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Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and 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 65 of document A/CN.9/WG.I/WP.49, which is before the Working Group at its eleventh 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. The regulation of such use, including in the context of the submission and opening of tenders, holding meetings, storing information and publicising procurement-related information, was included in the topics before the Working Group at its sixth to tenth sessions. At its tenth session, the Working Group requested the Secretariat to revise the draft provisions on the use of electronic communications in public procurement that it had considered at the session.[1] This note has been prepared pursuant to that request, and sets out the relevant draft provisions that reflect the Working Group's deliberations at its tenth session (see paragraphs 4-42 below).

3. This note also contains draft provisions for the Model Law and the Guide addressing abnormally low tenders ("ALTs"), revised pursuant to the Working Group's request at its tenth session (see paragraphs 43-49 below).

II. Draft provisions addressing the use of electronic communications in public procurement

A. Communications in procurement

1. Proposed draft text for the revised Model Law

4. The following draft article draws on a consolidated text of draft article 5 bis that was before the Working Group at its tenth session[2] and reflects the suggestions made to that text at that session:[3]

"Article [5 bis]. Communications in procurement

(1) Any document, notification, decision and other information generated in the course of a procurement and communicated as described in this Law, including in connection with review proceedings under [chapter VI] [article 53] or in the course of a meeting, or forming part of the record of procurement proceedings under article [11], shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(2) Communication of information between suppliers or contractors and the procuring entity referred to in articles [*7 (4) and (6), 12 (3), 31 (2)(a),*

[1] A/CN.9/615, para. 11.
[2] Ibid., para. 18.
[3] Ibid., paras. 19-26.

32 (1)(d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1), to update for revisions to Model Law] may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:

(a) Any requirement of form in compliance with paragraph (1) of this article;

(b) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf;

(c) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(d) The means to be used to hold any meeting of suppliers or contractors.

(4) The means referred to in the preceding paragraph shall be readily capable of being utilized with those in common use among suppliers or contractors in the relevant context. The means to be used to hold any meeting of suppliers or contractors shall in addition ensure that suppliers or contractors can fully and contemporaneously participate in the meeting.

(5) Appropriate measures shall be put in place to secure the authenticity, integrity and confidentiality of information concerned."

Commentary

Paragraph (1)

5. Paragraph (1) sets out the substantive requirements of form of communications in procurement. They may be derogated from only in accordance with paragraph (2) of the draft article.

6. The procuring entity must set out any specific form requirement when it first solicits the participation of suppliers or contractors in the procurement proceedings, in accordance with paragraph 3 (a) of the draft article. Such specific requirements have to comply with general requirements in paragraph (1) of the draft article.

7. The references in paragraph (1) to [chapter VI] [article 53] are put in square brackets to indicate that it may be inappropriate in the context of the article to refer to the entire chapter VI on review, which includes provisions on administrative and judicial reviews. Administrative review and court proceedings are likely to have their own rules for communications. The paragraph may therefore more appropriately refer only to article 53 that addresses review by a procuring entity.

Paragraph (2)

8. Paragraph (2) sets exceptions to the rule contained in paragraph (1) that the form of information has to provide a record of the content of the information. The list of the articles referred to in that paragraph is taken from the current paragraph (2) of article 9 of the Model Law.

9. The Working Group may wish to consider whether it would be appropriate to retain references to all the listed articles. For the ease of reference, the text of those articles is reproduced in the table below:

Article	*Content*
7 (Prequalification proceedings)	(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents. (6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.
12 (3) (Rejection of all tenders, proposals, offers or quotations)	Notice of the rejection of all tenders, proposals, offers or quotations shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations.
31 (2)(a) (Period of effectiveness of tenders; modification and withdrawal of tenders)	Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;
32 (1)(d) (Tender securities)	When the procuring entity requires suppliers or contractors submitting tenders to provide a tender security: (d) Prior to submitting a tender, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;
34 (1) (Examination, evaluation and comparison of tenders)	(a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No

