admissible tenders are invited to participate in the ERA.<sup>35</sup>

17. Under the new EU directives, the invitation has to include all relevant information concerning individual suppliers' connection to the electronic equipment being used; the date and time of the start and closure of the electronic auction, including the number of phases; timetable for each phase of the auction; and the time which they will allow to elapse after receiving the last submission before they close the electronic auction. When the contract is to be awarded on the basis of the most economically advantageous tenders, the invitation is to be accompanied by the outcome of a full evaluation of the relevant tenderer and has also to state the mathematical formula to be used in the auction to determine automatic re-ranking on the basis of the new prices and/or new values submitted. Where variants are authorized, a separate formula is to be provided for each variant.<sup>36</sup>

18. In Austria, no requirements on the content of the invitation are provided. Most information related to an ERA is made available to participants already at the stage of advertising a notice of auction, in particular in the auction rules.<sup>37</sup>

*Clarification and modification of solicitation documents and withdrawal of the solicitation*

19. In most jurisdictions, the general procurement rules apply to all methods, including ERAs. In Brazil, clarification may be requested by interested parties online or by phone through telephone centres at any time during the notice period. Clarifications communicated to one party are subsequently made available to all other interested parties without identifying the source of the request for clarifications. Brazilian regulations also allow the procuring entity to modify solicitation documents during the notice period and depending on the timing and content of the modifications, the notice period may be extended (see below, para. 24).

*Evaluation of initial proposals*

20. The requirement for evaluation of initial proposals is found both in the systems that recognize ERAs as an optional phase and in the systems that recognize ERAs as a distinct method. In Brazil, the evaluation of initial proposals is used solely for the purpose of determining the starting price of the auction. It takes place at the start of the auction when all registered bidders submit their initial prices. The lowest submitted price is announced as the starting price of the auction.<sup>38</sup>

*Other pre-auction measures*

21. Other measures may be required to be taken to set up an ERA and to ensure that all bidders are capable of participating in an ERA, for instance, through provision of training and holding simulated auctions.<sup>39</sup>

**2. Auction stage**

22. At the auction stage: (a) the participating bidders access a screen by logging in to the auction address provided in the notice of auction or invitation to the auction, as applicable, using their respective identification and personal password that permits them to participate in the auction; (b) the object of the ERA is announced (usually a screen is completed to describe the items to be procured); (c) the auction rules are announced (i.e., start time, duration, minimum bid, the method of termination, etc.); and (d) the call for bids is communicated simultaneously to all bidders.<sup>40</sup>

23. Details of the auction stage are not regulated but left to a procuring entity or a third party ERA service provider. They may vary depending on the size and complexity of procurement. The existing regulations usually regulate the timing of the auction, bidding requirements and the extent of disclosure of information during the bidding process.

*Timing*

24. A minimum period of time is usually required to elapse between the issuance of the notice of auction or invitation to the auction, as the case may be, and the opening of the auction.<sup>41</sup> In practice, the more complicated the procurement, the longer such a period usually is.

25. Usually, regulations provide flexibility to procuring entities with respect to the closure of the auction. For example, under the new EU directives, auctions may be closed in one or more ways: (a) at the date and time fixed in advance as communicated to tenderers in the invitation; (b) when contracting authorities receive no more new prices or new values which meet the requirements concerning minimum differences; or (c) when the number of phases fixed in the invitation has been completed.<sup>42</sup> The Austrian law adds to that a possibility of terminating an auction by a procuring entity if serious reasons objectively justify (“abortion of the auction”).<sup>43</sup> The end of the bidding session may be set electronically or, as in Brazil, if expressly provided in the notice of auction, announced by the auctioneer.<sup>44</sup> The Brazilian system permits bidders to challenge the time fixed for the auction and request extensions of the auction. However, it is within the discretion of auctioneer to satisfy such a request.<sup>45</sup>

26. In practice, the greater the value and complexity of the procurement, the longer the duration of the ERA. Rarely, ERAs close after a fixed duration of time has expired (what is called “hard close time”). Usually, the closing time of the ERA is automatically extended for a specified period of time (e.g., 5 minutes) if a new lowest bid or a bid that changed top bid rankings (usually one of the top three ranked bids) is received in the last few minutes (e.g., within 2 minutes of the closing time). Such extensions may be continuous for an indefinite period of time (known as “unlimited soft close”) or limited in the amount of overtimes (e.g., maximum of three 5-minute extensions). This process continues until there are no longer any lower bids being submitted within the stated period prior to closing. Some guidelines recommend considering a possibility for extensions for only very high value procurements, as they can be seen as imposing undue pressure on bidders to lower prices and disadvantaging bidders who may have allocated a fixed period of time to attend the ERA.

