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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 abnormally low tenders

Note by the Secretariat

Contents

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "UNCITRAL Model Procurement Law" or the "Model Law")[1] is set out in paragraphs 1 to 5 of document A/CN.9/WG.I/WP.34, submitted to the Working Group for its consideration at its seventh session.

2. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group considered (inter alia) the issue of unrealistically-priced or abnormally low tenders in procurement. The Working Group was advised that under-priced contracts involve a risk that, as a result of the low contract price, the selected supplier might be unable to meet its obligations under the contract concerned. The Working Group noted that the risk had also been observed in the context of electronic reverse auctions (this procurement method is reviewed in detail in document A/CN.9/WG.I/WP.35).

3. The Working Group therefore requested the Secretariat to conduct a comparative study on how procuring entities handled unrealistically-priced or abnormally low tenders, both in the context of electronic reverse auctions and generally, also considering the relationship between abnormally low prices and competition law (document A/CN.9/568, paragraph 54). This Note provides the results of the comparative study requested.

II. The phenomenon of unrealistically-priced or abnormally low tenders

A. Definition of "unrealistically-priced or abnormally low tenders"

4. The phenomenon of under-priced contracts is discussed under various names and the Secretariat will refer to it as an "abnormally low tender" ("ALT"). The term ALT covers a response to any type of procurement opportunity (whether a formal tender proceeding or not). Similarly, and for consistency, the Secretariat will use procurement terms from the Model Law even when discussing other systems.[2]

5. The Secretariat will use the following working definition of an ALT:

> "A tender price is assumed to be abnormally low if it seems to be unrealistic, in that it appears not to provide a margin for a normal level of profit or appears to be below cost, such that it may not be feasible to perform the contract at that price; and if the supplier cannot explain his price on the basis of the economy of the solution chosen, or the exceptionally favourable conditions available to the supplier, or the originality of the work proposed."[3]

B. The impact of ALTs

6. The submission of an ALT gives rise to a performance risk. In 1989, the then Procurement Working Group pointed out that ALTs involve a risk that "the tenderer would be unlikely to be able to perform the contract at (such) a price … or could do

so using only substandard workmanship or materials by suffering a loss… it could also indicate collusion between the tenderers."[4]

7. For the supplier, fulfilling a contract at a loss can lead to excessive pressures to save costs, restricted cash flow, and even to insolvency. The procuring entity may sustain increased costs in seeking alternative supply, in attempting to ensure adequate contractual performance, and in reduced quality of the goods or services contracted. It may also be put under pressure to pay additional amounts without proper justification (also raising the risk of corruption), and it may have to devote internal resources to higher than normal monitoring functions. If reduced quality goods or services provided leads to maintenance and replacement being needed earlier in time than would have been the case had the quality been as stipulated in the specifications, then the overall costs of a contract may increase. Subcontractors can be pressured into submitting abnormally low sub-tenders, such that subcontract performance and the supply chain are also jeopardized.

8. From the macroeconomic perspective, ALTs may compromise environmental, health and safety provisions (as compliance with such provisions involves costs, and suppliers under cost constraints seek to reduce their costs wherever they can), they may give rise to reduced research and development and investment, they may put downwards pressure on employment conditions and they may increase the risks of the evasion of taxes and social security contributions. The longer-term effects may also include an anti-competitive impact on national economies and reduced international competitiveness, if there is a reduction in the number of market-players through insolvencies, and reduced working capital, investment, training, and poorer working practices. ALTs may therefore involve additional costs to the national Government outside the contract concerned.

9. These impacts may be incidental to the unintentional submission of ALTs, or direct consequences of ALTs submitted intentionally so as to drive out competition. Small- and medium-sized enterprises (SMEs) tend to have limited financial resources, and the cash constraints normally found with under-priced contracts (as explained in paragraph 6 above) are proportionately more severe for SMEs.

10. In summary, ALTs can be seen as contrary to several aims of the Model Law, including economy and efficiency in procurement, the promotion of competition among suppliers and contractors, and the fair and equitable treatment of all suppliers and contractors.

C. Possible reasons for the submission of ALTs

11. Empirical data indicate that ALTs are most prevalent in times of decreasing economic demand and in situations in which competition is fiercest.[5]

12. The Secretariat's study has identified various reasons why ALTs may be submitted, including:

(a) Unintentional ALTs:

(i) Imprecise and ambiguous project and tender documentation, and errors in evaluating the specifications and tender, increasing the risk that a supplier may misinterpret the requirements;

(ii) Inadequate time to prepare tenders, preventing suppliers from undertaking adequate costs evaluation and risk analysis;

(iii) Errors in estimating the internal costs of production. Estimates use historical data, and studies have shown that errors in estimation tend to be under-estimates;[6] and

(iv) Below-cost pricing during the auction process.[7]

(b) Intentional ALTs:

(i) Issues relating to anti-competitive behaviour in the marketplace. Suppliers may submit contracts knowingly at a loss, seeking market share, and may engage in predatory pricing,[8] to drive out other suppliers and thereby gain excess profits. Anti-competitive behaviour is normally controlled and regulated in competition law, though certain procurement regimes prohibit unrealistically low pricing.[9] Also, large enterprises may keep branches in business, even though they operate at a loss, because they serve the strategy of the enterprise as a whole, and those branches may submit ALTs as they do not have to cover their own costs;[10]

(ii) Issues related to potential insolvency. A supplier may seek a contract at any price, even if it will make a loss in fulfilling the contract, because its only aim at the time is to stay in business, or to secure credit and avoid insolvency. Its motivation may therefore be to cover its fixed costs, such as salaries, and an ALT may reflect those costs alone. Some suppliers may also fail to meet fiscal, social or environmental obligations, in which case the supplier can avoid such costs in its bids.[11]

13. Additionally, it has been noted that there is a greater risk of an ALT if procuring entities are authorized to enter into pre- or post-tender negotiations.[12] Negotiations may be held with the sole aim of reducing prices or imposing onerous contractual terms. Under pressure from the procuring entity, suppliers may have to offer prices below costs or lose the contract.

