



General Assembly

Distr.: Limited
15 February 2006

Original: English

**United Nations Commission
on International Trade Law**
Working Group I (Procurement)
Ninth session
New York, 24-28 April 2006

Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services— drafting materials for the use of electronic reverse auctions in public procurement and addressing abnormally low tenders

Note by the Secretariat

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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 “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 43 of document A/CN.9/WG.I/WP.41, which will be before the Working Group at its ninth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments, including the use of electronic communications and technologies in public procurement.

2. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group held a preliminary exchange of views on the use of electronic reverse auctions (ERAs) in public procurement. Recognizing the reality of ERAs, it expressed its willingness to consider the appropriateness of enabling provisions for the optional use of ERAs in the Model Law. However, to make a final decision on the matter, the Working Group requested the Secretariat to prepare a study on the practical use of ERAs in the countries that had introduced them, including as regards existing approaches for handling the risk of abnormally low tenders (ALTs) (A/CN.9/568, para. 54).

3. At its seventh session (New York, 4-8 April 2005), the Working Group considered the topic of the use of ERAs in public procurement and the topic of ALTs on the basis of the studies presented by the Secretariat (A/CN.9/WG.I/WP.35 and Add.1 (concerning ERAs) and A/CN.9/WG.I/WP.36 and Corr.1 (concerning ALTs)). It concluded that the revised Model Law should contain provisions on ERAs, and new provisions should be incorporated in the Model Law enabling the identification of possible ALTs. The Working Group requested the Secretariat to prepare drafting materials addressing the topics for its eighth session (A/CN.9/575, paras. 60-62, 66 and 67 as regards ERAs, and para. 76 as regards ALTs).

4. At its eighth session (Vienna, 7-11 November 2005), the Working Group had before it the drafting materials addressing ERAs and ALTs submitted by the Secretariat pursuant to the Working Group’s request at its seventh session (A/CN.9/WG.I/WP.40 and Add. 1). The Working Group requested the Secretariat to revise the drafting materials for its consideration on these topics at its ninth session (see A/CN.9/590, paras. 64-105).

5. This note is submitted for the Working Group’s consideration at its ninth session pursuant to that request. It draws on, and should be read in conjunction with, the related notes by the Secretariat presented to the Working Group on the topics at its seventh and eighth sessions (A/CN.9/WG.I/WP.35 and Add.1, A/CN.9/WG.I/WP.36 and Corr.1 and A/CN.9/WG.I/WP.40 and Add.1).

II. Draft provisions to enable the use of electronic reverse auctions under the Model Law

A. General remarks

6. At its eighth session, the Working Group noted that the provisions regarding ERAs should (i) address the general conditions for use of ERAs (of which the most

important was that the specifications could be drafted with precision and the criteria to be subject to auction easily and objectively quantified), (ii) the Guide to Enactment text should be drafted so as to ensure as wide a participation as possible,¹ and (iii) the draft should allow for the evolution of ERAs, and should not exclude any type of auction per se.²

7. The Working Group also noted at the eighth session that the following main issues were outstanding, to which the Working Group would return at its ninth session:

(a) Whether ERAs should be allowed in the revised Model Law as a procurement method or as a phase in other procurement methods;³

(b) Whether the price alone, or price and other evaluation criteria should be subject to the ERA;⁴ and

(c) Location in the Model Law of provisions on ERAs.⁵

8. The Working Group noted that it would not be possible to finalize its deliberations on the remaining provisions proposed until the resolution of those pending issues.⁶

B. Conditions for use of electronic reverse auctions (A/CN.9/590, paragraphs 67-80, and A/CN.9/WG.I/WP.40, paragraphs 9-17)

1. Proposed new text for the Model Law: new article [19 bis]

9. The Working Group requested the draft text before it at its eighth session to be revised as follows (additional proposed text is underlined, and the text proposed to be removed is struck through):

“Article [19 bis]. Conditions for use of electronic reverse auctions

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may [engage in procurement/select the successful tender in accordance with article 34 (4) (b)] by means of an electronic reverse auction in accordance with article[s 47 bis and ter,] in the following circumstances:

(a) Where it is feasible for the procuring entity to formulate detailed and precise ~~[and accurate]~~ specifications for the goods [construction or services] ~~such that homogeneity in the procurement can be achieved;~~

(b) Where there is a competitive market of ~~at least ten~~ suppliers or contractors that are anticipated to be qualified to participate in the electronic reverse auction such that effective competition is ensured; and

(c) The goods [, construction or services] to be procured are standardized ~~[standard products] [commodities],~~”

With the following optional additional text for subparagraph (c):

Variant A

“[such that/and] the price is the only criterion to be used in determining the successful bid”

Variant B

“[such that/and] the price and other quantifiable criteria expressed in [figures or percentages of the price/monetary terms] are the only criteria to be used in determining the successful bid”