#### *Bidding requirements*

27. It is affirmed in some sets of rules that only bids submitted online are acceptable.<sup>46</sup> In some jurisdictions, this is implied in the definition of ERA.<sup>47</sup> On the other hand, a procuring entity may permit participation in ERAs through proxies, for example, if technical problems arise that prevent some participants from participating in the ERA, provided that such option is made known in advance and available to all participants on a non-discriminatory basis.<sup>48</sup>

28. When the price only is subject to ERA, it is usually required that the value of each bid has to be necessarily lower than the value of the last bid registered by the system. In Romania, it is explicitly provided that the new bid cancels the previous one.<sup>49</sup> In Brazil, in the event of a bid tie, only the bid registered first will be considered.

29. In Austria and Poland, after each round of bids, participants who did not bid at all or did not vary their bids within the fixed increment are excluded.<sup>50</sup> A procuring entity is required to ensure that participants excluded are informed about the exclusion and reasons for the exclusion without delay, and prevented from participating any further in the auction.<sup>51</sup> In Brazil, no provisions on exclusion of bidders by the auctioneer are found but bidders are permitted to withdraw their bids at any time and, if they are not interested in continuing, disconnect at any time. The

time of disconnection is automatically registered and this comes out in the records of the ERA.

*Disclosure of information during the auction*

30. One of the inherent features of an ERA is that it enables current information about the status of the auction to be provided to bidders automatically and instantaneously as an auction unfolds. It has been observed that, unless properly regulated, this feature of ERAs gives rise to concerns, especially from competition law standpoint.<sup>52</sup>

31. Most regulations are flexible with respect to the extent of disclosure. In some systems, a general requirement is found to provide to participating bidders certain basic information about the progress of an auction on an on-going basis, such as information that allows bidders to ascertain their current relative rankings,<sup>53</sup> the number of bidders participating in the proceeding,<sup>54</sup> and the time remaining for the reverse auction. To determine relative ranking, some systems require real-time disclosure of the lowest price to be bid<sup>55</sup> while in other systems, only ranking but not prices are disclosed.<sup>56</sup> In yet other systems, such as France, participants are informed of the level of offers of the other participants.<sup>57</sup> Under the new EU directives and the Austrian law, information about other prices or values submitted may be disclosed if the specifications or auctions rules, as applicable, provide for the disclosure of that information.<sup>58</sup> In practice, suppliers are sometimes given information not only on their ranking but also on the extent to which their tender must be improved to win the contract (which may be of concern in view of generally applicable procurement rules).

32. A distinct feature of the Brazilian ERA system is a possibility for a reverse auctioneer and bidders to communicate through the “chat”, a tool used to clarify the understanding between the auctioneer and the suppliers on issues related to the auction during the ERA, such as conditions of the bidding documents, specifications, suspensions, extensions and abnormally low bids. Either side can initiate the chat. All communications through the chat are visible to all participants of the auction. The chat is open only for the interaction between the reverse auctioneer and the individual suppliers, not the suppliers among themselves. No regulations exist in Brazil that address the use of chats which operate as an application of COMPRASNET.<sup>59</sup>

33. It is general practice, and often required by law, that the identity of those submitting particular tenders in the auction phase is not disclosed to other bidders.<sup>60</sup> In some systems, the identity is not disclosed to the procuring entity.<sup>61</sup> Usually anonymity requirements apply until the closure of ERA<sup>62</sup> and is ensured through computerized or automatic means. In some systems, anonymity of bidders is preserved also after the auction.<sup>63</sup>

*Suspension of auctions*

34. In most countries surveyed, no specific rules regulating suspension of ERA have been found. Generally, applicable provisions of procurement law may apply, for instance suspension may be ordered by a court or supervisory authority. In the practice of many countries, procuring entities retain broad flexibility to suspend reverse auction procedures and fix the time frame of suspension.

35. At least one country, Brazil, addresses the subject specifically in the context of ERAs. The usual causes of an ERA's suspension are system or communications failures. If the auctioneer is disconnected from the system, the latter will remain accessible to bidders for up to 10 minutes. The auctioneer will return to the bidding session whenever it is possible to do so, without prejudice to the bids submitted during the time the auctioneer was disconnected. If, however, the auctioneer is disconnected for more than 10 minutes, the ERA is suspended and resumes on the date and time notified to the participants by the auctioneer through the COMPRASNET website.<sup>64</sup> Disconnection of a bidder does not necessarily suspend the process. If disconnection happens through the fault of the procuring entity or the government system, the bidder may seek suspension or cancellation of the process or damages from the government. If disconnection is caused by a third party, including the bidder's own Internet provider, the bidder can seek only damages. In case of disconnection, suppliers may contact a call center/helpdesk (toll free) which function throughout the bidding process to inform about the situation. The auctioneer may suspend the ERA until communications are re-established with all interested parties or, if more than 10 minutes have elapsed, may postpone the event and set a new date and/or time to resume the ERA.

