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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

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 76 of document A/CN.9/WG.I/WP.57, which is before the Working Group at its thirteenth 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 reverse auctions (“ERAs”), in public procurement.

2. Such use was included in the topics before the Working Group at its sixth to twelfth sessions. At its twelfth session, the Working Group requested the Secretariat to revise the drafting materials on ERAs that it had considered at the session.¹ This note has been prepared pursuant to that request.

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

A. Conditions for the use of electronic reverse auctions: draft article 22 bis

1. Proposed draft text for the revised Model Law

3. Draft article 22 bis below draws on the text of a draft article on conditions for use of ERAs that was before the Working Group at its twelfth session, and reflects amendments suggested to be made thereto:²

“Article 22 bis. Conditions for use of electronic reverse auctions

(1) A procuring entity may engage in procurement by means of an electronic reverse auction, or may use an electronic reverse auction to determine the successful tender, proposal, offer or quotation (collectively referred to as a “submission” in this section) in [other appropriate/specify relevant] procurement methods, in accordance with articles [51 bis to 51 septies], under the following conditions:³

(a) Where it is feasible for the procuring entity to formulate detailed and precise specifications for the goods [or construction or, in the case of services, to identify their detailed and precise characteristics];

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

¹ A/CN.9/640, para. 14. In the footnotes that follow, document A/CN.9/640 (which is the report of the Working Group on the work of its twelfth session) is referred to, so as to highlight for the benefit of the Working Group the reasons for the changes made to the revised Model Law and Guide text contained in this document.

² Ibid., paras. 56 and 57.

³ Amended to incorporate provisions of draft article 51 ter (1) as contained in document A/CN.9/WG.I/WP.55.

(c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

(2) The electronic reverse auctions shall be based on:

(a) Price where the procurement contract is to be awarded to the lowest price; or

(b) Prices and other criteria to be used by the procuring entity in determining the successful submission as specified in the notice of the electronic reverse auction, where the procurement contract is to be awarded to the lowest evaluated submission.

(3) Where the procurement contract is awarded to the lowest evaluated submission, the electronic reverse auction shall be preceded by a full evaluation of initial submissions in accordance with the criteria to be used by the procuring entity in determining the successful submission and the relative weight of such criteria, both as specified in the notice of the electronic reverse auction. The invitation to the electronic reverse auction shall be accompanied by the outcome of the full evaluation of initial submissions in accordance with the provisions of article [51 quater (4)].”⁴

2. Guide to Enactment text

4. The following text incorporates the suggestions made at the Working Group’s twelfth session to the draft text for the Guide to accompany provisions of the Model Law on the conditions for use of ERAs that was before the Working Group at that session as well as some drafting changes:⁵

“1. Article [22 bis] sets out the conditions for the use of electronic reverse auctions. Such auctions are defined as a repetitive process to select a successful submission, which involves suppliers’ use of electronic communications to present either new lower prices, or a lower revised submission combining the price and values for the other criteria to be used by the procuring entity in determining the successful submission.⁶ Each revised submission results in a ranking or re-ranking of bidding suppliers (the “bidders”) using automatic evaluation methods and a mathematical formula. The Model Law allows auctions only with automatic evaluation processes, where the anonymity of the bidders, and the confidentiality and traceability of the proceedings, can be preserved.

2. Electronic reverse auctions can improve value for money as a result of increased competition among bidders in a dynamic and real-time setting. They can also improve transparency in the procurement process since information on successive results of evaluation of submissions at every stage of the auction and the final result of the auction are made known to all bidders instantaneously and simultaneously. Furthermore, they are characterised by an

⁴ Other changes to the draft article were made in the light of A/CN.9/640, paras. 56-57.

⁵ Ibid., paras. 58-61.

⁶ A/CN.9/640, para. 58 (a).

evaluation process that is fully automated or with limited human intervention and therefore can discourage abuse and corruption.