14. The most common reasons why procuring entities may accept ALTs are insufficient awareness of the risks of and identification of ALTs, inadequate resources for drafting specifications and evaluation of tenders and supplier qualification, and pressure to award a contract to the supplier with the lowest price, irrespective of quality. Further, where procuring entities are required to publish and justify their contract awards, and in order to give as little cause for criticism as possible, the lowest tender price may be taken as the decisive award criterion.

15. Additionally, there is a risk that evaluation criteria may not be adequate to identify performance risks, and procuring entities may not take into account aspects of an ALT that can increase the overall price of a contract, such as:

(a) Excess variations to the contract as suppliers seek to make up losses, with increased numbers of contractual disputes;

(b) Poor execution of work;

(c) Inadequate quality of materials and systems, and consequently higher costs of use, maintenance and replacement;

(d) Additional monitoring and oversight costs; and

(e) Insolvency of suppliers during the contract phase.

16. Modern procurement methods have a high emphasis on price, in some cases obliging the procuring entity to take the lowest tender price or the lowest evaluated tender, with inadequate attention to quality issues. Certain commentators have observed that this aspect is seen in electronic reverse auctions,[13] which have a very high emphasis on price,[14] and perhaps in procurement methods aimed at taking advantage of economies of scale.[15]

D. Provisions addressing ALTs in the Model Law

17. ALTs were the subject of preliminary discussion during the formulation of the 1993 Model Law, from the perspective of whether ALTs might indicate collusion between suppliers. At that time, the Working Group also considered whether permitting procuring entities to set minimum or maximum prices would be appropriate,[16] and although transparency advantages were recognized, the Working Group did not recommend setting minimum or maximum prices, nor did it explicitly make provision for ALTs.

18. The only provisions in the Model Law that can therefore be used to address the issue of ALTs are those providing for the qualification of suppliers and the evaluation of tenders.

19. Article 6 of the Model Law regulates the proceedings for qualification of suppliers, and states that suppliers should satisfy the procuring entity regarding (inter alia) professional, managerial and technical qualifications and competence, resources, legal capacity, solvency, and that they have paid taxes and social security contributions, that their directors are not subject to criminal investigation or prosecution, and any other requirements set out in the solicitation documents. The Guide to Enactment states that the qualification exercise should afford the procuring entity "sufficient flexibility to determine the exact extent to which it is appropriate to examine qualifications in a given procurement proceeding".[17]

20. On the question of evaluating tenders, the procuring entity shall, under article 34(4)(a) of the Model Law:

> "Evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents."[18]

21. During the amendment of the Model Law to incorporate provision for services, Article 41 *quater* was proposed,[19] to include the "effectiveness of the proposal in meeting the needs of the procuring entity" as one of the evaluation criteria, along with the qualifications, experience, etc., of the supplier and its personnel.[20] The procuring entity would then be able to disregard a tender that had been inflated with regard to technical and quality aspects as compared with the price proposed for the items concerned. (This provision can now be found within Article 39.2 of the current Guide to Enactment.)

22. The Model Law does not, however, provide detailed guidance on the evaluation to be undertaken, providing that "the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents" (article 34(2)(a)), subject to the correction of clerical and similar errors. Under article 34(4)(b), the basis of evaluation and determination of the successful tender is the lowest tender price (or the lowest evaluated tender, if the latter basis is set out in the solicitation documents, and using the criteria specified in those documents). As regards the costs of completion of a contract, a procuring entity can take into account only "the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services" (article 34(4)(c)(ii)), and only where it is carrying out a lowest evaluated tender assessment. Additional costs that might arise from an ALT, such as are described in paragraph 15 above, may therefore not be taken into account in an evaluation carried out under these provisions.

23. Article 34(1)(a) permits the procuring entity to seek clarification of a tender, though a modification of substance or price is not permitted, and article 31 allows the procuring entity to set a bid validity period of a sufficient length to accommodate a clarification procedure, and to extend it if necessary. However, when drafting these provisions, the Working Group expressed concern at a potential for abuse,[21] and noted that the provision "[was] not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or from other errors not apparent on the face of the tender."[22] The Model Law does not therefore provide a procuring entity with the means to clarify possible ALTs as such with suppliers.

24. The Model Law does not permit a procuring entity to reject an ALT as such, though article 12 does enable it to reject all tenders, proposals, offers or quotations. The Guide to Enactment notes that the purpose of article 12 is to enable the procuring entity to reject all tenders for reasons of public interest (such as where there appears to have been a lack of competition), provided that the right to do so has been reserved in the solicitation documents.

III. Comparative study—ALTs in existing legislation

25. This section will examine three elements of current law: first, that in use for the identification of possible ALTs; secondly, the steps that can be taken to establish whether there is in fact an ALT; and thirdly, available measures to combat an ALT once identified. Procurement law generally addresses these three notions, and this section will also briefly consider relevant aspects of competition law and policy.

A. Prohibition of the submission of an ALT in public procurement

26. The Secretariat has encountered little legislation explicitly barring the submission of ALTs. Exceptions are found in the China Tendering and Bidding Law, which provides that "a bidder shall not bid in competition at a price below cost, nor shall he bid in the name of another person or resort to any other false and deceptive

means to win the bid by cheating,"[23] and in the United States Federal Acquisition Regulation 3.501, which bars unrealistically low pricing.[24] In Thailand, regulation provides for imprisonment or a fine when the submission of an ALT results in the award of a contract that it is not possible to fulfil, and provides for liability to compensate the procuring entity for its share additional costs incurred.[25] In the Philippines, there are general prohibitions against fraudulent activities on the part of bidders, with penal sanctions.[26]

B. Legislative measures designed to identify possible ALTs and subsequent steps to address them

27. The Secretariat has encountered more widespread procurement law aimed at preventing ALTs, normally found as part of the overall evaluation and supplier qualification procedures. The legislative measures seek to address possible ALTs from the perspective of avoiding performance risk, using procedures to identify possible ALTs and subsequent steps to address them.

28. The Secretariat has encountered various approaches in the systems surveyed, including identification of possible ALTs through tender evaluation, risk analyses, and price analyses. A risk or price analysis aims to assess whether an otherwise responsive bid would expose the procuring entity to a performance risk because, for example, the contract price would not involve a normal or adequate level of profit for the supplier (and the attendant risk of insolvency). Other systems permit (or oblige) procuring entities to investigate potential ALTs before any bids can be rejected, through the mechanism of requesting price justifications from the supplier(s) concerned.