36. The Brazilian system permits suspension on other grounds. Decisions to suspend may be taken by auctioneers either on their own initiative or at the request of bidders. For instance, temporary suspensions may be requested by participants and granted by the reverse auctioneer to give time to bidders to rethink their bids. The fact of suspensions and justifications are automatically reflected in the records of ERA. Notably, complaints filed by bidders during the auction (the system allows filing those online through the specific e-mail service provided on the website) do not suspend the ERA although they must be dealt with by the auctioneer before closing an ERA.

#### *Record keeping*

37. In most countries surveyed, the rules applicable generally to preservation of procurement-related documentation apply also in the context of an ERA.<sup>65</sup> In other systems, a more specific requirement is found on recording the course of the ERA and any and all data transfers made in connection with it.<sup>66</sup> In Brazil, all ERA proceedings are automatically generated by COMPRASNET, in the form of the records of the proceedings, which is electronically signed by the reverse auctioneer and assistants, and is published on the COMPRASNET website at the end of the session. An extract is also generated and automatically sent to the Official Journal, which exists in paper and electronic forms, for the publication the next day. Usually the procuring organization also publishes an extract of the results on its website.<sup>67</sup>

### **3. Post-auction**

38. At the post-auction stage, the selection of a winner and award of the contract takes place. At that stage, a procuring entity may also have to deal with complaints and appeals by aggrieved bidders. Some systems impose special duties on a procuring entity with respect to the monitoring of ERA systems.

*Selection of the winner*

39. When auctions of models 1 and 2 are utilized (see A/CN.9/WG.I/WP.35, para. 33), the winning bidder should be known in the end of the auction as it is normally the bidder offering the lowest bid. In model 3 auctions, the winning bidder is not known until after the full evaluation of auctionable and non-auctionable criteria.

40. However, even in auctions of models 1 and 2, there may be situations in which the lowest bid is not necessarily the winning bid. Some systems allow the notice on ERA or the terms and conditions of auctions to state that the final decision to accept the offer rests with the procuring entity allowing it to ascertain if the product meets the standards required and whether the supplier is able to proceed with the supply (see above, para. 9). In Brazil, the bidder offering the lowest bid may be disqualified in the course of evaluation of its qualifications, which takes place after the auction.<sup>68</sup> In China, the lowest bid may be invalidated by the procuring entity, for instance, if it is higher than the market price or abnormally low or in case of a misconduct of the winning bidder during the bidding process or the registration.<sup>69</sup> Notably, in resolving a price tie, a bidder with a higher credibility will win.<sup>70</sup> The right to reject all bids at the end of ERAs is explicitly provided in some ERA-specific regulations.<sup>71</sup>

41. The existing regulations usually allow the procuring entity to accept the second best offer, if for legitimate reasons it rejected the lowest bid, provided that such a possibility was disclosed in advance to the bidders.<sup>72</sup> In other systems, however, if the lowest bid is invalidated, the procuring entity has to reconduct ERA or adopt other methods of procurement.<sup>73</sup>

42. In most jurisdictions bids are binding on bidders<sup>74</sup> and withdrawal of bids may be subject to the forfeiture of a bid security, if any. However, in the United States, bidders are allowed to submit quotations (rather than bids), which are not considered to be binding offers under United States law until the purchase order is extended by the procuring entity and accepted by the bidder.

*Announcement of the winner*

43. In some systems, the law requires the name of the successful bidder to be communicated immediately after termination of the auction to the Internet address fixed in the auction rules.<sup>75</sup> In other systems, regulations do not require an immediate release of the results of the ERA. At least in one province of China, regulations recommend that this should be done on the second day after the closing date.<sup>76</sup>

44. Some systems regulate specifically the content of the notice on the winning bid, including the identity and coordinates of the winning bidder, the price of the winning bid,<sup>77</sup> and the place of publication (e.g., on the website specified in the notice of the auction).<sup>78</sup>

*Contract award*

45. Under the new EU directives, contracts are awarded after closing an ERA on the basis of the results of the electronic auction.<sup>79</sup> The directives do not specify the precise time when the contract award should take place. This may be subject to

provisions regulating review and appeal mechanism. In Austria, the contract must not be awarded until three working days have elapsed from the date of the contract award notice; otherwise it is null and void.<sup>80</sup> The contract award notice, in turn, is given to tenderers simultaneously, without delay, using electronic or telefax service.<sup>81</sup> In China, while the timing of the contract award is to be stated in the solicitation documents,<sup>82</sup> regulations in some provinces recommend that this should happen three days after the publication of the notice of auction.<sup>83</sup>

#### *Review*

46. In most jurisdictions, a general review mechanism applies to ERAs. Specific detailed regulations on appeals in the context of ERA exist in Austria. The following decisions by a procuring entity may be appealed: the invitation (within 7 days), the exclusion from participation (within 3 days), the selection of participants for auctions with a limited number of participants (within 3 days of the notice of the choice), and the award decision (within 3 days from the date of the contract award notice).<sup>84</sup> The law allows unsuccessful tenderers to request information on the reasons for which their tender was unsuccessful as well as on the characteristics and advantages of the successful tender immediately after publication of the name of the successful tenderer. It requires a procuring entity, immediately after being served the request, at the latest one day before expiry of the waiting period, to inform the unsuccessful tenderer of the contract sum awarded and of the characteristics and advantages of the successful tender. A procuring entity is released from such obligation if disclosure of such information would prejudice public interest, the legitimate commercial interests of any company or free and fair competition.<sup>85</sup>