Variant C

“and all criteria that are to be submitted and evaluated in the auction can be evaluated automatically”

Commentary**(a) Approval of use of electronic reverse auctions by third parties**

10. At its eighth session, the Working Group decided that it would revisit whether the text in parentheses in subparagraph (a) “(Subject to approval by ... (the enacting State designates an organ to issue the approval),)” should be retained, notably as regards whether a third party should have such a power in this context.⁷

(b) Ensuring effective competition

11. As regards subparagraph (b), the Working Group decided that a minimum number of suppliers should not be stipulated in the text.⁸

(c) Inclusion of construction or services in procurement through electronic reverse auctions

12. This issue is addressed in subparagraphs (a) and (c). The Working Group has decided on a preliminary basis that neither services nor construction should be excluded from the draft, pending its further decision as to which type of procurement(s) would be suitable for ERA.⁹

13. The Working Group has also noted that, for an ERA to function correctly (that is, to ensure that bidders price their bids realistically and provide their best offers), bidders will be required to know the cost structure of their bids in detail. As prime contractors in complex construction contracts will not have such knowledge as regards the subcontracted elements of their bid, such procurement may not be suitable for an ERA.¹⁰

14. Most systems regulating ERAs exclude most construction procurement, but there is some variation in the degree of prescription to be found. The Working Group may wish to consider the extent to which the article should be prescriptive or facilitative, and the level of guidance on these questions that should be included in the Guide to Enactment (for example, the issues raised in the preceding paragraph).

(d) Location of text

15. At its eighth session, the Working Group noted that the proposed article 19 bis addressed the conditions for use of ERAs, and had been proposed as a standalone provision akin to the alternative methods of procurement regulated under chapter V of the Model Law.

16. However, the Working Group has requested that the provisions be drafted at this stage so as to allow ERAs to be treated as either a separate method or a phase in other procurement methods. The Working Group may consider that including the draft text addressing conditions for use of ERAs as an article within chapter II of the Model Law (“Methods of procurement and their conditions for use”) effectively implies a separate procurement method.

17. The Working Group may consider that the use of ERAs raises issues that are specific to the ERA itself, and for that reason alone, they could most efficiently be regulated as a standalone procurement method. However, the conditions for use may address the types of purchase that can be so procured (applying, for example, the conditions for use of tendering proceedings and request for quotations). See, further, the following section for a description of those procedures. In such a case, the conditions for use in the first paragraph of the draft text would need to be expanded to allow the specifications to be set during rather than at the outset of the procurement process.

18. The Working Group has also noted that all provisions related to ERAs could be addressed in one section, through revisions to articles of the Model Law governing the relevant procedures, or through the provision of derogations from other procedures, using cross-references where necessary.¹¹ It may therefore consider that the provisions, whether to allow ERAs as a standalone method or a phase in other procurement methods, should in any event be located together, for ease of use of procuring entities. So, for example, they could be located as a section III bis within chapter III if ERAs are to be permitted as a phase in tendering proceedings, or chapter V bis if as a standalone method or if they are to be permitted in any other procurement method.

(e) Types of procurement method appropriate to include electronic reverse auctions

19. Allied to the question of location of the text, the Working Group has observed that the Guide text should note that the conditions of use for restricted tendering would normally not apply to procurement suitable for an ERA (and by implication, nor would those applying to other “alternative” methods of procurement), and therefore that the number of participants should not, in normal circumstances, be restricted.

20. In considering whether to provide for ERAs as a standalone procurement method or as an optional phase in other procurement methods, the Working Group may consider that there are two ways of providing for such auctions as an optional phase. First, and in the light of the guidance referred to in the previous paragraph, the Working Group may wish to consider whether ERAs should be permitted as a phase in tendering proceedings alone. In this regard, the Working Group may consider that the wide initial publication would be required, given the generally perceived higher risks of corruption and abuse in non-tendering proceedings. On the other hand, the use of ERAs may be more transparent and competitive than would otherwise be the case for urgent procurement.

21. The current Guide to Enactment, paragraph 16, notes as regards tendering: “Some of the key features of tendering as provided for in the Model Law include: as a general rule, unrestricted solicitation of participation by suppliers or contractors; comprehensive description and specification in solicitation documents of the goods,

construction or services to be procured, thus providing a common basis on which suppliers and contractors are to prepare their tenders; full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender (i.e., price alone, or a combination of price and some other technical or economic criteria); strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; public opening of tenders at the deadline for submission of tenders; and disclosure of any formalities required for entry into force of the procurement contract.” The Working Group may consider that these conditions are those that should apply before recourse is had to ERAs.