Article	*Content*
34 (1) (Examination, evaluation and comparison of tenders)	(a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted; (b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that submitted the tender.
36 (1) (Acceptance of tender and entry into force of procurement contract)	Subject to articles 12 and 34 (7), the tender that has been ascertained to be the successful tender pursuant to article 34 (4)(b) shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.
37 (3) (CHAPTER IV. PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES, Notice of solicitation of proposals)	(Subject to approval by ... (the enacting State designates an organ to issue the approval),) where direct solicitation is necessary for reasons of economy and efficiency, the procuring entity need not apply the provisions of paragraphs (1) and (2) of this article in a case where: (a) The services to be procured are available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors; or (b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or (c) Direct solicitation is the only means of ensuring confidentiality or is required by reason of the national interest, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.
44 (b) to (f) (Selection procedure with consecutive negotiations)	Where the procuring entity, in accordance with article 41 (1), uses the procedure provided for in this article, it shall engage in negotiations with suppliers and contractors in accordance with the following procedure: (b) Invite for negotiations on the price of its proposal the supplier or contractor that has attained the best rating in accordance with article 42 (1); (c) Inform the suppliers or contractors that attained ratings above the threshold that they may be considered for negotiation if the negotiations with the suppliers or contractors with better ratings do not result in a procurement contract; (d) Inform the other suppliers or contractors that they did not attain the required threshold; (e) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to subparagraph (b) of this article will not result in a

Article	*Content*
44 (b) to (f) (Selection procedure with consecutive negotiations)	Where the procuring entity, in accordance with article 41 (1), uses the procedure provided for in this article, it shall engage in negotiations with suppliers and contractors in accordance with the following procedure: (b) Invite for negotiations on the price of its proposal the supplier or contractor that has attained the best rating in accordance with article 42 (1); (c) Inform the suppliers or contractors that attained ratings above the threshold that they may be considered for negotiation if the negotiations with the suppliers or contractors with better ratings do not result in a procurement contract; (d) Inform the other suppliers or contractors that they did not attain the required threshold; (e) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to subparagraph (b) of this article will not result in a procurement contract, inform that supplier or contractor that it is terminating the negotiations; (f) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.
47 (1) (Restricted tendering)	(a) When the procuring entity engages in restricted tendering on the grounds referred to in article 20 (a), it shall solicit tenders from all suppliers and contractors from whom the goods, construction or services to be procured are available; (b) When the procuring entity engages in restricted tendering on the grounds referred to in article 20 (b), it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

10. As may be seen from the table above, most exceptions refer to situations when communications are made by a procuring entity to any single supplier or contractor participating in the procurement proceedings. Some exceptions, however, refer to more general communications addressed to all suppliers or contractors involved in the procurement proceedings.

11. In the exclusively paper-based environment, these exceptions allow faster communication of information between a procuring entity and suppliers or contractors concerned. In the electronic environment, there are means to achieve the same goal by more efficient and transparent means, such as e-mails.

12. At least with respect to information to be communicated to all suppliers or contractors participating in a particular procurement, it may be more appropriate for the Model Law to encourage the use of electronic means, rather than telephones, in-person meetings or other means of communication that do not provide a record of

the content of the information communicated using such means. Although the Model Law requires that when such latter means are used, confirmation of the communication must immediately be given to the recipient in a form that provides a record of the content of the communicated information, practical difficulties may exist with verification of compliance with that requirement and its enforceability. Thus the exceptions may create conditions for abuse, including corruption and favouritism, and the Working Group may consider that they should be limited to accommodate only those situations that are strictly necessary.

13. In line with its intention to encourage where appropriate the use of electronic means of communication and to ensure more transparency in public procurement, the Working Group may wish to consider which exceptions are justifiable to retain in paragraph (2) and which could be dispensed with in the light of the widespread use of e-mails and other modern means of communication.