47. At least one country, the United States, permits the reopening of the auction after an ERA had closed on the basis of a protest. In a 2001 decision in *Royal Hawaiian Movers, Inc.*,<sup>86</sup> for example, the Government Accountability Office (GAO) held that the purchasing agency could properly reopen a competition, after an ERA had closed, to accept revised price proposals in order to correct an ambiguity in the solicitation that one of the offerors had protested to the agency.<sup>87</sup> The GAO summarized its decision as follows:

“Notwithstanding a provision in a request for proposals that price revisions could only be made during a reverse auction, the agency reasonably determined to request revised price proposals after the end of the auction, in response to an agency-level protest, where the solicitation was ambiguous concerning when the auction would end and the agency reasonably believed that offerors may have been misled.”

## **IV. Conclusion**

48. Empirical studies demonstrate that ERAs are currently being used in public procurement in some countries and are being considered for introduction in some others. In the light of experience gained and of initiatives at the regional and international levels, it appears likely that this purchasing method will receive acceptance as an appropriate method of public procurement. A consensus appears to be emerging at the international level that, if properly used, ERAs generate substantial savings for governments without undermining, but rather enforcing, such

procurement objectives as economy and efficiency in procurement, transparency, fair and equitable treatment of all suppliers, and the integrity and fairness and public confidence in the procurement process.

49. It has been observed that absence of regulation, or of adequate regulation in some countries where ERAs have been introduced, has deterred some of the procuring entities from using ERAs. The questions that such regulation should address, without however over-regulating the subject, include: (a) when, and for what type of goods and services, the use of ERA is appropriate and when it is not; (b) how to prevent its overuse; and (c) what safeguards must be in place to mitigate risks stemming from the use of ERAs. Although most aspects of ERAs are to be addressed in procurement laws and regulations, the introduction of this electronic purchasing method in public procurement may necessitate adjustments in other relevant branches of law, such as competition and general public administration law.

50. The Model Law does not deal expressly with ERAs, and certain provisions effectively prevent them. For instance, substantial changes to tenders after submission, including to their price, and disclosure of tender information, are prohibited (article 34(1)(a) and (8)). The provision conferring a right to tender in writing in a sealed envelope also precludes an ERA if a supplier does not agree to the use of the method (article 30(5)).

51. Thus, the Working Group may wish to decide: (a) whether ERAs should be incorporated in the Model Law at all; (b) if so, the approach to be taken as to whether ERAs are to be a distinct procurement method, or an optional phase in the existing procurement methods; and (c) the content of such regulation.

52. The main possible advantages of a distinct-method approach are that: (a) it avoids including in the general provisions on other relevant procurement methods any modifications to take account of the use of ERAs, which may make such provisions overly complex; and (b) it permits governments to restrict the grounds for using ERAs (for example, ERAs may be inappropriate in open tendering). The main arguments for an optional phase approach are: (a) flexibility—an ERA can be used within more than one procurement method (e.g., open tendering, restricted tendering and two-stage tendering); and (b) special regulations have to be drafted only for those aspects of ERA proceedings that are different from normal rules and procedures, as the general aspects of procurement methodology will continue to apply.

53. The choice of the approach, to a large degree, will depend on the Working Group's view on which types of purchases will be eligible for procurement using ERAs. Consequential decisions may also include: (a) the auction scope (i.e., which variables could be subject to ERA, e.g., price only, as in Brazil, or non-price criteria in addition, as in the EU) and evaluation and award criteria; (b) the auction model (1, 2 and/or 3); (c) parameters preventing overuse of ERAs; and (d) if the Working Group adopts an optional-phase approach, in which procurement method an ERA phase should be envisaged and whether it should necessarily be the final phase.

54. Regardless of the preferred approach, ERA-specific provisions in the Model Law would need to be consistent with the principles and objectives of the Model Law and, if the optional-phase approach is chosen, with the rules governing the relevant procurement method (e.g., in terms of degree of transparency, advertising requirements).