3. On the other hand, electronic reverse auctions can encourage an excessive focus on price, and their ease of operation can lead to their overuse and use in inappropriate situations. They may also have an anti-competitive impact in the medium and longer-term. In particular, they are more vulnerable than other procurement processes to collusive behaviour by bidders, especially in projects characterized by a small number of bidders, or in repeated bidding in which the same group of bidders participate.*

4. It is common for third-party agencies to set up and administer the auction for procuring entities, and to advise on procurement strategies. Procuring entities should be aware of the possible negative implications of outsourcing of decision-making beyond government, such as to third-party software and service providers when electronic reverse auctions are held. These agencies may represent and have access to both procuring entities and bidders, raising potential organizational conflicts that may pose a serious threat to competition. All these factors in turn may negatively affect the confidence of suppliers and contractors in procurement proceedings involving electronic reverse auctions. Procuring entities may also incur overhead costs in training and facilitating suppliers and contractors in bidding through electronic reverse auctions. As a result, the procuring entity may face additional costs arising from the use of electronic reverse auctions (opportunity costs such as those arising should suppliers or contractors abandon the government market if required to bid through electronic reverse auctions) and higher prices than those they would have obtained if other procurement techniques were used. Furthermore, in the setting of an electronic auction environment, the risk of suppliers' gaining unauthorized access to competitors' commercially sensitive information may be elevated.

5. Recognizing both the potential benefits of electronic reverse auctions and the concerns over their use, the Model Law enables recourse to them subject to the safeguards contained in the conditions for use in article [22 bis] and procedural requirements in articles [51 bis to septies] of the Model Law.⁷

6. Electronic reverse auctions may be used either as procurement method in itself or as a phase in other procurement methods, as and where appropriate, preceding the award of the procurement contract. Using electronic reverse auctions as a phase may not be appropriate in all procurement methods envisaged under the Model Law.⁸ Whether such an option is appropriate would depend first of all on how close the conditions for the use of electronic reverse auctions specified in article [22 bis] coincide with the conditions for the use of

* Collusion may occur when two or more bidders work in tandem to manipulate and influence the price of an auction keeping it artificially high or share the market by artificially losing submissions or not presenting submissions. For more discussion of this matter, see paragraphs [...] of this Guide.

⁷ Ibid., para. 58 (b).

⁸ It was suggested that the Guide should alert enacting States about the lack of practical experience with regulation and use of auctions in this manner. However, such a provision might become obsolete and on this ground has not been included in the revised text. The Working Group may wish to reconsider this point.

a procurement method in question. For example, article 19 of the Model Law enables a procuring entity to engage in procurement by means of request for proposals where it is not feasible for the procuring entity to formulate detailed specifications. This condition is in direct contrast with the primary condition for the use of electronic reverse auction specified in article [22 bis] (1) (a) and therefore the use of electronic reverse auction in request for proposals proceedings would not comply with the requirements of the Model Law. Procedural requirements of some procurement methods may also be in contrast with inherent features of electronic reverse auctions. For example, in tendering proceedings, the prohibitions of negotiations with suppliers or contractors and of submission of tenders after a deadline for submission of tenders would contradict the natural course of an electronic reverse auction where suppliers or contractors are expected to present successively lowered submissions. Electronic reverse auctions may appropriately be used in particular upon the reopening of competition in framework agreements.⁹

7. Under the conditions for the use of electronic reverse auctions set out in article [22 bis], electronic reverse auctions are primarily intended to satisfy the needs of a procuring entity for standardized, simple and generally available goods that arise repeatedly, such as for off-the-shelf products (e.g., office supplies), commodities, standard information technology equipment, and primary building products. In these types of procurement, the determining factor is price or quantity; a complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated. The types of procurement involving multiple variables and where qualitative factors prevail over price and quantity considerations should not normally be subject to the electronic reverse auctions.

8. The requirement for detailed and precise specifications found in paragraph (1) (a) will preclude the use of this procurement technique in procurement of most services and construction, unless they are of a highly simple nature (for example, straightforward road maintenance works). It would be inappropriate, for example to use auctions in procurement of works or services entailing intellectual performance, such as design works. Depending on the circumstances prevailing in an enacting State, including the level of experience with electronic reverse auctions, an enacting State may choose to restrict the use of electronic reverse auctions to procurement of goods by excluding references to construction and services in the article.¹⁰

9. Some jurisdictions maintain lists identifying specific goods, construction or services that may suitably be procured through electronic reverse auctions. Enacting States should be aware that maintaining such lists could prove cumbersome in practice, since it requires periodic updating as new commodities or other relevant items appear. If lists are intended to be used, it is preferable to develop illustrative lists of items suitable for acquisition through electronic reverse auctions or, alternatively, to list generic

⁹ The provisions in this paragraph are new.

¹⁰ A/CN.9/640, para. 58 (c).

characteristics that render a particular item suitable or not suitable for acquisition through this procurement technique.¹¹

10. In formulating detailed and precise specifications, procuring entities have to take special care in referring to objective technical and quality characteristics of the goods, construction and services procured, as required in article 16 (2) of the Model Law, so that to ensure that bidders will bid on a common basis. The use of a common procurement vocabulary to identify goods, construction or services by codes or by reference to general market-defined standards is therefore desirable.