22. Paragraph 18 of the Guide continues that procuring entities may use other methods of procurement (two-stage tendering, request for proposals, and competitive negotiation) if it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings. This situation may arise, for example, if the procuring entity has not determined the exact manner in which to meet a particular need, and seeks proposals as to various possible solutions, or, concerning procurement of high technology items, the technical sophistication and complexity of the goods, it would be preferable for the specifications to be drawn up after negotiations with suppliers and contractors as to the exact capabilities and possible variations. The Working Group may wish to consider whether, once the specifications have been set following negotiation of consultation with suppliers, it would be appropriate to allow the second phase of the procurement to take place through an ERA in the case of two-stage tendering and competitive negotiation (but the conditions of use for request for proposals, and for single-source procurement, appear to preclude the use of ERAs). Similarly, another use of competitive negotiation, in cases of urgent procurement, may be more transparent and competitive if the procedure includes an ERA.

23. The Model Law also offers restricted tendering for technically complex or specialized goods, construction or services available from only a limited number of suppliers or for very low value procurement. Again, the Working Group may wish to consider whether procurement using this method would be appropriate to conclude with an ERA. Similarly, for low-value procurement of standardized goods or services, the Model Law offers the request for quotations method (also known as “shopping”).

24. To the extent that the Working Group considers that other “alternative methods of procurement” should be permitted to include an ERA to determine the successful supplier, the draft conditions of use set out above would need to be redrafted so as to allow the specifications to be set during the procurement process, to allow for the possibility that the items to be procured are not “standardized”, and to include selection of the successful supplier or contractor “in accordance with article 49 (4)” (competitive negotiations) or “the lowest-priced quotation in accordance with article 50 (3)” (request for quotations). To the extent that the use of ERAs is to be confined to tendering proceedings (including restricted and two-stage tendering), the drafting will cross-refer to the relevant existing provisions. The use of the term “bid” should also reflect the Working Group’s deliberations in this regard, in that the term “bid” may be appropriate for a standalone method, but the alternatives “tender” or “offer” would be appropriate for ERAs as a phase in other procurement methods.

25. Pending the Working Group's decisions in this regard, the provisions addressing the procedural aspects of ERAs (articles 47 bis and ter) are presented on the basis of a standalone method or an optional phase in tendering proceedings.

(f) Price and other criteria to be subject to auction

26. As regards the criteria to be permitted to be auctioned (addressed in optional additional text of subpara. (c) in the proposed article 19 bis above), the Working Group has noted that the draft requires a decision as to whether the price alone, or price and other evaluation criteria should be subject to the ERA, and has deferred its consideration of that issue.¹²

27. The Working Group has noted that the main issue for consideration is whether the ERA should include non-price criteria that are qualitative and not quantifiable.¹³

28. There are two models of ERA that can be provided for in addressing this issue. The first ("Model 1") addresses an ERA under which all aspects of the bids that are to be evaluated in selecting the winning supplier are to be submitted through the auction. These criteria are the price alone, or the price and price-equivalents that can be expressed as a percentage of price or in figures.

29. The second ("Model 2") involves a pre-auction assessment of all elements of the initial bid or of those elements not to be submitted to the auction, following which suppliers are ranked, and their rankings communicated to them. All evaluation criteria are then factored in a mathematical formula, which would then re-rank the bidders on the submission of each bid during the auction itself. In any event, there is no criterion that is not assessed either before or during the ERA.¹⁴

30. If Model 1 auctions alone are to be provided for, the Working Group may wish to include either the additional text Variants A or B.

31. As noted above, Model 2 ERAs envisage more complex procedures that allow criteria other than price to be subject to auction, such that the equivalent of a lowest evaluated tender approach as described in paragraph 34 (4) (b)(ii) of the current Model Law is followed. Under Model 2 auctions, a formula is to be used to quantify the non-price or non-price-equivalent elements to be presented. It is implicit in the use of a formula that the non-price or price-equivalent elements are expressed as a figure, percentage, or otherwise numerically. However, the Working Group may wish to consider whether it is realistic to make an assumption that non-price or non-price-equivalent criteria can be so expressed in a clear and transparent manner.

32. The new European Union Directives¹⁵ make provision for such non-price criteria to be subject to auction, but the Secretariat has been able to locate very limited examples of such auctions conducted in practice so as to examine their effectiveness. In those encountered, non-quantifiable criteria were assessed using a points system. For example, the technical and commercial aspects of the tender in one case were assessed out of a score of 6000, and each such point was converted using an "exchange rate" of 2500 to equate price reductions with the additional value provided by the non-price assessment points (the latter included such matters as management of subcontractor and the ability to deal with unusual incidental aspects of the contract, such as archaeological constraints). In another case, the value of risk transferred back to the procuring entity from minor tender non-

compliances and caveats was weighted in cash terms (so doing is relatively straightforward if the risk can be insured, but in other cases may be difficult).

33. If Model 2 auctions are also to be provided for, the Working Group may wish to include either the additional text Variant C.