55. The answers to the policy questions raised in the above paragraphs will determine the direction of the Working Group's future work on the subject and on the revision of the Model Law and its Guide to Enactment generally. The extent of regulation of most procedural aspects will follow from the approach chosen. Nevertheless, it could be expected that aspects of the auction phase worth addressing regardless of the chosen option would include: (a) the type and extent of disclosure of information during the auction phase; (b) the binding or non-binding nature of bids on bidders; (c) the circumstances under which bidders would be authorized to withdraw their bids or themselves from the ERA; (d) the right of a procuring entity to exclude bidders from ERA during the bidding process; (e) the obligation of the procuring entity to accept the lowest bid; (f) justifiable grounds for suspension of ERAs; (g) the level of protection of aggrieved bidders; and (h) the need for and extent of record keeping specifically in the context of ERAs. Other questions that may need to be addressed by the Working Group are of a more general nature, including: (a) the extent to which the issues of ERAs should be addressed in the Model Law or implementing regulations or the Guide to Enactment; and (b) safeguards that the Model Law should establish to prevent the problems stemming from the use of ERAs, such as risks of collusion and obstacles to the participation in ERAs by foreign bidders.

#### Notes

- <sup>1</sup> See, e.g., e-auction decision tool (available at <http://www.ogc.gov.uk/index.asp?id=1001034&syncNav=1> - eAuctionDecisionTool) of the Office of Government Commerce (OGC) of the United Kingdom.
- <sup>2</sup> At the stage of introduction or trial of ERAs, some countries limit the list of procuring entities that can use ERAs in public procurement. In Brazil, for instance, the use of procurement auctions in both versions, conventional and electronic, was initially restricted to the Federal Public Administration bodies but by article 2(1) of Federal Law No. 10.520/2002 of 17 July 2002 (available at [http://www.planalto.gov.br/ccivil\\_03/Leis/2002/L10520.htm](http://www.planalto.gov.br/ccivil_03/Leis/2002/L10520.htm)), their use was extended to the states, the Federal District and municipal entities.
- <sup>3</sup> OGC launched Reverse Auction Framework (RAF, available at <http://www.ogcbuyingsolutions.gov.uk/RAF/default.asp>), a framework agreement concluded with five ERA service providers, designed to supply the ERA services to the public sector.
- <sup>4</sup> The United States General Services Administration provided such services, through its Rocky Mountain Regional Office (Region 8) of the Federal Technology Service. For a review of the procedures used in launching such a reverse auction, see <http://www.r8.gsa.gov/FTSWeb.nsf/0/def311033320029b87256c07004811b0?OpenDocument>.
- <sup>5</sup> See, e.g., the Procurement Guidelines on Reverse Auctions of the New South Wales Government of Australia of March 2001 (available at <http://www.dpws.nsw.gov.au/NR/rdonlyres/ezac4yppqkqzaj5qdjgerv3aj62n4ishpa3xhofh4fdl3cqt4m714ibv3a2w67sslw5zuhmjpois43joel4ees4xe/Reverse+Auctions.pdf>) (the "Australian Guidelines").
- <sup>6</sup> Ibid.
- <sup>7</sup> "Pregoeiros" in Portuguese.
- <sup>8</sup> The National School of Public Administration (Escola Nacional de Administração Pública)—ENAP designed and administers a standard 40 hour course for reverse auctioneers. Auctioneers are to be selected with the adequate profile in initiative, creativity, flexibility, integrity and fairness.

- <sup>9</sup> See, e.g., article 54(3) of Directive 2004/18/EC; article 75 of the Public Procurement Law of Poland; and article 4 of the Rules on the content, conditions and restraints for rendering electronic auction in contract award procedures of Slovenia, published in the Official Gazette of the Republic of Slovenia No. 130/2004, 3 December 2004 (the “Slovenian Rules”).
- <sup>10</sup> See article 54(3) of EU Directive 2004/18/EC.
- <sup>11</sup> Such a requirement is found in article 75(1) of the Public Procurement Law of Poland.
- <sup>12</sup> This is practiced in Brazil and required in some provinces of China (see, e.g., article 14 of the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding).
- <sup>13</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 44.1. Also, the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 14.
- <sup>14</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, Schedule VIII.
- <sup>15</sup> Article 1 of Law No. 10.520 of 17 July 2002 of Brazil.
- <sup>16</sup> See, e.g., the Public Procurement Law of Poland, article 75(2); and Purchase Contract Awards Act 2002 of Austria, para. 116.2-4.
- <sup>17</sup> See, e.g., the requirement in the OGC’s “E-auctions guidelines” (available at <http://www.ogc.gov.uk/index.asp?docid=1001034>).
- <sup>18</sup> Article 7 of Decree No. 3.697.
- <sup>19</sup> In Austria (Purchase Contract Awards Act 2002, para. 116.2-4), it is required by law that the procuring entities grant unrestricted access free of charge to any and all documentation concerning the auction, including the solicitation documents, as of the day of the notice. The same requirement is found in Brazil.
- <sup>20</sup> See, e.g., article 54(4) of EU Directive 2004/18/EC; article 5, second paragraph, of the Slovenian Rules (see above, footnote 9); and section 3.1.1(a) of the Administrative guidelines for assisted reverse auction event of the Singapore Ministry of Defence (the “Singapore guidelines”).
- <sup>21</sup> See, for instance, article 44 of EU Directive 2004/18/EC; or para. 116.7 of the Purchase Contract Awards Act 2002 of Austria.
- <sup>22</sup> See, e.g., the Shanghai Interim Measures for the Management of Online Public Procurement Bidding.
- <sup>23</sup> See, e.g., the Public Procurement Law of Poland, article 76, that subjects the participation of bidders in ERA to their compliance with applicable procedural conditions for participation, which may include pre-qualification.
- <sup>24</sup> *Sistema de Cadastro de Fornecedores* (SICAF) is the unified registry system of the Federal Government.
- <sup>25</sup> While minimum is three participants, no maximum limit is established.
- <sup>26</sup> At the pre-auction stage, registered bidders certify before the opening of the auction only that they meet the qualification requirements (usually by typing in the designated space that they are fully aware of qualification requirements and that they are fully qualified).
- <sup>27</sup> Articles 7.20-21 of Decree 3.697. There are also manuals that explain the procedure to the reverse auctioneer and suppliers. Post-auction evaluation of qualifications is limited to the verification of legal, economic and financial information of the company, its fiscal compliance, and compliance with possible additional requirements contained in the notice of auction. If guarantees were requested, they are also verified. In practice, most of the evaluation takes place online as the auctioneer may access most of the required information from SICAF and other