Paragraph (3)

14. The paragraph lists information about communications in procurement, which the procuring entity has to specify in the beginning of the procurement proceedings.

Paragraph (4)

15. The paragraph sets out standards for the means by which information is communicated, requirements for "writing" and "signature" are met and meetings are held. Additional standards apply to the means by which meetings are held. They are based on the wording of the revisions to article 33 (2) agreed upon at the Working Group's tenth session (see paragraph 30 below).

Paragraph (5)

16. Paragraph (5) is expressed in the passive, as was suggested at the Working Group's tenth session, to cover situations when other branches of law may or should regulate the issues of authenticity, integrity and confidentiality of information communicated inter alia in the context of public procurement.[4]

Use of terms

17. The proposed text refers to "document, notification, decision and other information" in paragraph (1) while in subsequent paragraphs it refers to "information" alone. The Working Group may wish to consider using the full list consistently throughout the text or retaining the reference only to "information" for the sake of conciseness after the guidance as to what the article is aimed at is provided in paragraph (1). The Guide may give examples of types of information other than documents, notifications and decisions referred to in the article.

Location of the provisions

18. The Working Group may wish to defer its decision on the final location of the provisions until a later date.

[4] Ibid., para. 22.

2. Guide to Enactment text

19. The draft texts for the Guide that would accompany provisions of the Model Law on (i) the use of electronic means of communication in general, (ii) functional equivalence, (iii) choice of means of communication and (iv) requirement as regards form of communication were presented to the Working Group at its eighth and ninth sessions (documents A/CN.9/WG.I/WP.38 (the text following paragraphs 23), 38/Add.1 (the text following paragraph 4), 42 (the text following paragraphs 13, 19 and 26) and 42/Add.1 (the text following paragraphs 2 and 5)).

20. Following the consolidation of all the relevant provisions in one article dealing with communications in procurement, a new consolidated text for the Guide is being prepared and will be presented to the Working Group for consideration at a future session. The revised text for the Guide will incorporate relevant suggestions made at the Working Group's sessions.

21. Furthermore, also at the Working Group's eighth and ninth sessions, the Secretariat proposed the additions to the Guide text that accompany some of the existing provisions of the Model Law, such as article 36 on acceptance of tender and entry into force of procurement contract (documents A/CN.9/WG.I/WP.42 (the text following paragraph 29), and 42/Add.1 (the text following paragraph 6), revising the text in document A/CN.9/WG.I/WP.38/Add.1 following paragraph 14). They will also be amended to reflect the relevant deliberations at the Working Group's subsequent sessions.

B. Electronic submission of tenders

1. Proposed draft text for the revised Model Law

22. The following draft text for article 30 (5) incorporates drafting suggestions made at the Working Group's tenth session:[5]

"Article 30. Submission of tenders

(5) (a) A tender shall be submitted in writing, and signed, and:

(i) if in paper form, in a sealed envelope; or

(ii) if in any other form, according to requirements specified by the procuring entity, which ensure at least a similar degree of [authenticity,] [security,] integrity and confidentiality;

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

(c) The procuring entity shall preserve the integrity and confidentiality of a tender from the time as determined by the procuring entity, but in no case later than the time of its receipt, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law."

Commentary

[5] Ibid., paras. 27-28.

Paragraph 5 (a)(ii)

23. The Working Group may wish to consider whether references to "authenticity" and "security" of tenders should be inserted in paragraph 5 (a)(ii). In current article 30 (5)(b) of the Model Law, in the same context, the reference is made in addition to the requirement of confidentiality to the requirements of authenticity and security of tenders.

24. At the tenth session, the issue of security was discussed only in the context of paragraph 5 (c) above: it was suggested that in that context the security requirement should not appear since the requirements of integrity and confidentially were sufficient (although some doubts were expressed about that suggestion).[6] The Working Group may wish to consider whether the same is true in the context of paragraph 5 (a)(ii).[7]

25. As regards the issue of authenticity, the Working Group may wish to consider whether the requirement of signature in the opening phrase of paragraph 5 (a) will always ensure authenticity of tenders (for example, in situations where a supplier sends several signed tenders from different addresses, which would raise the issue of authenticity in determining which tender is final and binding on the supplier).