34. The Working Group may alternatively consider that the use of Model 2 ERAs in the public sector remains immature (in contrast to the use of various types of Model 3 auctions),¹⁶ and that as the techniques are being developed and refined, the Model Law should be drafted in a way so as to allow their introduction in due course (perhaps through regulations).

2. Guide to Enactment text regarding draft article [19 bis]

35. Paragraphs 1-3 inclusive of the previous text, set out following paragraph 17 of A/CN.9/WG.I/WP.40, remain unchanged. The text proposed to be removed in accordance with the Working Group's conclusions at its eighth session is struck through).

“Article [19 bis]. Conditions for use of electronic reverse auctions

(4) In the light of the matters set out above, enacting States may wish to specify further conditions for the use of electronic reverse auctions in regulations. For example, their use may be restricted to standardized goods ~~[standard products]~~ ~~[commodities]~~, [and some simple types of construction and services], such as commodities (fuel, standard information technology equipment, office supplies and primary building products), and items with no or limited impact from post-acquisition costs and without services or added benefits after the initial contract is completed. Although illustrative lists may be used to identify goods [construction and services] that may be procured using electronic reverse auctions, enacting States should be aware that such lists will require periodic updating as new commodities or other appropriate items appear. It has been observed that some construction works and services (e.g. road maintenance) may be appropriately procured through electronic reverse auctions, but the requirement for detailed, precise ~~[and accurate]~~ specifications will exclude most services and construction from the use of this procurement method.

(5) In order to minimize the risk of collusive practices, including price signalling, ~~and to preserve bidders' anonymity during the electronic reverse auction, and to ensure an appropriate level of competition, enacting States may wish to specify the minimum number of suppliers or contractors in the appropriate market~~ the provisions require a sufficient number of potential suppliers anticipated to participate in the electronic reverse auction. Article 47 bis provides that the electronic reverse auction is to be withdrawn should the number of bidders drop below that level before the opening of the electronic reverse auction itself. However, enacting States may consider that suppliers should not be permitted to participate in an electronic reverse auction through a proxy and over the telephone, as such participation might give rise to a risk of abuse, and the use of the Internet ensures traceability of the proceedings, which telephone systems may not.¹⁷

Commentary

36. The changes to the draft text before the Working Group at its eighth session reflect the drafting suggestions of the Working Group. However, significant additions to the text will be necessary once the issues set out in the context of the draft Model Law article [19 bis], notably to provide guidance on the conditions set out in subparagraph (c) of the draft.

37. The Working Group has noted that there may be a risk to an effective level of competition if suppliers can withdraw their bids before the ERA itself. The Guide to Enactment text for this article may, therefore, cross-refer to those requiring the procuring entity to withdraw the ERA if effective competition cannot be ensured. See, further, paragraph 42 below.

C. Procedures in the pre-auction period (article [47 bis]) (A/CN.9/590, paragraphs 84-86, and A/CN.9/WG.I/WP.40, paragraphs 18-25)

38. The Working Group has requested the Secretariat to produce two alternative provisions addressing procedures for the pre-auction period for its consideration, to reflect Models 1 and 2 ERAs respectively.

1. Proposed new text for the Model Law: new article [47 bis]¹⁸

39. These procedures address the specific steps in preparation for an ERA, and would apply whether the auction is held as a standalone method or a phase in other procurement methods. However, as noted above, they are based on tendering proceedings pending the Working Group's decisions on the matters set out in paragraphs 15 to 18 above.

“Article [47 bis]. Conduct of electronic reverse auctions in the pre-auction period

(1) [The provisions of chapter III of this Law shall apply to procurement by means of electronic reverse auctions except to the extent that those provisions are derogated from in this article.]

(2) Suppliers or contractors shall, prior to the auction, submit initial [tenders/bids] that are complete in all respects, except that the [tenders/bids] need not include the elements that are to be presented through the auction. [The procuring entity may, however, require that [tenders/bids] include such elements.]

(3) (a) The procuring entity shall carry out on an initial evaluation of the [tenders/bids] to determine responsiveness in accordance with article 34, and to assess all elements of [tenders/bids] that are not to be presented in the auction in accordance with the award criteria set;

(b) Following the evaluation referred to in paragraph (3) (a), the procuring entity shall send an invitation to participate in the auction to all suppliers or contractors except for those whose [tenders/bids] have been rejected under paragraph (3) (a);

(c) The invitation to participate shall set out the manner and deadline by which suppliers and contractors shall register to participate in the auction;

(d) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction is sufficient to ensure effective competition. If the number of suppliers or contractors [qualified to participate in/admitted to/that have registered to participate in] the auction [falls below [number]] [is in the opinion of the procuring entity insufficient to ensure effective competition], the procuring entity [may/shall] withdraw the electronic reverse auction];

(e) Unless already provided to suppliers or contractors, the invitation to participate in the electronic reverse auction shall include all information necessary to enable the supplier or contractor to participate in the auction [as described in the items set out in subparagraph 4 (e)(ii)-(v) and (vii)-(xii) after paragraph 20 of A/CN.9/WG.I/WP.40, to be included in the solicitation documents].”