government databases (Decree 3.555 explicitly permits the procurement entity not to require paper evidence of the fiscal qualification). There is a special application allowing such an online process to which both the auctioneer and the winner have to log on immediately after the winning bid is announced. Other bidders may continue to be logged on and see the exchange of information but cannot participate in the evaluation process. Proponents of the system argue that post-auction evaluation considerably expedites the process, as little room is left for frivolous complaints and a procuring entity does not have to handle complaints on the ground of disqualification before the auction.

- <sup>28</sup> To obtain the membership, suppliers fill out and submit the online information form and register in the database at public procurement centres. Suppliers must then submit to procurement centres originals and duplicates of the following documents: (a) business licences and certificates of organizational code; (b) tax registration certificates; (c) financial reports of the previous year; (d) relevant qualification certificates; (e) e-mail accounts; and (f) other documents required by the procurement centre. Upon receipt of the application documents, the procurement centre will examine and decide, within the period of time set by law, whether to grant membership to the suppliers (see articles 7-9 of the Shanghai Interim Measures for the Management of Online Public Procurement Bidding; and article 11 of the Interim Measures for the Management of Online Public Procurement Bidding of Shunyi District of Beijing).
- <sup>29</sup> See the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding, article 8; the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 6; and the Xuzhou City Interim Measures for the Management of Online Public Procurement Bidding, article 8.
- <sup>30</sup> Purchase Contract Awards Act 2002, para. 23.8 and 9.
- <sup>31</sup> Purchase Contract Awards Act 2002, para. 23.8, addressing auctions with unlimited number of participants, states that all qualified applicants chosen from unlimited number of entrepreneurs publicly invited to submit applications to participate are permitted to participate in the auction, while para. 23.9 dealing with ERAs with a limited number of participants states that only selected applicants chosen from an unlimited number are permitted to participate. Proof of qualifications must be presented at the latest at the time of admission to the auction (para. 52.5.3).
- <sup>32</sup> Purchase Contract Awards Act 2002, para. 116.5-9. The result of the evaluation or selection, including the reasons as to whom to invite, are to be recorded and the records in relevant parts are open to applicants for inspection. The procuring entity is obliged to inform without delay applicants not admitted to the ERA including information as to the reasons for such refusal, unless such information would be contrary to the public interest or the legitimate business interests of companies, or would prejudice free and fair competition.
- <sup>33</sup> For instance, in Romania, Government Ordinance No. 20 suggests, in the context of e-procurement, the application of the non-discrimination principle, also with regard to the nationality of a bidder (article 2(a)), however, on the basis of reciprocity (article 8).
- <sup>34</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 116.5. Those pre-qualified or selected have to be immediately informed accordingly by e-mail.
- <sup>35</sup> See, e.g., article 54(4) of EU Directive 2004/18/EC. Invitations are to be sent simultaneously to all invitees by electronic means.
- <sup>36</sup> Article 54(4 and 5) of EU Directive 2004/18/EC. See also the Slovenian Rules (see above, footnote 9), articles 5 and 6.
- <sup>37</sup> Purchase Contract Awards Act 2002 of Austria, para. 116.2-4. The auction rules must include at least the following: (a) requirements for registration and identification; (b) auction procedure (in particular minimum between bids); (c) time of beginning and modality of termination of the auction; (d) rights of use and exploitation; (e) reasons for exclusion; (f) deadlines; (g) website publishing the currently lowest bid or, in case of award based on the technically and

economically most advantageous bid, the current ranking of bidders during the auction;  
(h) information that will be made available to bidders during the auction and time/phase of the auction when it will be made available; (i) website where such information is made available; and (j) any deposit, if applicable.