Paragraph 5 (b)

26. The paragraph reproduces provisions of article 30 (5)(c) of the Model Law without change.

Paragraph 5 (c)

27. The paragraph is new and based on the draft provisions agreed upon at the Working Group's tenth session.[8]

2. Guide to Enactment text

28. At the Working Group's tenth session, the point was made that the Guide should provide guidance to enacting States as regards separate treatment of submission and receipt of tenders in the paper and electronic environments to avoid overly stringent requirements in traditional tendering, and the need to avoid imposing excessive requirements on the electronic submission of tenders (which might otherwise discourage such submissions).[9]

29. The draft text for the Guide that would accompany a revised article 30 (5) was presented to the Working Group, at its eighth session, in document A/CN.9/WG.I/WP.38/Add.1, the text following paragraph 26. Since then, a number of suggestions have been made to the text. The revised text for the Guide that will replace in entirety the previously proposed text is being prepared and will be presented to the Working Group for consideration at a future session.

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[6] Ibid., para.29.

[7] At the tenth session, in the context of paragraph 5 (a) (ii), it was suggested to replace the word "protection" with "integrity and confidentiality". No issues of security and authenticity of tenders were raised. A/CN.9/615, para. 28 (iii).

[8] A/CN.9/615, para. 28.

[9] Ibid., para. 30.

C. Presence at the opening of tenders

30. At its tenth session, the Working Group decided to base its future consideration of provisions for revised article 33 (2) on the following text:[10]

> **"Article 33. Opening of tenders**
>
> (2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are fully apprised of the opening of the tenders contemporaneously through the means of communication used by the procuring entity."

31. A revised text of draft article 5 bis above incorporates the requirement for holding meetings, which will also apply to opening of tenders (see article 5 bis (4) in paragraph 4 above). For avoidance of a repetition, the Working Group may wish to shorten the second sentence of the text in the preceding paragraph to read:

> "Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if conditions of article [5 bis (3)(d) and (4)] are met."

32. The draft text for the Guide that would accompany a revised article 33 (2) will be prepared and presented to the Working Group for consideration at a future session, reflecting suggestions made at the Working Group's session for reflection in such a text.

D. Publication of procurement-related information

1. Proposed revisions to article 5

33. At its tenth session, the Working Group agreed to split the current text of article 5 of the Model Law into two paragraphs: the first paragraph dealing with legal texts (law, procurement regulations and directives of general application) that had to be made accessible to the public, with respect to which the requirements to "systematically maintain" would remain; and the second paragraph dealing with judicial decisions and administrative rulings of precedent value and general application, with respect to which the requirement to "systematically maintain" would be replaced with the requirement "to update on a regular basis if need be".[11] The Working Group may therefore wish to consider the following text:

> **"Article 5. Publicity of legal texts**
>
> (1) The text of this Law, procurement regulations and all directives of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

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[10] Ibid., para. 32.

[11] Ibid., para. 33. See also A/CN.9/WG.I/WP.47, para. 31.

(2) Judicial decisions and administrative rulings with precedent value and of general application in connection with procurement covered by this Law, and all amendments thereto, shall be made available to the public and updated on a regular basis if need be."

Commentary

34. The amendments to the article reflect the deliberations on article 5 at the Working Group's ninth and tenth sessions, such as concerns that the requirements found in the current article 5 of the Model Law as regards the public accessibility of legal texts and their systematic maintenance appeared to be too onerous with respect to some types of legal texts. The suggestions were made to reconsider the application of these requirements to such legal texts as judicial decisions and administrative rulings.[12]

35. In the light of the changes made to the article (in particular paragraph (2) that refers to public availability, not public accessibility, of the texts referred therein), it is suggested that the title of the article should be changed from "Public accessibility of legal texts" to "Publicity of legal texts".