29. The regulation of tender evaluation, supplier qualification and how those procedures can identify and address ALTs and performance risk are therefore examined together in this section.

1. Identification of ALTS

30. The identification of possible ALTs submitted is the first step towards addressing the risks that they pose. The main identification methods are arithmetical or statistical techniques to identify bids that fall outside the normal price range ("statistical analysis"), using market information to identify reference prices for comparative purposes and analysing the price structures of suppliers ("price analysis"), and considering whether a particular tender appears to pose a performance risk ("risk analysis"). This section will look at each of these techniques in turn, though an evaluation of tenders and suppliers will not necessarily include each technique, nor will it necessarily treat each technique as a separate stage in the evaluation process.

(a) Statistical analysis

31. There are number of existing systems aimed at the identification of possible ALTs using arithmetical or statistical methods (sometimes carried out as part of price analysis), including:

(a) Arithmetic systems that measure the deviation of a particular tender price (normally by between 10 per cent and 15 per cent) from an average of all tender prices submitted, found, for example, in Belgium, Greece, Italy, Lithuania, Portugal and Spain;[27]

(b) Analysing whether the prices and costs provide the contractor with a profit margin lower than a "normal" margin; and

(c) Analysing whether the price proposed appears to be exceptionally low (whether generally, as envisaged under the new European Commission Directives on procurement,[28] or, for example, establishing a threshold below which a tender is considered as abnormally low).

32. For example, Spain's Procurement Law[29] considers tenders to be ALTs ("temerity" offers) if there is only one supplier and his price is 25 per cent below the reference price, if there are only two suppliers, one of whose prices is more than 20 per cent below the other, and so on using a decreasing percentage scale for more than two suppliers.[30]

33. Commentators have noted that any fixed percentage rates or other "arithmetical methods" can be arbitrary and question their efficiency, especially as they may be distorted by tenders that are high-priced in relation to the average.[31] In Bangladesh, the previous practice of rejecting bids more than five per cent below the procuring entity's estimated price has been abandoned in the new Public Procurement Regulations, 2003, which provide, in Regulation 31(8), that "[t]here shall be no automatic exclusion of tenders which are above or below a predetermined percentage of the official estimates", a change that commentators have linked to the arbitrariness of arithmetical methods.[32]

(b) Price analysis

34. Reference or market prices may be available to a procuring entity for some, but not all, products or services to be procured. Items that are bespoke, novel or not normally procured in the quantities the procuring entity may require will not have a reference or market price, and for items that are not commodities, the accuracy of reference or market prices will be difficult to ensure. Furthermore, the procuring entity may not have the resources or data available to it that would be necessary to estimate reference or market prices.

35. In some Latin American countries, notably Brazil and Argentina, reference prices (or maximum prices) can be set in the announcements of procurement opportunities, against which prices submitted can be compared for analytical purposes.[33] Brazil's COMPRASNET electronic government procurement system[34] provides recent historical reference prices, and requires each procurement to be accompanied by a corresponding budget forecast. Legislation also requires procuring entities to evaluate proposals using an analysis of local costs and prices.[35]

36. In Indonesia, the procuring entity is required to assess a "self-estimated price", to be used as tool for evaluating the reasonableness of the tender price and its constituent parts, and while it can also be used for assessing the value of any independent guarantee required to address an ALT,[36] it cannot be used as the basis for bringing down the tender price itself.[37]

37. Under the United States Federal Acquisition Regulations (FAR), a price analysis must be undertaken to evaluate and examine "a proposed price without evaluating its separate cost elements and proposed profit", known as a "price realism" analysis. The FAR has a non-exhaustive list of techniques and procedures that can be used for the purpose, including comparison of tendered prices among themselves and with those previously proposed, with previous contract prices, with independent Government cost estimates, with competitive published prices and indexes, and with prices obtained through market research. It also suggests the use of statistical and other estimates to highlight significant inconsistencies that warrant additional enquiry, and the analysis of pricing information from the supplier. Significantly, cost information (as opposed to price information) cannot be sought.[38]

38. By contrast, in Mexico, legal regulation stipulates that tender evaluations must demonstrate that both costs and prices are commensurate with prevailing conditions in the relevant regional or other market where the works will be carried out, requires budget consistency, and mandates an analysis of price and cost components, including comparisons with prevailing norms, profit margins and other expenses.[39] Similarly, in Buffalo City Municipality, South Africa, procuring entities estimate prices (called shadow prices) by considering (inter alia) statutory obligations, bills of quantities, the scope of the work, site conditions, production rates, statutory wage rates, contractual obligations and requirements, levels of remuneration of staff, profit, overheads and purchase and replacement of tools.[40]

39. However, setting maximum or minimum prices is not generally viewed as appropriate.[41] In the Philippines, regulations provide that "[t]here shall be no lower limit or floor on the amount of the award".[42] Commentators have noted, in particular, that the procurement may become a lottery in the case of a minimum price, as suppliers all bid at the minimum price.[43]

(c) Risk analysis and tender evaluation

40. The various multinational and domestic systems surveyed by the secretariat all contain some guidance as to the evaluation of tenders to be carried out, but the level of detail of the elements of that evaluation varies considerably. (The relevant provisions of the Model Law are found in paragraphs 20 to 24, above.) The two main award criteria are lowest price tender and lowest evaluated tender,[44] with the latter criterion affording greater flexibility in assessing the quality of a particular tender. However, some systems explicitly link the award criteria with the qualification of the supplier, as further set out in the following paragraphs.

(i) Evaluation of tenders in multilateral legislation

41. Article 44 of the second new EU Directive addresses the "[v]erification of the suitability and choice of participants and award of contracts", and in addition to specific procedures where an ALT is suspected (in article 55, see paragraph 52, below),[45] the procuring entity is obliged to check "the suitability of the economic operators not excluded under Articles 45 and 46 … in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 47 to 52, and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3 [of article 44]." The procuring entity is therefore obliged to consider both the responsiveness of the tender and the suitability of the supplier.