11. Paragraph (1) (b) aims at mitigating risks of collusion and ensuring acceptable auction outcomes for the procuring entity. It requires that there must be a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction. This provision is included to recognize that higher risks of collusion are present in the auction setting than in other procurement methods, and electronic reverse auctions are therefore not suitable in markets with only a limited number of potentially qualified and independent suppliers, or in markets dominated by one or two major players since such markets are especially vulnerable to price manipulation or other anti-competitive behaviour. Paragraph 1 (b) is supplemented by article [51 quater (6)] that requires procuring entities in inviting suppliers or contractors to the auction to keep in mind the need to ensure effective competition during the auction. The procuring entity has the right to cancel the auction in accordance with article [51 quinquies (2)] if the number of suppliers or contractors registered to participate in the auction is insufficient to ensure effective competition during the auction. [Appropriate cross-reference to Guide text that would accompany the relevant articles].¹²

12. The reference in article 22 bis (1)(b) to potential suppliers anticipated to be qualified to participate in the electronic reverse auction should not be interpreted as implying that pre-qualification will necessarily be involved in procurement through electronic reverse auctions. It may be the case that, in order to expedite the process and save costs, qualifications of only the supplier or contractor that presented the accepted submission are checked. [Appropriate cross-reference to a Guide text that would discuss the relevant options, in particular in conjunction with article 51 septies (2)].

13. The article is intended to apply to procurement where the award of contracts is based on either the price or the price and other criteria that are specified in the beginning of the procurement proceedings, that is, in the notice of the electronic reverse auction. When non-price criteria are involved in determination of the successful submission, paragraph (1) (c) (as elsewhere in the Model Law) requires that such criteria should be transparent, objective and quantifiable (e.g., figures, percentages) and can be expressed in monetary terms.¹³ These non-price criteria should be differentiated from those elements of the specifications that would determine whether or not a submission was responsive (i.e., pass/fail criteria; see article 34 (2) of the Model Law). The

¹¹ Ibid., para. 59.

¹² Ibid., para. 58 (e). See also revisions made to draft articles 51 quater and quinquies.

¹³ Ibid., para. 58 (f).

article requires that all non-price criteria should be evaluated prior to the auction as part of the full evaluation of initial submissions, and that the results of such evaluation should be communicated in the relevant part individually and simultaneously to each supplier or contractor concerned, along with a mathematical formula that will be used during the auction for determination of the successful submission. This formula must allow each supplier or contractor concerned to determine its status vis-à-vis other suppliers prior and at any stage during the auction. These requirements intend to ensure that all criteria are transparently and objectively evaluated (through pre-disclosure of evaluation procedures, the mathematical formula and the results of evaluation of initial submissions), and no manipulation and subjectivity (such as through a points system) are introduced in determination of the successful submission.¹⁴ The procuring entity should treat initial submissions received as if they were tenders or any other submissions under the Model Law, in that confidentiality and integrity should be preserved.¹⁵

14. The enacting States and procuring entities should be aware however of potential dangers of allowing non-price criteria to be used in determining the successful submission. Apart from concerns common for all procurement methods and techniques (see paragraphs ... of this Guide for the relevant discussion), the enacting State should be aware of concerns arising in the specific context of electronic reverse auctions, such as: **[further detail to be added at a future session]**.¹⁶

15. Whether price only or other award criteria are factored into procurement by electronic reverse auctions is to be decided by an enacting State in accordance with the prevailing circumstances on the ground, including its level of experience with electronic reverse auctions, and in which sector of the economy the use of electronic reverse auctions is envisaged. It is recommended that enacting States lacking experience with the use of electronic reverse auctions should introduce their use in a staged fashion as experience with the technique evolves; that is, to commence by allowing simple auctions, where price only is to be used in determining the successful submission, and subsequently, if at all appropriate, to proceed to the use of more complex auctions, where award criteria include non-price criteria. The latter type of auctions would require an advanced level of expertise and experience in procuring entities, for example, the capacity properly to factor any non-price criteria to a mathematical formula so as to avoid introducing subjectivity into the evaluation process. Such experience and expertise in the procuring entity would be necessary even if handling electronic reverse auctions on behalf of the procuring entity is outsourced to private third-party service providers, in order to enable the procuring entity to properly supervise activities of such third-party providers.