36. The draft text for the Guide that would accompany a revised article 5 was submitted to the Working Group for consideration at its ninth session in document A/CN.9/WG.I/WP.42, the text following paragraph 45 (a). This text will be revised to reflect the Working Group's discussion of the relevant issues.

2. Proposed draft text for the revised Model Law addressing the publication of information on forthcoming procurement opportunities

37. At its tenth session, the Working Group agreed that enabling provisions on publication of information on forthcoming procurement opportunities should be included in the Model Law, based on the wording of the text contained in paragraph 33 of document A/CN.9/WG.I/WP.47.[13] The Working Group may therefore wish to consider the following text:

"As [promptly] as possible after beginning of a fiscal year procuring entities may publish information of the expected procurement opportunities for the following [the enacting State specifies the period], and this information shall not constitute the solicitation of the participation of suppliers or contractors in the procurement proceedings."

Commentary

38. The Working Group may wish to consider that the wording "as promptly as possible" in the text above should be changed to a less prescriptive wording, such as "as early as possible", in the light of the permissive nature of the provisions.

39. The ending of the provisions that reads "the solicitation of the participation of suppliers or contractors in the procurement proceedings" has replaced the previous reference to "the solicitation documents or parts thereof". The suggested new wording is broader and covers all procurement methods under the Model Law (the

[12] A/CN.9/595, paras. 68-72, and A/CN.9/615, para. 33.
[13] A/CN.9/615, para. 36.

reference to solicitation documents in the Model Law is relevant only in the context of tendering proceedings). This broader reference is used for example in articles 8 (3) and 9 (1) of the Model Law as well as in the revised article 5 bis (3) above.

40. The Working Group is still to decide about the location of these provisions in the Model Law. At a Working Group's previous session, the suggestion was made to include provisions on publication of information on forthcoming procurement opportunities in article 5.[14] However, taking into account that the current article 5 deals with publication of regulatory legal texts, the appearance of the provisions on publication of information on forthcoming procurement opportunities in that article may give the wrong impression about the intended nature of that information (informative as opposed to regulatory and binding). It may be more appropriate to include provisions on publication of information on forthcoming procurement opportunities in a separate article.

41. The Working Group may wish to defer its decision on the location of the provisions to a later date, in the light of its decisions on the location of other articles, such as article 5 bis that would set rules for communications in procurement, which may also apply to the publication of information on forthcoming procurement opportunities.

42. The draft text for the Guide that would accompany provisions on publication of information on forthcoming procurement opportunities was submitted to the Working Group for consideration at its ninth session in document A/CN.9/WG.I/WP.42, the text following paragraph 45 (b). This text will be revised to reflect the Working Group's discussion of the relevant issues.

III. Draft provisions addressing abnormally low tenders

1. Proposed draft text for the revised Model Law

43. At its tenth session, the Working Group requested the Secretariat to propose the appropriate location for the provisions on ALTs, taking into account that risks of ALTs should be addressed by the procuring entity not only in the context of examination, evaluation and comparison of tenders in the tendering proceedings, as was originally implied by placing provisions in article 34 of the Model Law, but in addition at any other stage of the procurement, including during qualification of suppliers, and in procurement proceedings by means other than tendering.[15]

44. At the same session, the drafting suggestions were made to the text of the provisions on ALTs that were before the Working Group in document A/CN.9/WG.I/WP.43/Add.1 (the text following paragraph 8).[16]

45. The text below incorporates those suggestions and is presented as a new article 12 bis. In the process of revising the structure of the Model Law, the Working Group may wish to consider putting all articles addressing rejection of tenders, such as articles 12, 15 and the proposed article 12 bis, in one cluster, one after another.