42. Article 53 of the second new EU Directive sets out the criteria for awarding contracts themselves, noting that the provisions are "without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services", and that when the award is made to the most economically advantageous tender, the procuring entity is to set out in its solicitation documents, or equivalent, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender (for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion).[46]

43. Under the GPA, procuring entities must award contracts to the supplier who has been determined to be fully capable of undertaking the contract and whose tender is either the lowest price tender or the lowest evaluated tender.[47] The GPA also sets out general principles for the assessment of a supplier's suitability on the basis of non-discrimination, but notes that "[t]he financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations".[48]

44. The North American Free Trade Agreement (NAFTA) authorizes a procuring entity to inquire into suspected ALTs as part of its tender assessment, and notes that the successful tender shall be that which is the lowest price or most advantageous tender, and in respect of which the supplier "has been determined to be fully capable of undertaking the contract". The text also provides that if a procuring entity "has received a tender that is abnormally lower in price than other tenders submitted, the entity may inquire of the supplier to ensure that it can comply with the conditions of participation and is or will be capable of fulfilling the terms of the contract".[49]

(ii) Evaluation of tenders in domestic legislation

45. In Chile, legislation requires an economic and technical analysis of the present and future benefits and costs of the goods and services quoted in each tender, and stipulates that evaluation criteria must include the price, experience of the supplier, quality, technical assistance, technical support, after-sales service, delivery times, transportation costs, and other items that are deemed relevant.[50]

46. In Singapore (a signatory to the GPA), procurement is largely decentralized to individual Government ministries, but there are two central government registration authorities (GRAs),[51] which carry out centralized purchasing services for common items. The GRAs are required to assess the track record and financial capability of potential suppliers, and those who are assessed to be suitable receive a certificate from the central registration authority, which can then be submitted in future tenders.[52] The GRA registration may be specified in the solicitation documents as critical, non-critical or fully exempted for a particular procurement,[53] but if it is not required, procuring entities are required to carry out an equivalent assessment.

47. In the Hong Kong SAR, which is also a signatory to the GPA, potential suppliers can be required under tender conditions to demonstrate their financial capability to the Government.[54]

48. In the municipality of Buffalo City, South Africa, procuring entities are required to conduct a risk analysis (that is, additional to the price analysis described in paragraph 38, above) to ensure that the tender would not place the municipal council or the procuring entity at undue risk were it to be accepted. The regulation requires the following items to be considered, and notes that suppliers can be interviewed for the purpose: first, the tender price and its constituent elements and particularly any imbalance in prices, and unduly high or low individual rates; and secondly, the supplier's ability to obtain an independent guarantee, if applicable, its previous experience, financial and human resources, track record, its ability to supervise and control labour and, if required, to supply materials and provide plant/transport, and its understanding of the scope of work required. Tenders may be disregarded if "the price make up of portions of the work differ substantially from the estimated price and the [supplier] is unable to account for such discrepancies."[55]

49. In the United Kingdom, procuring entities, when assessing whether a supplier meets any "minimum standards of economic and financial standing", are authorized to seek statements from a supplier's bankers in addition to assessing its published financial statements.[56]

2. Measures that can be taken to address a possible ALT once identified

(a) Ability or obligation to seek price justification where a possible ALT is suspected

50. Most systems permit or require procuring entities to provide suppliers with an opportunity to explain prices that appear to indicate a possible ALT, and to take account of the explanations received in considering whether tenders are responsive, in broadly similar terms.

(i) Price justification in multilateral legislation

51. A justification or explanation stage prior to any rejection of a tender is authorized (but not required) under article XIII (4) of the GPA, the aim being to ensure that the supplier can comply with the conditions of participation and is capable of fulfilling the terms of the contract.

52. Article 55 of the second new EU Directive, concerns, inter alia, ALTs and their identification and subsequent actions, and provides as follows:

> "1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.
>
> "Those details may relate in particular to:
>
> "(a) the economics of the construction method, the manufacturing process or the services provided;
>
> "(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;
>
> "(c) the originality of the work, supplies or services proposed by the tenderer;

"(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

"(e) the possibility of the tenderer obtaining State aid.

"2. The contracting authority shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

"3. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact."[57]

(ii) Price justification in domestic legislation

53. France follows the same approach as that of the EU set out above, providing that should a tender appear to be abnormally low, it may be rejected (with written justification) after written clarification of details of the constituent elements of the tender has been requested, and after having taken the explanations received into account.[58] Similar provisions are found in Austria,[59] Sweden[60] and the United Kingdom.[61] The United States FAR also follows a price justification approach, as set out in paragraph 37, above), but it is important to note that, unlike in other systems, price information alone (and not costs information) may be sought.

54. The EU approach has also been followed by most Central and Eastern European systems (such as the Slovak Republic).[62]

55. In China, if there is a possibility of an ALT, the evaluation committee will seek explanations from the supplier concerned. If the explanations are not satisfactory, it can decide not to award the contract to that supplier.[63]

56. A procuring entity may be authorized to seek an extension of the bid validity period so as to complete bid evaluation while bids are still valid, such as is found in Tamil Nadu, India.[64]

(b) Assessing explanations of prices submitted following price justification procedure

57. The procurement laws of various States, and provisions in the new EU Directives, indicate some or all of the factors to which the procuring entity may give weight in considering explanations given by suppliers for apparently abnormally low prices, addressing favourable conditions available to the bidder.

58. The factors set out in the new EU Directives are:

(a) The methods and economics of the manufacturing process, of the construction methods or of the services provided;

(b) The technical solutions chosen and/or any exceptionally favourable conditions available to the bidder for the execution of the work, for the supply of the goods or services;

(c) The originality of the work, supplies or services proposed by the tenderer;

(d) Compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) The possibility of the tenderer obtaining State aid.[65]

(c) Possibility of rejection of an ALT

59. Under article 55 of the second new EU Directive, a procuring entity, if it anticipates rejecting a tender, must request price justification explanations from the supplier as set out above, but is otherwise free to accept or reject a tender in the normal way.