¹⁴ Ibid.

¹⁵ The Working Group has previously expressed the point of view that current article 45 of the Model Law should apply to all procurement methods, and appropriate reference or cross reference should be included.

¹⁶ The provisions in paragraphs 13 and 14 are mostly new. See also A/CN.9/640, para. 58 (c) and (g).

16. In order to derive maximum benefits from an electronic reverse auction, both procuring entities and suppliers need to realise the benefits from it and receive support necessary to make them confident in the process. Therefore, if the enacting State decides to introduce this procurement technique, it should be ready to invest sufficient resources in awareness and training programs to show in as short timeframe as possible that the upcoming change is profitable and sustainable for all concerned. Otherwise, a marketplace where procurement was previously handled successfully through other procurement techniques may be abandoned, and the government investment in electronic reverse auction system may fail. Procuring entities will need to learn new job skills and undergo orientation in the electronic reverse auction and understand all its benefits and potential problems and risks. Suppliers and contractors, especially small and medium enterprises, will need to be aware and understand the changes involved in doing business with the government through an electronic reverse auction and what impacts these changes will have on their businesses. The public at large should understand benefits of introducing the new procurement technique and be confident that it will contribute to achieving the government objectives in procurement. The awareness and training program can be delivered through various channels and means, many of which may already be in place, such as regular briefings, newsletters, case studies, regular advice, help desk, easy-to-follow and readily accessible guides, simulated auctions, induction and orientation courses. The awareness and training program should include collection and analysis of feedback from all concerned, which in turn should lead to necessary adjustments in the electronic reverse auction processes.¹⁷

17. Provisions of the Model Law should not be interpreted as implying that electronic reverse auctions will be appropriate and should always be used even if all conditions of article [22 bis] are met. Enacting States may wish to specify in regulations further conditions for the use of electronic reverse auctions, such as advisability of consolidated purchases to amortize costs of setting a system for holding an electronic reverse auction, including costs of third-party software and service providers.

18. [Cross-references to provisions of the Guide providing functional guidance on the use of ERAs.]”

B. Procedures in the pre-auction and auction stages: draft articles 51 bis to septies

1. Proposed draft text for the revised Model Law

5. The following revised draft article are proposed for consideration by the Working Group. They reflect the suggestions made at the Working Group’s twelfth session, in particular as regards alternative approaches to drafting provisions on pre-auction procedures (previously draft article 51 bis).¹⁸ The new drafting

¹⁷ The provisions in this paragraph are new. See also *ibid.*, para. 58 (h).

¹⁸ *Ibid.*, paras. 72-73.

approach presented below has affected the drafting of all articles related to procedural aspects of ERAs.

“Article 51 bis. Procedures for soliciting participation in procurement involving the use of electronic reverse auctions¹⁹

(1) Where an electronic reverse auction is to be used as a procurement method, the procuring entity shall cause a notice of the electronic reverse auction to be published in accordance with procedures of article 24 of this Law.

(2) Where an electronic reverse auction is to be used in [other] procurement methods envisaged in this Law, the procuring entity shall give a notice of the electronic reverse auction when first soliciting the participation of suppliers or contractors in the procurement proceedings in accordance with the relevant provisions of this Law.”

“Article 51 ter. Contents of the notice of the electronic reverse auction²⁰

(1) The notice of the electronic reverse auction shall include, at a minimum, the following:

(a) Information referred to in article 25 (1)(a), (d) and (e), and article 27 (d), (f), (h) to (j) and (t) to (y);²¹

(b) The criteria to be used by the procuring entity in determining the successful submission, including any criteria other than price to be used, the relative weight of such criteria, the mathematical formula to be used in the evaluation procedure and indication of any criteria that cannot be varied during the auction;

(c) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;

(d) The manner and, if already determined, deadline by which the suppliers and contractors shall register to participate in the auction;

(e) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;

(f) 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); and

(g) The rules for the conduct of the electronic reverse auction, including the information that will be made available to the bidders in the course of the auction and the conditions under which the bidders will be able to bid.

¹⁹ The draft article is new. It draws on provisions of draft articles 51 bis (1) and 51 ter (2) in A/CN.9/WG.I/WP.55.

²⁰ The draft article is new. It draws on the provisions of draft article 51 bis (2) in document A/CN.9/WG.I/WP.55, and A/CN.9/640, para. 79.

²¹ The Working Group may wish to consider whether the cross-referred provisions should be restated in full in this subparagraph.