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[14] A/CN.9/595, para. 76.
[15] A/CN.9/615, para. 75.
[16] Ibid., para. 73.

"Article [12 bis]. Rejection of abnormally low tenders, proposals, offers, quotations or bids

(1) The procuring entity may reject a tender, proposal, offer, quotation or bid if a price submitted therein is abnormally low in relation to the goods, construction or services to be procured, provided that:

(a) The procuring entity has requested in writing details of constituent elements of a tender, proposal, offer, quotation or bid that give rise to concerns as to the ability of the supplier or contractor that submitted such a tender, proposal, offer, quotation or bid to perform the procurement contract;

(b) The procuring entity has taken account of the information supplied, if any, but continues, on a reasonable basis, to hold those concerns; and

(c) The procuring entity has recorded those concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a tender, proposal, offer, quotation or bid in accordance with this article and grounds for the decision shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned."

Commentary

46. The provisions contain a reference to "bid" along references to "tenders, proposals, offers and quotations". This is in the light of the draft provisions on electronic reverse auctions submitted to the Working Group for consideration at its eleventh session in document A/CN.9/WG.I/WP.51. Additional references may be needed in the light of the provisions on framework agreements (see document A/CN.9/WG.I/WP.52).

47. The Working Group deferred its decision on whether any action regarding ALTs by the procuring entity should be open to review. The Working Group noted that domestic regulation of that issue might vary significantly. It was suggested that the Working Group might revert to that point when it considered review provisions.[17]

2. Proposed draft text for the revised Guide

48. At its tenth session, the Working Group considered the text of the Guide that would accompany provisions of the Model Law on ALTs. A number of drafting suggestions were made to that text.[18]

49. The revised text below reflects those suggestions. It replaces in entirety the previously proposed texts in documents A/CN.9/WG.I/WP.43/Add.1 (the text following paragraphs 13) and 40/Add.1 (the texts following paragraphs 27 and 28).

[17] Ibid., para. 74.
[18] Ibid., paras. 76-78.

"Article [12 bis]. Rejection of abnormally low tenders, proposals, offers, quotations or bids

(1) The purpose of the article is to enable, but not to require, the procuring entity to reject abnormally low tenders, proposals, offers, quotations or bids (henceforth referred to as "abnormally low tenders") that give rise to procuring entity's concerns as to the ability of the supplier or contractor that submitted such an abnormally low tender to perform the procurement contract.

(2) The article does not require any approval of a higher administrative authority for the procuring entity to take measures referred to in the article. The article applies to any procurement proceedings under the Model Law, including one involving an electronic reverse auction, where risks of abnormally low tenders may be especially high.

(3) The article provides necessary safeguards that aim to protect legitimate interests of both sides: procuring entities and suppliers and contractors. On the one hand, it enables the procuring entity to address possible abnormally low tenders before a procurement contract has been concluded. From the perspective of the procuring entity, an abnormally low tender involves a risk that the contract cannot be performed, or performed at the price tendered, and additional costs and delays to the project may ensue leading to higher prices and disruption to the procurement concerned. The procuring entity should therefore take steps to avoid running such a performance risk.

(4) On the other hand, the article protects suppliers and contractors against the possibility of arbitrary decisions and abusive practices by procuring entities. The procuring entity cannot automatically reject a tender simply on the basis that the tender price appears to be abnormally low. Conferring such a right on procuring entities would introduce the possibility of abuse as tenders could be rejected for being abnormally low without justification, or on the basis of a purely subjective criterion. Such a risk is especially acute in international procurement, where an abnormally low price in one country might be perfectly normal in another. In addition, some prices may seem to be abnormally low if they are below cost; however, selling old stock below cost, or engaging in below cost pricing to keep a workforce occupied, subject to applicable competition regulations, might be legitimate.