60. The Secretariat has found no system that allows a potential ALT to be rejected without an evaluation (that is, using arithmetical or statistical methods to disqualify ALTs is not permitted). This position has been reaffirmed by decisions of the European Court of Justice, which has held that tenders may not automatically be excluded if they deviate more than a fixed percentage rate from the average of all other tenders submitted.[66] Laws to the same effect are widespread, and those systems that allow ALTs to be rejected as such (e.g. under the new EU Directives in the case of illegal state aid, see paragraph 52, above, South Africa's Buffalo City municipality, see paragraph 48, above, and China, see paragraph 55, above), authorize the rejection after a consultation or justification procedure. Thus, tenders that are ALTs are rejected generally on the basis that they are not considered to be responsive (for example, the procuring entity may consider that the supplier is not capable of carrying out the contract on time or on the basis or with the quality stipulated). It may be considered that maintaining a link between responsiveness to specifications is critical if the potential for abuse inherent in permitting the rejection of ALTs is to be avoided.

61. A further element of provisions regulating the treatment of ALTs is a requirement that any rejection in such circumstances should be promptly notified to the bidder concerned.[67]

C. Other issues regarding ALTs

1. Use of tender securities or independent guarantees

62. A tender security guarantees that a supplier will enter into a contract if the tender is accepted and will provide performance and payment bonds as regards the performance of the contract, if the latter are required in the solicitation documents. An independent guarantee guarantees contract performance in accordance with the terms and conditions, accepted price and time allowed. A payment bond protects certain service providers, material suppliers and subcontractors against non-payment by the prime or main contractor.[68] Tender securities and bonds are in widespread use in Europe, in North America and under other systems such as the Uniform Rules for Contract Bonds of the International Chamber of Commerce,[69] and the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995).[70]

63. As to independent guarantees, in Chile, for example, legislation provides that "when the price of an offer is below 50 per cent of the price of the next offer and the procuring entity verifies that the costs of the offer are economically inconsistent, the procuring entity may, through a properly justified resolution, award the contract to the lower offer, requesting an increase in the contract fulfilment guarantee up to the difference in price with the next offer." (New regulations will reduce the 50 per cent figure to 20 per cent.)[71]

64. In Indonesia, regulations state that the supplier of a possible ALT can be required to provide an additional independent guarantee up to 80 per cent of the procuring entity's estimate of the price, and that if the supplier refuses to do so, its tender security is forfeit, its tender is disqualified, and it will be blacklisted.[72]

65. If a supplier's obligations are backed by an independent guarantee, it is likely that the provider of the security has undertaken a review of the supplier's capabilities and solvency. It has therefore been argued that an independent guarantee system greatly decreases the probability of the failure of the enterprise during the currency of a contract, and therefore reduces the risks inherent in the submission of ALTs.

66. However, it has also been argued that tender securities (as opposed to independent guarantees) do not protect against ALTs,[73] and that the cost of securing bonds of any type is a significant fetter on the participation of small- and medium-sized enterprises (SMEs) in procurement. Further, the discipline of being required to complete contracts and the negative impact of failing to do so for future business have been cited as sufficient incentive not to submit an ALT. On the other hand, it has been noted that SMEs can suffer from the perception that they are a reliability risk because of their size, and an independent guarantee system may improve the perception.

67. It has also been argued that independent guarantees are disproportionately costly to SMEs, and their cost is simply an additional cost in any procurement. Their use as a deterrent to ALTs is therefore not universally accepted; with commentators stating that (as with tender securities) appropriate evaluation is a more cost-effective solution.[74]

2. Electronic reverse auctions and ALTs

68. As noted in paragraph 16 above, an additional situation in which the submission of an ALT has been encountered is the electronic reverse auction. The mechanisms of electronic reverse auctions in various systems are described in document A/CN.9/WG.I/WP.35. Observers have noted that the intense competition and price focus of electronic reverse auctions increase the risk of ALTs.[75]

69. In Brazil, the electronic reverse auction is accompanied by an Internet "chat" facility during the auction itself, where anonymous bidders are able to "chat" with the electronic reverse auctioneer. If the electronic reverse auctioneer considers that a bid is abnormally low, he may signal through the "chat" facility that he has received a bid that is very low and the bidder may wish to withdraw it. Although designed to address the risk of ALTs, some commentators have noted that this facility offers a potential for fraudulent activities.[76] Certain multilateral lending agencies have decided against funding auctions run with a "chat" facility (and indeed, auctions other than those run in a fully automated fashion).

70. It is noted in A/CN.9/WG.I/WP.35 that electronic reverse auctions are in some systems mainly or only for the purchase of standardized goods or commodities,[77] and in those types of supply contracts there is little performance risk beyond the possible insolvency of the supplier. In essence, the significant feature of the auction is that bidders are virtually congregated and bid against each other and a price, and assuming each knows his cost base, rational suppliers will not bid at a price that would involve a loss on the contract concerned. Commentators have therefore noted that the phenomenon of submission of ALTs in electronic reverse auctions should not be a long-term one, and that the greater the information available to suppliers during the auction itself (such as other suppliers' tenders), the lower the risk of an ALT being submitted.[78]

3. Aspects of competition law

71. The survey conducted by the Secretariat has considered elements of competition law that regulate anti-competitive behaviour in the marketplace, such as anti-dumping legislation (legislation seeking to prevent the export of a product at a lower price than that charged on the home market), and measures prohibiting below-cost pricing with the intention of gaining or maintaining market share and driving out competitors.[79] In Canada, for example, legislation prohibits enterprises from engaging in anti-competitive acts, one of which is defined as selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.[80] Other provisions prohibiting below-cost sales are noted above.[81]

72. Article 82 of the Treaty establishing the European Community (the EC Treaty),[82] which EU member States are required to enforce domestically, prohibits enterprises that have a "dominant position" in a market from abusing that position.[83] The EC Treaty and European Commission provide examples of abusive practice, including low pricing with the object of eliminating a competitor.[84] Many EU member States have legislated that abusers of a dominant position (such as through the systematic submission of ALTs) can face potential fines of up to 10 per cent of the annual turnover of the enterprise.[85]

73. The measures found by the Secretariat rely on the notion of intentional below-cost or abnormally low pricing, and so can be invoked where intentional ALTs are established, but will not address unintentional ALTs submitted for the reasons set out in paragraph 12, above. There may also be time constraints in the use of competition law as regards a single procurement opportunity, in that the time required to establish a breach of competition legislation might extend well beyond that available for the award of a procurement contract.