Commentary

(a) Provision for electronic reverse auctions as standalone method or optional phase

40. Paragraph 1 states that the provisions of chapter III (“Tendering proceedings”) will apply unless the article derogates from them, which is consistent with provision for ERAs as a standalone method or an optional phase in tendering proceedings.

41. Unless ERAs are to be permitted only as an optional phase in tendering proceedings, an introductory paragraph to replace paragraph 1 and provide cross-references to other procurement methods, or procedures for the initial publicity of the procurement and the solicitation of participation, will be required.

(b) Withdrawal of the auction in cases of insufficient competition

42. Paragraph 3 (d) of the proposed text addresses the requirement for effective competition. The Working Group may wish to consider whether the procuring entity should be enabled or required to withdraw the auction should there be insufficient competition, and the guidance that should be given should the provision be permissive.

(c) Initial evaluation of tenders

43. Paragraph 2 addresses the contents of the initial tenders. If the provisions are to be included within chapter III of the Model Law, this item may alternatively be omitted as it would be included in the ambit of article 27 (a) (contents of solicitation documents, addressing the instructions for preparing tenders). On the other hand, the Working Group may wish all ERA-specific provisions to be located together.

44. Paragraph 3 (a) addresses the evaluation of initial tenders. The Working Group may recall that not all systems regulating ERAs provide for such an initial evaluation,¹⁹ but may consider that it is an important element of the process.²⁰ The Working Group may consider that the final sentence of the paragraph could alternatively be included in the Guide to Enactment.

45. Paragraph 3 (b) requires all responsive bidders to be invited to participate in the auction. The Working Group may wish to consider whether the article should leave open the possibility of restricting the number of suppliers in other than normal circumstances,²¹ with appropriate guidance in the Guide to Enactment.²² If the Working Group decides that procuring entities should be able to restrict the numbers of participants in the auction, subject to maintaining an effective level of competition, the following additional text would be required at the end of subparagraph 3 (b):

“[The procuring entity] may send an invitation to participate in the auction to [the tenderers that have received the highest ranking in accordance with the preceding paragraph/a limited number of bidders], subject to the provisions of paragraph (d) below.”

(d) Model 1 and Model 2 auctions

46. If Model 1 auctions alone are to be provided for, only price or price-equivalents will be submitted to the auction, and ranking of the bidders will not be necessary (they pass or fail the qualification and responsiveness criteria, and thereafter the price determines the successful bid).

47. If the Working Group considers that Model 2 auctions should also be provided for, it may wish to provide for weighting and ranking of the bidders prior to the auction, and include the following underlined text:

“(3) (a) The procuring entity shall carry out an initial evaluation of [tenders/bids] to determine responsiveness in accordance with article 34, and to assess all elements of [tenders/bids] [that are not to be presented in the auction in accordance] with the award criteria set and with the weighting fixed for them. The procuring entity shall rank the [tenders/bids] on the basis of the elements of [tenders/bids] [that are to be evaluated in the selection of the successful supplier/that are not to be presented in the auction] in accordance with the award criteria.

“and

“3 (e)(i) If elements of [tenders/bids] other than price have been used in the initial evaluation, the results of the initial evaluation of the supplier or contractor’s tender; and

“(ii) If the award is to be based on the lowest evaluated tender, the formula to be used to quantify the non-price or non-price-equivalent elements to be presented. The formula shall incorporate the weighting of all the criteria established to determine the lowest evaluated tender.”

48. As noted above, Model 2 ERAs envisage more complex procedures that allow criteria other than price to be subject to auction, such that the equivalent of a lowest evaluated tender approach as described in paragraph 34 (4) (b)(ii) of the current Model Law is followed, and the bidders are ranked prior to and during the auction. The Working Group may wish to consider whether either or both alternatives in the final square brackets in paragraph 3 (a) (referring to the elements of tenders “that are to be evaluated in the selection of the successful supplier” and “that are not to be presented in the auction” should be retained, so as to allow the ranking to include

either all elements of the tender, or merely those that are to be auctioned (the others then being pass/fail criteria).

(e) Information to be provided to potential suppliers or contractors

49. A detailed list of information to be provided to potential suppliers or contractors as regards the holding of an ERA is set out in subparagraphs 4 (e)(ii)-(v) and (vii)-(xii), to be found in the text following paragraph 20 of A/CN.9/WG.I/WP.40. The aim of providing such information is to give potential suppliers or contractors all information necessary to enable them to decide whether to, and if so to participate in, the auction. The Working Group has indicated in the context of solicitation documents that such detailed information would be more appropriately set out in the Guide to Enactment text or in procurement regulations addressing the contents of the solicitation documents, rather than in the text of the Model Law itself.²³ The contents of the solicitation documents themselves are addressed in paragraphs 60 to 64 below.