(5) For these reasons, the Model Law allows the rejection of an abnormally low tender only when the procuring entity has concerns as to the ability of the supplier or contractor to perform the procurement contract. This, however, is without prejudice to any other applicable law that may require the procuring entity to reject the abnormally low tender, for example, if criminal acts (such as money-laundering) or illegal practices (such as non-compliance with minimum wage or social security obligations) are involved. In any case, proper procedures should be in place to ensure due process and prevent arbitrary decisions and abusive practices.

(6) Subparagraphs 1 (a) to (c) of the article specify the steps that the procuring entity has to take before the abnormally low tender may be rejected, to ensure due process is followed and the rights of the supplier or contractor concerned are preserved.

(7) First, a written request for clarification must be made to the supplier or contractor concerned about details of constituent elements of the submitted tender, which the procuring entity considers relevant for justification of the price submitted. Those details may include: the methods and economics of the manufacturing process for the goods or of the construction methods or of the services provided; the technical solutions chosen and/or any exceptionally favourable conditions available to the supplier or contractor for the execution of the construction or for the supply of the goods or services; or the originality of the construction, supplies or services proposed by the supplier or contractor.

(8) The enacting State may choose to regulate which type of information the procuring entity may request to submit for price justification. It should be noted in this context that the assessment is whether the price is "realistic" (that is, the price reflects market conditions and not a loss-leading or other pricing strategy with steep discounts to gain a competitive advantage), using such factors as pre-tender estimates, market prices or prices of previous contracts, where available. It might not be appropriate to request information about the underlying costs that will have been used by suppliers and contractors to determine the price itself. Since cost assessment can be cumbersome and complicated, and is also not possible in all cases, the ability of the procuring entities to assess prices on the basis of cost may be limited. In some jurisdictions, procuring entities may be barred by law from demanding information relating to cost structure, because of risks that such information could be misused.

(9) The procuring entity should take account of the response supplied by the supplier or contractor in the price assessment. The supplier's refusal to provide information requested by the procuring entity should not give an automatic right to the procuring entity to reject the abnormally low tender. The price assessment must be carried out in any case and on a purely objective basis. It may turn out during such assessment that the abnormally low tender was submitted due to a misunderstanding or other error.

(10) If after price justification the procuring entity continues to hold concerns about the ability of the supplier or contractor to perform the procurement contract, it must record those concerns and its reasons for holding them in the record of procurement proceedings pursuant to subparagraph (1) (c) of the article. This provision is included to ensure that before a decision to reject the abnormally low tender is made, all information relevant to that decision is properly recorded for the sake of accountability, transparency and objectivity in the process.

(11) Only after the steps outlined in subparagraphs 1 (a) to (c) have been fulfilled, may the procuring entity reject the abnormally low tender. The decision on the rejection of the abnormally low tender must be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned, under paragraph (2) of the article. [If the Working Group decides that an appeal against the rejection should be allowed, reference and comment would appear here]

(12) Enacting States should be aware that, apart from the measures envisaged in this article, other measures can effectively prevent the performance risks

resulting from abnormally low tenders. Thoroughly evaluating suppliers' qualifications, tenders, proposals, offers, quotations or bids can play an especially important role in this context, which in turn depends on the proper formulation of qualification requirements and the precise drafting of specifications. Procuring entities should be appropriately instructed to that end, and should be aware of the needs to compile accurate and comprehensive information about the qualifications of suppliers or contractors, including information about their past performance, and to pay due attention in evaluation to all aspects of submitted tenders, proposals, offers, quotations or bids, not only to price (such as to maintenance and replacement costs where appropriate).

(13) Additional measures may include: (i) promotion of awareness of the adverse effects of abnormally low tenders; (ii) provision of training, adequate resources and information to procurement officers, including reference or market prices; and (iii) allowing for sufficient time for each stage of the procurement process. The solicitation documents or other documents for solicitation of proposals, offers, quotations or bids may include an explicit statement to the effect that the procuring entity is not obligated to accept any tender, and that a procuring entity may carry out analyses of potential performance risk and prices submitted."