IV. Conclusions

74. In summary, the survey conducted by the Secretariat has found that the phenomenon of abnormally low tenders is addressed in both multinational and domestic procurement systems. It is not explicitly addressed in the Model Law, however. The measures in existence that seek to prevent ALTs are, in the main, found in the regulation of the evaluation of tenders and qualification of suppliers, requiring procuring entities to analyse whether a tender price is objectively reasonable (and whether quality is sufficient), and whether a supplier appears

capable of performing the contract as stipulated. Measures seeking to prevent anti-competitive behaviour, such as the submission of ALTs with the intention of driving out competitors, are generally found in competition law rather than procurement law.

75. The Working Group may consider that procurement regulation should address unintentional ALTs, through the use of evaluation and qualification criteria, and the provisions governing price justification, but that intentional ALTs may more effectively be policed through competition law and policy (indeed, from the procuring entity's perspective there may be no reason to reject an ALT unless it involves a performance risk).[86] However, the Working Group may consider that provisions may be included in the Model Law, or in regulations or the Guide to Enactment, to address the need for coordination between the two fields of law and cooperation between relevant competition law and procurement entities.

76. Items that the Working Group may also wish to bear in mind in considering how to provide for the prevention of ALTs include, in the context of regulating procurement procedures generally:

(a) Promoting awareness of the adverse effects of ALTs, and providing training to procurement officers;

(b) Addressing contract administration in procurement law, such as limiting variations to the contract awarded, and ensuring that specifications are strictly enforced, addressing contractor and subcontractor relations, and ensuring adequate dispute resolutions measures are available should it become necessary to terminate contracts or fire contractors;

(c) Ensuring appropriate emphasis is given to both price and non-price criteria in procurement proceedings;

(d) Respecting general prohibitions against post-tender negotiations, and restricting negotiations appropriately;[87]

(e) Including robust reporting and record requirements, requiring, for example, the reporting of a rejection of an ALT to a central procurement monitoring office; and

(f) Whether the use of tender securities and independent guarantees is effective.

77. As regards individual procurements, the Working Group may wish to consider whether to make provision for the following factors:

Pre-procurement:

(a) Ensuring that the procurement entity has adequate resources and information, including reference prices where possible;

(b) Ensuring that the specification is drafted as clearly as possible, and whether potential suppliers should be consulted in the drafting phase;[88]

(c) Whether to incorporate maintenance and replacement costs in price analyses;

(d) Allowing for sufficient time for each stage of the procurement process; and

(e) Ensuring effective qualification criteria, perhaps authorizing the compilation of accurate and comprehensive information about the qualifications and past performance of a bidder.

During procurement:

(a) Including in the solicitation documents a statement to the effect that the procuring entity is not obligated to accept the lowest-priced, or any tender;

(b) Including in the solicitation documents a statement to the effect that a procuring entity may carry out risk and price analyses, perhaps in addition to qualification criteria.

(c) Ensuring thorough evaluation of suppliers' qualifications and tenders, including risk and price analyses;

(d) Requiring price justification if an ALT is suspected;

(e) Regulating the factors that procuring entities may take into account when assessing the responses of suppliers to price justification requests; and

(f) Requiring all steps taken to address a possible ALT be adequately reflected in the record of the procurement proceedings.[89]

78. The Working Group may therefore first wish to consider whether the items set out in the above paragraph that address stages of the procurement cycle which are not currently regulated in the Model Law, that is, the pre-procurement or planning stage and the contract administration stage, should be brought within its ambit.

79. Secondly, the Working Group may consider that the Model Law's current provisions concerning the evaluation of tenders and qualification criteria may usefully be amplified in the Guide to Enactment so as to aid the identification of ALTs, the assessment of performance risk and subsequent action to address these issues.

80. Thirdly, the Working Group may consider that article 34(4)(b) of the Model Law could be amended so as to provide explicitly that the lowest price tender or the lowest evaluated tender is that submitted by a fully qualified supplier, such as, for example:

> "(b) <u>The successful tender</u> shall be that <u>submitted by a supplier that has been determined to be fully qualified to undertake the contract, and whose tender is</u>:
>
> > "(i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or ..."

81. The Working Group may also wish to consider whether the addition of further explanation and cross-referencing in the Guide to Enactment as regards articles 6 (qualification of suppliers) and 34(4)(b) would be warranted.

82. Fourthly, the Working Group may wish to consider whether article 34(4)(b) or the Guide to Enactment should set out parameters that could be used so as to conduct a price analysis (for a description of "price analysis", see paragraphs 34 to 39, above). The price analysis could include comparisons between the suppliers' (total) prices submitted and between those submitted and previously proposed prices for relevant items and any available market parameters, cost estimates, and the

equivalent analysis of the component items from each supplier. The Working Group may also consider that commentary on the risks of the use of statistical methods as part of a price analysis should be included (these risks are set out in paragraphs 31 to 33 above). Further, the Working Group may wish to include a discussion on how price analyses can be conducted for those procurements for which there is no market or reference price.

83. Finally, the Working Group may wish to consider whether to amend the commentary in the Guide regarding article 34(1)(a) of the Model Law in order to enable that provision to be used to seek price justification in the submission of suspected ALTs.

Notes

[1] For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the Yearbook of the United Nations Commission on International Trade Law, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (http://www.uncitral.org/english/texts/procurem/ml-procure.htm).

[2] Terms in direct quotations have been left as in the original texts. Further, the Secretariat makes reference to tender proceedings as a procurement model in this Note, but the Note applies equally to other procurement methods.

[3] See European Commission Directorate General III Working Group Report, 19 May 1999, "Prevention, Detection and Elimination of Abnormally Low Tenders in the European Construction Industry", available at http://www.ceetb.org/docs/Reports/DG3ALT-final.pdf.

[4] Procurement: Report of the Secretary-General (A/CN.9/WG.V/WP.22), UNCITRAL Yearbook 1989, p. 116.

[5] See E. Engel and A. Wambach, "Risk Management in procurement Auctions", 2004, Working Paper, University of Erlangen-Nuernberg, available at http://www.acquistinretepa.it/pls/portal30/docs/FOLDER/CONSIP/DOCUMENTI/DOCS_HOME 3/Paper.pdf, p. 18.

[6] See European Commission Directorate General III Working Group, endnote 3, above.