(2) The procuring entity may decide to impose a minimum and/or maximum on the number of suppliers or contractors to be invited to the auction on the condition that the procuring entity has satisfied itself that in doing so it would ensure effective competition and fairness. In such case, the notice of the electronic reverse auction shall state such a number and, where the maximum is imposed, the criteria and procedure that will be followed in selecting the maximum number of suppliers or contractors.

(3) The procuring entity may decide that the electronic reverse auction shall be preceded by prequalification. In such case, the notice of the electronic reverse auction shall contain invitation to prequalify and include information referred to in article 25 (2) (a) to (e).²²

(4) The procuring entity may decide that the electronic reverse auction shall be preceded by assessment of responsiveness of submissions. In such case, the notice of the electronic reverse auction shall contain invitation to present initial submissions and include information referred to in articles 25 (1) (f) to (j) and 27 (a), (k) to (s) and (z)²³ and information on procedures to be used in such assessment.

(5) Where a full evaluation of initial submissions is required in accordance with the provisions of article 22 bis (3), the notice of the electronic reverse auctions shall contain invitation to present initial submissions and shall include information referred to in articles 25 (1) (f) to (j) and 27 (a), (k) to (s) and (z) and information on procedures to be used in such evaluation.”²⁴

“Article 51 quater. Invitation to participate in the electronic reverse auction²⁵

(1) Except as provided for in paragraphs (2) to (4) of this article, the notice of the electronic reverse auction shall serve as an invitation to participate in the auction and shall be complete in all respects, including as regards information specified in paragraph (5) of this article.

(2) Where a limitation on the number of suppliers or contractors to be invited to the auction has been imposed in accordance with article 51 ter (2), the procuring entity shall send the invitation to participate in the auction individually and simultaneously to each supplier or contractor selected corresponding to the number, and in accordance with the criteria and procedure, specified in the notice of the electronic reverse auction.

(3) Where the auction has been preceded by prequalification of suppliers or contractors in accordance with articles 7 and 51 ter (3), the procuring entity shall send the invitation to participate in the auction

²² The Working Group may wish to consider whether the cross-referred provisions should be restated in full in this paragraph.

²³ The Working Group may wish to consider whether the cross-referred provisions should be restated in full in this paragraph.

²⁴ The Working Group may wish to consider whether the cross-referred provisions should be restated in full in this paragraph.

²⁵ The draft article is new. It draws on draft articles 51 bis (3) to (7) and 51 quater (1) in document A/CN.9/WG.I/WP.55, and A/CN.9/640, para. 80.

individually and simultaneously to each supplier or contractor prequalified in accordance with article 7 of this Law.

(4) Where the auction has been preceded by the assessment of responsiveness or full evaluation of initial submissions in accordance with articles 26, 28 to 32, 33 (1), 34 (1) and (2) and 51 ter (4) and (5), the procuring entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor except for those whose submission has been rejected in accordance with article 34 (3). The procuring entity shall notify each supplier or contractor concerned on the outcome of the assessment of responsiveness or the full evaluation, as the case may be, of its respective initial submission.

(5) Unless already provided in the notice of the electronic reverse auction, the invitation to participate in the auction shall set out:

(a) The deadline by which the invited suppliers and contractors shall register to participate in the auction;

(b) The date and time of the opening of the auction;

(c) The requirements for registration and identification of bidders at the opening of the auction;

(d) Information concerning individual connection to the electronic equipment being used; and

(e) All other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction.

(6) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction in accordance with this article is sufficient to guarantee effective competition [to the greatest reasonable extent].”

“Article 51 quinquies. Registration to participate in the electronic reverse auction and timing of holding of the auction²⁶

(1) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.

(2) If the number of suppliers or contractors registered to participate in the auction is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity may cancel the electronic reverse auction. The fact of the cancellation of the auction shall be promptly communicated individually to each registered supplier or contractor.

(3) The auction shall not take place before expiry of adequate time after the notice of the electronic reverse auction has been issued or, where invitations to participate in the auction are sent, from the date of sending the invitations to all suppliers or contractors concerned. This time shall be sufficiently long to allow suppliers or contractors to prepare for the auction.”

²⁶ The draft article is new. It draws on draft articles 51 bis (8) and (9) and 51 quater (2) in document A/CN.9/WG.I/WP.55.