2. Guide to Enactment text for article [47 bis]

50. The Working Group has noted that it will consider the text of the Guide to Enactment before the Working Group at its eighth session (see the text following para. 25 of A/CN.9/WG.I/WP.40) and any draft regulations once the draft text of the Model Law, as revised, has itself been addressed.²⁴

51. If Model 2 auctions are to be included in the Model Law, the Working Group may consider that detailed guidance as to their use and the use of non-price criteria in a formula will be required in paragraph (4) of the existing draft Guide to Enactment text.²⁵

52. A further issue for the Working Group's consideration is the question of pre-qualification and qualification.

53. If no change is made to the Model Law's current article 7 (other than to add a cross-reference in the text of that article to the chapter where ERAs are addressed) the procuring entity, when conducting an ERA, will not be required to engage in prequalification proceedings (but may elect to do so). The Working Group has yet to decide how to address the question of whether prequalification proceedings should be required or may be used, whether the issue should be addressed during the initial evaluation stage, or whether post-qualification may be desirable.²⁶ In summary, the aims of prequalification include certainty as to the winner at the end of the auction, and it is recalled that prequalification also enables the number of participants to be invited to the ERA to be assessed, so as to ensure effective competition. On the other hand, the procedural costs and time involved in prequalification can be avoided if there is no assessment until after the closure of the auction.

D. Procedures in the auction phase (article [47 ter]) (A/CN.9/590, paragraphs 88-93, and A/CN.9/WG.I/WP.40, paragraphs 26-35)

1. Proposed new text for the Model Law: article [47 ter]

54. As noted above for article 47 bis, these procedures address the specific steps in preparation for an ERA, and would apply whether the auction is held as a standalone

method or a phase in other procurement methods. However, their location would fall to be considered once the Working Group has decided on the manner of provision for such auctions.

55. The Working Group requested the following drafting changes to the text before it at its eighth session (paras. 1 (a) and (c), 4, 6 and 7 of the text before the Working Group at its eighth session remain unchanged and are not repeated):

“Article [47 ter]. Conduct of electronic reverse auctions during the auction itself²⁷

...

1 (b) Procuring entities must ~~[provide]~~ instantaneously communicate to the lowest price submitted to all bidders on a continuous basis during the auction ~~[with] sufficient information [to enable each to establish its own current ranking in the auction] [whether it has the top ranking in the auction] [to establish the changes needed to any bid to give it the top ranking in the auction]];~~

(2) The auction shall be closed in accordance with the precise method, dates and times specified in the solicitation documents or in the invitation to participate in the auction, ~~as follows:~~

~~—— (a) When the date and time specified for the close of the auction has passed; or~~

~~—— (b) When a certain period of time, as specified, has elapsed [without a valid new submission that improves on the top-ranked bid] [when the procuring entity receives no more new prices or new values which meet the requirements concerning minimum differences];²⁸~~

(3) ~~(c)~~ The procuring entity [may also at any time announce the number of participants in the auction but] shall not disclose the identity of any bidder [during the auction] [until the auction has closed. Articles 33 (2) and (3) shall not apply to a procedure involving an electronic auction].²⁹

~~(3)~~(4) The procuring entity may suspend or terminate the electronic reverse auction in the case of system or communications failures.³⁰

...

~~(5)~~(6) The successful bid shall be the bid with the lowest price that is first in the ranking as determined by the automatic evaluation mechanism at the time the auction closes.”

Commentary

56. The Working Group agreed at its eighth session to defer the questions of options available should the successful bidder fail to enter into a procurement contract, or fail to provide any security required to a later session.³¹ Paragraph 6 of the draft before the Working Group at the eighth session provides options for the procuring entity in such circumstances to select another bid in accordance with article 34 (7) or article 36 (5), to reopen the ERA, or to recommence the

procurement. Although the provisions could allow the second-best bidder to receive the contract, if that bidder can be identified, or for negotiations with other bidders, the Working Group has noted issues of false bidding that can arise if the second-best or other bidders can be awarded the contract.³²

57. The draft text before the Working Group at its eighth session (set out following para. 27 of A/CN.9/WG.I/WP.40) contemplates Model 1 auctions. If the Working Group decides to provide for Model 2 auctions in addition, the following amendments to paragraphs 1 (b) and (6) would be required:

“1 (b) Procuring entities must instantaneously communicate to all bidders the lowest price submitted and sufficient information to enable each to establish its own current ranking in the auction on a continuous basis during the auction;

...