[7] See the American Bar Association, Public Contract Law Section, Comments on Reverse Auction Notice (Jan. 5, 2001), available at http://www.abanet.org/contract/federal/regscomm/ecomm_003.html (citing D. Wald, "The Auction Model: How the Public Sector Can Leverage the Power of E-Commerce Through Dynamic Pricing", p. 18 (The PricewaterhouseCoopers Endowment for The Business of Government (October 2000)), available at http://www.businessofgovernment.org/pdfs/WyldReport.pdf.

[8] Predatory pricing is the practice of cutting prices below the marginal costs of production to drive out a new enterprise (or to deter future entry into the market of new enterprises), at which point prices can be raised again (see, e.g. P. Areeda and D. F. Turner, (1975) "Predatory Pricing and Related Issues Under Section 2 of the Sherman Act," Harvard Law Review, 88, pp. 697-733).

[9] See, further, paragraph 26 and endnote 24, below.

[10] Similarly, ALTs may be submitted by public entities that do not have private-sector capital costs. A less common source of ALTs is State-imposed use of official price lists.

[11] This observation was brought to the attention of the Secretariat during consultations held for the preparation of this Note. See, further, European Commission Directorate General III Working Group Report, endnote 3, above.

[12] See, for example, European Commission Directorate General III Working Group Report, endnote 3 above, and J. Roselle, "The Abuse of Reverse Auctions In The Utility Industry", p. 2, available at http://www.mccallan.com/AbuseofReverseAuctions.pdf.

[13] This procurement method is reviewed in detail in document A/CN.9/WG.I/WP.35.

[14] O. Soudry, "Promoting economy: electronic reverse auctions under the EC directives on public procurement", 2004, Journal of Public Procurement, vol. 4, No. 3, p. 365, though other commentators have noted that distributing awards (multi-sourcing) in larger contracts can offset this risk. See, for example, R. Gilbert and P. Klemperer, 2000, "An equilibrium theory of rationing", RAND Journal of Economics, vol. 31(1), pp. 20-21.

[15] For example, framework agreements, as described in the Report of Working Group I (Procurement) on the work of its sixth session (Vienna, 30 August-3 September 2004) A/CN.9/568, paragraphs 68-78.

[16] Procurement: Report of the Secretary-General (1989), paragraph 170, see endnote 4, above.

[17] UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (1994) (*Official Records of the General Assembly, Forty-ninth Session*, Supplement No. 17 (A/49/17), Annex I , UNCITRAL Yearbook 1994, part three, chap. I), paragraph 23.

[18] This analysis does not address socio-economic issues, such as margins of preference and balance of payments.

[19] Draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction: Note by the Secretariat (A/CN.9/394), paragraph 21.

[20] See discussion of article 39(2) in the Guide to Enactment.

[21] Report of the Working Group on the New International Economic Order on the work of its eleventh session (New York, 5-16 February 1990) (A/CN.9/331), paragraph 144.

[22] Draft Guide to Enactment of UNCITRAL Model Law on Procurement: Note by the Secretariat (A/CN.9/375), UNCITRAL Yearbook 1993, p. 114.

[23] Article 33 of the Tendering and Bidding Law of China.

[24] France prohibits sales at a loss ("*vente à perte*") but only as regards sales to private consumers and not to public entities. See article L. 420-5 of the *Code de Commerce*.

[25] Act on Offences related to submission of bids, section 8.

[26] Art. XXI(b)(4) of the Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes (Republic Act No. 9184, 22 July 2002).

[27] See European Commission Directorate General III Working Group, see endnote 3, above.

[28] References to EU Directives are to the new directives governing public procurement (Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Official Journal of the European Union, No. L 134, 30 April 2004, pp. 114 and 1, respectively. Both available at http://europa.eu.int/comm/ internal_market/publicprocurement/legislation_en.htm) (the first and second new EU Directives, respectively). The previous EU Directives on public procurement contained broadly similar provisions (Directive 93/36/EEC of 14 June 1993

(Supply Directive), Official Journal of the European Communities, No. L 199, 9 August 1993, p. 1, as amended by Directive 97/52/EC of 13 October 1997, Official Journal of the European Communities, No. L 328, 28 November 1997, p. 1; Directive 93/37/EEC of 14 June 1993 (Works Directive), Official Journal of the European Communities, No L 199, 9 August 1993, p. 54, as amended by Directive 97/52/EC, above).

[29] *Ley de Contratos de las Administraciones Públicas, Real Decreto Legislativo* 2/2000.

[30] Exceptionally, the procuring entity may reduce the percentages by one third if the solicitation documents have reserved the possibility, and it may consider the relationship between the solvency of the supplier and the offer presented. See, further, article 85 of the regulations issued under the *Ley de Contratos de las Administraciones Públicas* (*Real Decreto Legislativo 2/2000*), the *Reglamento General de la Ley de Contratos de las Administraciones Públicas, Real Decreto* 1.098/2001.

[31] For example, the French system has rejected such an approach, as it does not provide a true comparison (*Avis du Conseil de la concurrence*, 96A-08, 2 July 1996 and Avis 97-A-11, 5 March 1997).

[32] This observation was brought to the attention of the Secretariat during consultations held for the preparation of this Note.

[33] See Brazilian General Procurement Law 8.666, article 40, and Argentina's procurement regulations, Decree 436/2000, article 41, available at http://infoleg.mecon.gov.ar/normas/texactdto436%2D2000.htm.

[34] Available at http://www.comprasnet.gov.br/

[35] The Brazilian General Procurement Law 8.666 requires each acquisition to have a corresponding budget forecast.

[36] See, further, paragraph 64, below.

[37] *Keppres* 80/2003.

[38] FAR 15.404-1(b), available at http://www.arnet.gov/, and as advised to the Secretariat by experts during consultations held for the preparation of this Note.

[39] Article 37 of the Law of Public Works and Related Services (*Ley de Obras Públicas y Servicios Relacionados*), available at http://www.funcionpublica.gob.mx/unaopspf/dgaop/lopt1cu.htm.

[40] See http://www.buffalocity.gov.za/municipality/internalaudit_tenders.stm (paragraph 3.9 of the Procurement Policy).

[41] See, for example, S. Parlane, "Procurement contracts under limited liability," *Economic and Social Review*, 34, 1-21, p. 13.