- <sup>38</sup> Articles 7.4 and 7.6 of Decree No. 3697, before amended, provided for the exclusion at the evaluation stage of those bidders whose initial submitted prices were higher than the lowest submitted initial price by certain pre-determined percentage. However, those provisions were deleted as not promoting competition.
- <sup>39</sup> The Singapore Guidelines (see above, footnote 20), section 3.1.1(d) and (e), require participants to sign a bidding/license agreement, and to undergo a training session as a precondition for participation in ERA. Although no requirement on training for a particular auction exists in Brazil, by general way of education, manuals and an online simulator have been developed for different users of ERAs (see <http://www.comprasnet.gov.br/>).
- <sup>40</sup> Required by law, for example, in Austria, Purchase Contract Awards Act 2002, para. 116.10(4).
- <sup>41</sup> See para.116.2 of Purchase Contract Awards Act 2002 of Austria, providing that an ERA must not begin before expiry of two working days after having been advertised in the Internet; Law 10.520 of Brazil that provides for at least 8 days after the notice of auction is given; article 54(4) of EU Directive 2004/18/EC, providing that ERAs may not start sooner than two working days after the date on which invitations are sent out; and article 76(4) of the Public Procurement Law of Poland, which refers to a five-day waiting period between the transmittal of the invitation and the opening of the auction.
- <sup>42</sup> Article 54(7) of Directive 2004/18/EC.
- <sup>43</sup> Purchase Contract Awards Act 2002, para. 116.10(4). Immediately after abortion of an auction, the reasons for the abortion shall be communicated at the Internet address fixed in the auction rules to those bidders who were last in participating in the auction (para. 116.11).
- <sup>44</sup> Decree 3.697.
- <sup>45</sup> Auctioneer's discretion in this regard has been criticized by some analysts, as well as by the MDBs that prefer fully automated systems without little, if at all, human intervention.
- <sup>46</sup> See the Singapore Guidelines (see above, footnote 20), section 3.1.2(b).
- <sup>47</sup> For instance, under article 1(7) of EU Directive 2004/18/EC, "electronic auction" is defined as a repetitive process involving an electronic device for presentation of new prices and/or new values. Although an "electronic device" is not defined, it implies electronic means, defined in article 1(13) of the directive as using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means and by other electromagnetic means.
- <sup>48</sup> See Arrowsmith S., "Electronic reverse auctions under the EC public procurement rules: current possibilities and future prospects," 11 Public Procurement Law Review, No. 6, 2002, pp. 299-330 (originally prepared for Achilles Information Ltd.).
- <sup>49</sup> Article 36(4) of Government Ordinance No. 20 of 24 January 2002.
- <sup>50</sup> See Purchase Contract Awards Act 2002 of Austria, para. 116.10(4) and article 79(2) of the Public Procurement Law of Poland.
- <sup>51</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 116.10(4).
- <sup>52</sup> See Kennedy-Loest C. and Kelly R., "EC competition law rules and electronic reverse auctions: a case for concern?", 2003, 12 Public Procurement Law Review, No. 1, pp. 28-30.
- <sup>53</sup> Article 54(6) of EU Directive 2004/18/EC requires contracting authorities to instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their

“relative rankings” at any moment. The same provisions exist in Austria (Purchase Contract Awards Act 2002, para. 118.3).

- <sup>54</sup> See, e.g., the Purchase Contract Awards Act 2002 of Austria, paras. 117.2 and 118.3; article 54(6) of EU Directive 2004/18/EC; and article 79(3) of the Public Procurement Law of Poland.
- <sup>55</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 117.2.
- <sup>56</sup> See, e.g., the Shanghai Interim Measures for the Management of Online Public Procurement Bidding. According to the analysts of the EU competition law rules, showing during the auction overall ranking instead of prices is preferable from competition law perspective. See Kennedy-Loest C. and Kelly R., “EC competition law rules and electronic reverse auctions: a case for concern?”, 2003, 12 Public Procurement Law Review, No. 1, p. 29.
- <sup>57</sup> Decree No. 2001-846, article 1.
- <sup>58</sup> Purchase Contract Awards Act 2002 of Austria, para. 118.3 and article 54(6) of EU Directive 2004/18/EC.
- <sup>59</sup> The multilateral development banks (MDBs) view the chat feature as offering a potential for fraudulent activities, for example price-signalling and corruption. The position of the MDBs, as communicated to the secretariat, is that for the operations that they fund, they will not accept such a chat facility and will require a fully-automated auction without the participation of an individual representative of a government.
- <sup>60</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para.116.12; Decree No. 3.697 of Brazil; article 54(6) of EU Directive 2004/18/EC; Decree No. 2001-846 of France, article 1; and Government Ordinance No. 20 of Romania, section 36(2).
- <sup>61</sup> In Brazil, the system only provides an identification number of the bidders, so that the reverse auctioneer may control the receiving of bids from the different bidders, but not be able to identify them physically. The bidders themselves have sufficient information to perceive only which is the lowest bid and if it is theirs or not.
- <sup>62</sup> See article 7 of the Slovenian Rules (see above, footnote 9); and Government Ordinance No. 20 of Romania, section 36(5).
- <sup>63</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 116.12.
- <sup>64</sup> Article 11 of Decree 3.697.
- <sup>65</sup> E.g., under article 43 of EU Directive 2004/18/EC.
- <sup>66</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 116.13.
- <sup>67</sup> The information published includes: (a) the name and other details of the bidders and the procuring organization; (b) the items of the procurement and the budgeted unit price for each; (c) the initial price proposal of all bids; (d) the initial and closing time of the reverse auction session and suspensions; (e) all decisions taken by the reverse auctioneer; (f) the communications exchanged between bidders and the reverse auctioneer in the “chat”; (g) the complaints filed, if any, and decisions taken regarding them; (h) clarifications requested and given; and (i) the complete data on the adjudication procedure and any procedure that would be dealt afterwards, such as the testing of samples.
- <sup>68</sup> Law 10.520 and Decree 3.697. Another distinct feature of the Brazilian system found in article 4 of the Decree, is that the auctioneer may negotiate the price directly with the winner or with the next best bidder if the first is disqualified, if the auctioneer is not satisfied with the lowest price obtained in the ERA (paras. XI and XVI). Regulations do not impose any limit on the price that can be negotiated indicating only that unrealistic pricing is not permitted. The winning bidder, however, has the right to refuse lowering the price submitted in the ERA and the auctioneer is not allowed to disqualify the bidder for that reason. The utility of the procedure has been