(6) The successful bid shall be the bid with the lowest price or that is first in the ranking as determined by the automatic evaluation mechanism at the time the auction closes.”

2. Guide to Enactment text for article 47 ter

58. The Working Group has also decided that it will be appropriate to consider the text of the Guide (and any draft regulations) once the draft text of the Model Law settled. The Working Group has also noted that the text should be drafted so as to prevent technical obsolescence so far as possible.³³

E. Requirement to maintain a record of the procurement proceedings: proposed addition to article 11 of the Model Law (A/CN.9/590, paragraph 94, and A/CN.9/WG.I/WP.40/Add.1, paragraph 3)

59. The Working Group has requested that the application of the accessibility standards be reflected by recording a decision to use ERAs in the record of the proceedings, but with the following text to replace the draft before the Working Group at its eighth session:³⁴

“Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

...

(b) ter³⁵ “In procurement proceedings involving the use of electronic reverse auctions pursuant to [article 19 bis], a statement to that effect.”

F. Contents of the solicitation documents (A/CN.9/590, paragraph 97, and A/CN.9/WG.I/WP.40/Add.1, paragraph 7)

60. The Working Group has requested that level of detail in the proposed revisions to article 27 before it at its eighth session be reviewed, so that those provisions that

do not require regulation by the Model Law should be removed to regulations or the Guide. Accordingly, it is proposed that the items struck through in the revised draft text below could be removed to regulations or the Guide, with a suitable cross reference to article [47 bis (e)], which requires information necessary for potential bidders to be supplied.

“Article 27. Contents of solicitation documents

The solicitation documents shall include, at a minimum, the following information:

...

(n) bis Where the procurement proceedings³⁶ are to be conducted by way of an electronic reverse auction pursuant to [articles 47 bis and ter], a statement to such effect, and:

[i] The date and time of the opening of the electronic reverse auction;

[ii] The website address at which the electronic reverse auction will be held, and at which the auction rules, the tender and other relevant documents will be accessible;

~~[iii] The requirements for registration and identification of bidders at the opening of the auction;~~

[iv] The elements of the tender that are to be presented at the auction;

~~[v] The information that will be made available to bidders in the course of the auction and, where appropriate, how and when it will be made available;~~

~~[vi] All relevant information concerning the auction process itself, including any identification data for the procurement, technical requirements as to information technology equipment to be utilized, whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage);~~

~~[vii] The conditions under which the bidders will be able to bid and, in particular, any minimum differences in price or other elements that [will be required when bidding] [must be improved in any individual; new submission during the auction] [and the time which the procuring entity will allow to elapse after receiving the last submission before closing the auction];~~

~~[viii] All relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection;~~

[ix] All other information necessary to enable the supplier or contractor decide whether or not to participate in the auction;

(n) ter The procurement regulations may prescribe further information that is to be so provided.”

Commentary

61. The text is drafted with reference to the solicitation documents, and would apply to ERAs conducted as a part of tendering proceedings. However, if the Working Group considers that auctions should be provided for in a separate Chapter, either as a standalone method or as an optional phase in other procurement methods, the provisions would then be specified to the contents of solicitation documents as additions in that Chapter.

62. The Working Group has noted that the provisions of subparagraph (n)(i) should be included in subparagraph (q) of the current article 27.³⁷ Accordingly, the Working Group may wish to delete the former subparagraph, and revise the latter to read as follows:

“The place, date and time of the opening of tenders, in conformity with article 33 or, where an electronic reverse auction is to be held in accordance with the provisions of [articles 47 bis and ter], the start of the auction.”

63. The treatment of alternatives contained in subparagraph (g) of the current text of article 27 would apply in the context of Model 2 ERAs, but the Working Group may consider that they should not in the case of Model 1 auctions. If so, the Working Group may wish the Guide to Enactment to provide guidance in this regard.³⁸

64. If the Working Group decides to make provision for Model 2 auctions in addition to Model 1 auctions, it may wish to include in article 27 the following additional subparagraph within subparagraph (n) bis:

“If the award is to be based on the lowest evaluated tender, the formula to be used to quantify the non-price elements to be presented. The formula shall incorporate the weighting of all the criteria established to determine the lowest evaluated tender.”

G. Modification and withdrawal of tenders (article 31 of the Model Law, A/CN.9/590, paragraph 99, and A/CN.9/WG.I/WP.40/Add.1, paragraph 12)

65. The Working Group has observed that if suppliers can withdraw their bids before the ERA itself, the impact on the level of competition that would be required for an effective auction should be considered. The Working Group may wish, therefore, to include the following text as a new paragraph 4 bis in the Guide to Enactment text addressing article 31:

“Although suppliers and contractors may withdraw their [bids/tenders] prior to the deadline for the submission of initial [bids/tenders] in the case of an electronic reverse auction held in accordance with the provisions of [articles 47 bis and ter], the impact of such withdrawals may be that a sufficient level of competition as required by paragraph 4 (d) of [article 47 bis] cannot be ensured. In such circumstances, the procuring entity must consider whether effective competition will be in place and, if not, [is required to/may] withdraw the auction.”