“Article 51 sexies. Requirements during the auction²⁷

- (1) During an electronic reverse auction:
 - (a) All bidders shall have an equal and continuous opportunity to present their submissions;
 - (b) There shall be automatic evaluation of all submissions in accordance with the criteria and other relevant information included in the notice of the electronic reverse auction;
 - (c) Each bidder must instantaneously and on a continuous basis during the auction receive sufficient information allowing it to determine a standing of its submission vis-à-vis other submissions;
 - (d) There shall be no communication between the procuring entity and the bidders, other than as provided for in paragraphs 1 (a) and (c) above.
- (2) The procuring entity shall not disclose the identity of any bidder during the auction.
- (3) The auction shall be closed in accordance with the criteria specified in the notice of the electronic reverse auction.
- (4) The procuring entity [may] [must] [shall] suspend or terminate the electronic reverse auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the electronic reverse auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.”

“Article 51 septies. Award of the procurement contract on the basis of the results of the electronic reverse auction²⁸

- (1) The procurement contract shall be awarded to the bidder that, at the closure of the auction, presented the submission with the lowest price or the lowest evaluated submission, as applicable, unless such submission is rejected in accordance with articles 12, 12 bis, 15 and [36 (...)]. In such case, the procuring entity may:
 - (a) Award the procurement contract to the bidder that, at the closure of the auction, presented the submission with the next lowest price or next lowest evaluated submission, as applicable; or
 - (b) Reject all remaining submission in accordance with article 12 (1) of this Law; or
 - (c) Hold another auction under the same procurement proceedings; or

²⁷ The draft article is new. It draws on draft article 51 quinquies in document A/CN.9/WG.I/WP.55. Revisions in paragraph (4) draw on paragraphs 86-87 of A/CN.9/640.

²⁸ The draft article is new. It draws on draft article 51 sexies in document A/CN.9/WG.I/WP.55: paragraph (1) of that draft article was revised; paragraphs (2) to (4) of the current draft are new (paragraph (2) draws on the provisions of article 34 (6) of the Model Law); and paragraphs (5) and (6) repeat paragraphs (2) and (3) of draft article 51 sexies in document A/CN.9/WG.I/WP.55. All changes were made in the light of A/CN.9/640, para. 89.

(d) Announce new procurement proceedings; or

(e) Cancel the procurement.

(2) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor presenting the submission that has been found to be the successful submission to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 6.

(3) Where it has not assess responsiveness of initial submissions prior to the auction, the procuring entity shall assess after the auction the responsiveness of the submission that has been found to be the successful submission.

(4) The procuring entity may engage in procedures described in article 12 bis if the submission that has been found to be the successful submission gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract.

(5) Notice of acceptance of the submission shall be given promptly to the bidder that presented the submission that the procuring entity is prepared to accept.

(6) The name and address of the bidder with whom the procurement contract is entered into and the contract price shall be promptly communicated to other bidders.”

2. Guide to Enactment text

6. In accordance with the view expressed at the Working Group’s twelfth session,²⁹ the text to accompany articles 51 bis to septies will be proposed for the Working Group’s consideration as soon as the Working Group agrees on the main issues of principle as regards these articles and on their presentation and structure. The relevant points for reflection in the accompanying provisions of the Guide are listed in document A/CN.9/WG.I/WP.55. In addition, at the Working Group’s twelfth session, some suggestions have been made as regards the guidance to be provided to enacting States in relation to the relevant provisions of the Model Law.³⁰

C. Consequential changes to provisions of the Model Law: record of procurement proceedings (article 11 of the Model Law)

7. The proposed revisions to article 11 reflect suggestions made at the Working Group’s twelfth session:³¹

“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:

²⁹ A/CN.9/640, para. 26.

³⁰ Ibid., paras. 79, 81, 85 and 89.

³¹ Ibid., paras. 90-91.

...

(i bis) In procurement proceedings involving the use of electronic reverse auctions, information about the grounds and circumstances on which the procuring entity relied to justify recourse to the auction, the date and time of the opening and closing of the auction and [any other information that the Working Group decides to add].

(2) Subject to article 33 (3), the portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) of this article shall, on request, be made available to any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to article 33 (3), the portion of the record referred to in subparagraphs (c) to (g), and (m), of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs (c) to (e), and (m), may be ordered at an earlier stage by a competent court.

(4) Except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) Information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1) (e).

(5) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.”

8. It was agreed that the Guide should note possible risks of collusion in subsequent procurement if the names of unsuccessful bidders, or of bidders in suspended or terminated procurement proceedings were disclosed. It was also agreed that the Guide would discuss the meaning of the term “opening of the auction” referred to in article 11 (1) (i bis).³²

³² Ibid.