questioned by some analysts and, in practice, the procedure has not been utilized often.

<sup>69</sup> See, e.g., in China, the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, articles 22 and 27; the Shenzhen City Interim Measures for the Management of Online Public Procurement Bidding, article 31; the Zhuhai City Interim Measures for the Management of Online Public Procurement Bidding, article 29; and the Hefei City Interim Measures for the Management of Online Public Procurement Bidding, article 25.

<sup>70</sup> See, in China, the Shanghai Interim Measures for the Management of Online Public Procurement Bidding”, article 19; and the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding, article 22.

<sup>71</sup> Section 3.1.2(c) of the Singapore Guidelines (see above, footnote 20).

<sup>72</sup> See, e.g., in China, the Liuzhou City Rules of Implementation for Public Procurement through Online Procurement, article 19. The Brazilian system permits an auctioneer to approach the bidder who submitted the second lowest bid if the winning bidder is disqualified or the bid is deemed to be unacceptable or non-responsive. If the second lowest bidder is not logged on to the system, the reverse auctioneer will call by e-mail to continue the procedure. In the case of disqualification or refusal by the second bidder to provide the goods or services at the price of the original winner, the next lowest bidding bidder is called upon, and so on until the contract is awarded. If none agree, the ERA is cancelled.

<sup>73</sup> See, in China, the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 22; the Shunyi District of Beijing Interim Measures for the Management of Online Public Procurement Bidding, article 20; and the Liuzhou City Rules of Implementation for Public Procurement through Online Procurement”, article 22.

<sup>74</sup> As the secretariat was advised during consultations with experts, imposing the requirement of binding bids may be regarded as an effective tool against potential abuses in the ERA, such as by “phantom” bidders, or members of a cartel who may keep bids artificially high.

<sup>75</sup> See, e.g., Purchase Contract Awards Act 2002 of Austria, para. 116.11.

<sup>76</sup> See, e.g., the Working Procedure for Online Procurement Bidding (Office Equipment), article 6, under the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding.

<sup>77</sup> Under the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, only the name of the winning bidder but not the winning price is disclosed.

<sup>78</sup> See, e.g., the Public Procurement Law of Poland (article 80(2)); and, in China, the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding, article 22.

<sup>79</sup> See article 54(8) of EU Directive 2004/18/EC.

<sup>80</sup> See Purchase Contract Awards Act 2002 of Austria, para. 100.2.

<sup>81</sup> *Ibid.*, para. 100.1.

<sup>82</sup> See, e.g., the Shanghai Interim Measures for the Management of Online Public Procurement Bidding, article 17; and the Interim Measures for the Management of Online Public Procurement Bidding of Shunyi District of Beijing, article 15.

<sup>83</sup> See, e.g., the Zhejiang Province Interim Measures for the Management of Online Public Procurement Bidding”, article 22.

<sup>84</sup> Purchase Contract Awards Act 2002 of Austria, para. 20(13 a ii).

<sup>85</sup> *Ibid.*, para. 100.4.

<sup>86</sup> Decision of the Comptroller General of the United States, File No. B-288653, 31 October 2001,

available at <http://archive.gao.gov/legald425p10/a02467.pdf>.

<sup>87</sup> See also Nash R. L., and Cibinic J., “Oversight of procurements: delayed addendum”, vol. 16, No. 1, Nash & Cibinic Report 1 (West/Thomson, January 2002).

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