66. Again, the location and phrasing of this provision would need to reflect the types of procurement method that may be completed using ERAs.

Notes

- ¹ A/CN.9/590, paragraph 66.
- ² A/CN.9/590, paragraph 67.
- ³ A/CN.9/590, paragraph 65.
- ⁴ A/CN.9/590, paragraphs 76-78.
- ⁵ A/CN.9/590, paragraphs 103-105.
- ⁶ A/CN.9/590, paragraphs 81, 86, 87 and 102.
- ⁷ A/CN.9/590, paragraph 68.
- ⁸ A/CN.9/590, paragraph 75.
- ⁹ Noting that some electronic reverse auctions are conducted on the basis of lists or catalogues that set out items that may be procured through the mechanism (A/CN.9/590, paragraphs 72 and 73).
- ¹⁰ A/CN.9/590, paragraphs 70 and 78.
- ¹¹ A/CN.9/590, paragraphs 103-105.
- ¹² A/CN.9/590, paragraphs 76 and 77.
- ¹³ A/CN.9/590, paragraph 86.
- ¹⁴ The Working Group has decided that a third type of auction, described in paragraph 33 of A/CN.9/WG.I/WP.35, and in which the close of the auction does not determine the successful bidder, should not be provided for. See, further, A/CN.9/590, paragraph 84.
- ¹⁵ 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).
- ¹⁶ See endnote 14 above. The main element of this type of auctions is that when the ERA phase closes, the suppliers do not know whose tender is the best; this is established once the “non-auction” aspects of the tender have been factored in. This Model is also used under the EU public procurement directives of 31 March 2004 (see endnote 15 above) as evidenced by ERA case studies found at www.ogc.gov.uk.
- ¹⁷ See, further, A/CN.9/WG.I/WP.40, paragraph 12.
- ¹⁸ To enable the Working Group more easily to read the draft provisions and associated commentary during its deliberations, the provisions governing the procedures for the conduct of electronic reverse auctions have been separated into a draft articles 47 bis and ter, but the Working Group may consider that the final version of the revised Model Law should include all such provisions in a single article, for the ease of use of enacting States.
- ¹⁹ Such as in the Brazilian system.
- ²⁰ There may be situations, however, where the initial tender may not be required (for example, in competitive negotiations where a best and final offer is sought through an ERA).
- ²¹ See the commentary set out in paragraph 24 of A/CN.9/WG.I/WP.40.
- ²² Other than as a result of the initial evaluation described in paragraphs 82 and 83 of A/CN.9/590.
- ²³ A/CN.9/590, paragraph 97.
- ²⁴ A/CN.9/590, paragraph 86.
- ²⁵ Located following paragraph 17 of A/CN.9/WG.I/WP.40.
- ²⁶ Discussed in detail in paragraphs 21 and 22 of A/CN.9/WG.I/WP.40.
- ²⁷ Located following paragraph 27 of A/CN.9/WG.I/WP.40.
- ²⁸ The Working Group noted that these matters should be addressed in regulations. See A/CN.9/590, paragraph 89. If Model 1 auctions only are to be provided for, the Working Group may consider that subparagraph 2(b) should be amended as follows: “(2)(b) When a certain

period of time, as specified, has elapsed [without a valid new submission ~~with a lower price that improves on the top ranked bid~~] [when the procuring entity receives no more new prices ~~or new values~~ that meet the requirements concerning minimum differences]”.

²⁹ Paragraph re-numbered, A/CN.9/590, paragraph 90.

³⁰ A/CN.9/590, paragraph 91.

³¹ A/CN.9/590, paragraph 92.

³² Ibid.

³³ A/CN.9/590, paragraph 93.

³⁴ A/CN.9/590, paragraph 94.

³⁵ Initially proposed as subparagraph (i)bis (see A/CN.9/WG.I/WP.40/Add.1, paragraph 3). The location of the provision is proposed to be changed to 1 (b) ter that would follow proposed subparagraph 1 (b) bis containing the requirement to record the procuring entity’s decision as to the means of communication to be used in the procurement proceedings (see A/CN.9/WG.I/WP.42, paragraph 31).

³⁶ The phrase “procurement proceedings” has replaced “tendering proceedings” in the previous draft, as requested by the Working Group (see A/CN.9/590, paragraph 96). The same change will be made to the revised article 25, and elsewhere in the text addressing electronic reverse auctions, as necessary.

³⁷ A/CN.9/590, paragraph 97.

³⁸ Ibid.