[42] Section 31 of the Implementing Rules and Regulations Part A (IRR-A) of the Government Procurement Reform Act.

[43] This observation was brought to the attention of the Secretariat during consultations held for the preparation of this Note.

[44] See paragraphs 20 to 22, above.

[45] Leaving aside the possibility of permissible "variants" under article 24.

[46] The weightings can be expressed by providing for a range with an appropriate maximum spread and, if it is impossible to weight them, the documents must set out the criteria in descending order of importance.

[47] Article XIII:4. For a description of the GPA provisions generally, see http://www.wto.org/english/tratop_e/gproc_e/over_e.htm. The World Trade Organization (WTO) is currently negotiating draft revisions to the Agreement on Government Procurement (GPA)

(see Annex 4(b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf).

[48] Article VIII:b.

[49] Article 1015.

[50] Law 19,886, Articles 37 and 38.

[51] The Expenditure and Procurement Policies Unit, and the Building and Construction Authority, respectively. For a description of the Singaporean procurement regime, see http://www.gebiz.gov.sg/scripts/itt_gitis/biz_oppG_itt_procure_regime.jsp.

[52] Appendix B22 of the Contracts and Purchasing Procedures, available at www.gebiz.gov.sg/.

[53] Article 264 of the Contracts and Purchasing Procedures, available at www.gebiz.gov.sg/.

[54] See http://www.fstb.gov.hk/tb/eng/procurement/tender04.html.

[55] See http://www.buffalocity.gov.za/municipality/internalaudit_tenders.stm (paragraph 3.8 of the Procurement Policy).

[56] Public Supply Contracts Regulations 1995 (S.I. 1995 no. 201), to be amended when the new EU Directives come into force.

[57] See footnote 28, above. An equivalent provision is found in article 57 of the first EU directive, and, as advised to the Secretariat during consultations held for the preparation of this Note, the procuring entity is afforded greater flexibility in considering acceptable explanations for apparent ALTs in the new EU Directives.

[58] Article 55 of the *Code de Commerce*.

[59] Purchase Contract Awards Act 2002, sections 93-99, available at http://www.ris.bka.gv.at/erv/erv_2002_1_99.pdf.

[60] The Act (SFS 1992:1528) on Public Procurement, section 23, available at http://www.nou.se/loueng.html.

[61] The Utilities Contracts Regulations 1996 (S.I. 1996 No. 2911).

[62] Act No. 523/2003 (24 October 2003) on Public Procurement, Section. 43(5).

[63] China—Tendering and Bidding Law, article 33. See paragraph 26, above.

[64] Section 26 of the Tamil Nadu Transparency in Tenders Rules, 2000.

[65] Article 57 of the first new EU Directive, and article 55 of the Second new EU Directive. See endnote 28, above.

[66] See Judgment of 18 June 1991 in case C-295/89 (“Alfonso”); Judgment of 26 October 1995 in case C-143/94 (“Furlanis”), and Judgment of 16 October 1997 in case C-304/96 (“Genova”).

[67] See, for example, section 21(3) of the Latvia Law on Procurement for State or Local Government Needs.

[68] See European Commission Directorate General III Working Group, endnote 3, above.

[69] Uniform Rules for Contract bonds, ICC Publication 524.

[70] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17) Annex I (1995 Yearbook, part one, sect. D, Annex).

[71] Law 19,886, Section 41.

[72] *Keppres* 80/2003, Chapter II of the Annex.

[73] Some commentators argue that a bond system might prevent the repeated submission of ALTs.

[74] For a fuller discussion of tender securities and ALTs, see the Report of the European Commission's Construction Task Group 1 (YP, ICIA 08/2001), available at http://europa.eu.int/comm/enterprise/construction/alo/bonds/bondsfin.htm.

[75] See O. Soudry, pp. 356-7, see endnote 14, above, and as further advised to the Secretariat during consultations held for the preparation of this Note.

[76] As advised to the Secretariat during consultations held for the preparation of this Note.

[77] See paragraph 20 of A/CN.9/WG.I/WP.35.

[78] See O. Soudry, pp. 356-7, see endnote 14, above, and as further advised to the Secretariat during consultations held for the preparation of this Note.

[79] For a definition of such behaviour, known as predatory pricing, see footnote 8, above.

[80] "Cut-throat competition or abuse of dominant position? Challenges to the conduct of firms in a new technological era", WS 13 National Report for CANADA, by A. Neil Campbell and Jeffrey P. Roode, available at http://www.globalcompetitionforum.org/regions/n_america/canada/Cutthroat%20Competition%20Report%20with%20Appendices_Aug%202001.pdf.

[81] See, for example, paragraph 26 and endnotes 8 and 24, above.

[82] The text of which is available at http://europa.eu.int/abc/obj/treaties/en/entoc05.htm.

[83] A "dominant position" in a market was defined by the European Court of Justice in the United Brands case (27/76 of February 1978) as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers". The main indicator of dominance is a large market share; other factors include the economic weakness of competitors, the absence of latent competition and control of resources and technology.

[84] For further illustrations, see http://www.europarl.eu.int/facts/3_3_2_en.htm.

[85] See, for example, as regards the United Kingdom, http://www.oft.gov.uk/NR/rdonlyres/0620258B-3006-4B1C-ADC6-5CC69E6EF4F1/0/OFT402.pdf.

[86] Such laws may also address the unusual situation of non-performance risking ALTs, which may arise in the bids of public entities, which do not operate on the basis of private risk capital. For example, the Public Procurement Act of Slovenia (art. 53(4)) requires the issuance of an opinion by the Competition Protection Office in the case of an abnormally low-priced bid implicating State aid.

[87] Current provisions addressing these matters are found in article 35 of the Model Law ("Prohibition of negotiations with suppliers or contractors"). In Brazil, an electronic reverse auctioneer is authorized to negotiate with the "winner" of an electronic reverse auction.

[88] Current provisions addressing these matters are found in article 25 of the Model Law ("Contents of invitation to tender and invitation to prequalify"), article 27 ("Contents of solicitation documents"), article 28 ("Clarifications and modifications of solicitation documents") as regards open tendering, and there are equivalents for other procurement methods.

[89] The requirements as regards the procurement proceedings record are set out in article 12 of the Model Law.