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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – a revised text of the Model Law

Note by the Secretariat

Addendum

This note sets out articles 16-22 of chapter I (General provisions) and chapter II (Tendering proceedings) of a revised text of the Model Law. The Secretariat's comments are set out in the accompanying footnotes and in the square brackets in bold.



CHAPTER I. GENERAL PROVISIONS *(continued)*

Article 16. Rejection of all submissions¹

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval)), and if so specified in the solicitation or equivalent documents,² the procuring entity may reject all submissions at any time prior to the acceptance of a submission. The procuring entity shall upon request communicate to any supplier or contractor that presented a submission, the grounds for its rejection of all submissions, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have presented submissions.

(3) Notice of the rejection of all submissions shall be given promptly to all suppliers or contractors that presented submissions.

Article 17. Rejection of abnormally low submissions³

(1) The procuring entity may reject a submission if the procuring entity has determined that the submitted price with constituent elements of a submission is, in relation to the subject matter of the procurement, abnormally low and raises concerns with the procuring entity as to the ability of the supplier or contractor to perform the procurement contract, provided that:

(a) The procuring entity has requested in writing from the supplier or contractor concerned details of constituent elements of a submission that give rise to concerns as to the ability of the supplier or contractor 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 submission 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.

¹ Reproduces article 12 with consequential amendments in the light of the newly proposed definitions in article 2.

² The Working Group has expressed concern as to whether the second opening phrase in this article should be retained. The Working Group deferred the consideration of any amendments to this article to a future session (A/CN.9/623, para. 36).

³ The article is as preliminarily agreed by the Working Group at its twelfth session (draft article 12 bis, A/CN.9/640, paras. 44-55). Consequential amendments were made in the light of the newly proposed definitions in article 2.

Article 18. Rejection of a submission on the ground of inducements from suppliers or contractors or on the ground of conflicts of interest⁴

1. (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a submission if the supplier or contractor that presented it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings.

2. The rejection of the submission under this article and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.⁵

Article 19. Acceptance of submissions and entry into force of the procurement contract⁶

(1) Unless rejected in accordance with the provisions of this Law, the procuring entity shall accept the successful submission.⁷

(2) Except in the case of single-source procurement, the procuring entity shall promptly notify all suppliers or contractors participating in the procurement proceedings of its decision to accept the successful submission. The notice shall contain, at a minimum, the following information:⁸

(a) The name and address of the supplier or contractor presenting the successful submission;

(b) The contract price or, where necessary, a summary of other characteristics and relative advantages of the successful submission, provided that the procuring entity shall not disclose any information if its disclosure would be

⁴ Based on article 15 of the 1994 Model Law, which was amended in the light of the newly proposed definitions in article 2 and further to the Working Group's discussions of conflicts of interest at its fourteenth session (A/CN.9/664, para. 116). The title of the article has been amended accordingly.

⁵ In the light of the Working Group's discussions of conflicts of interest at its fourteenth session (A/CN.9/664, para. 116), the Working Group may wish to consider whether a provision should be including requiring the rejection of a submission that has been presented in circumstances indicating a conflict of interest. Alternatively, the Working Group may consider that the supplier or contractor should not be penalised if a procurement official has a conflict of interest, but that the procurement should be cancelled and another proceeding commenced.

⁶ Based on article 36 of the 1994 Model Law, which was amended in the light of: (i) the introduction of a standstill period (see the relevant Working Group's discussions in A/CN.9/664, paras. 45-55 and 72); (ii) expansion of the application of the article to all methods of procurement (see A/CN.9/WG.I/WP.66, para. 57 (a)); and (iii) the newly proposed definitions in article 2 and other revisions to the Model Law. It replaces article 13 of the 1994 Model Law.

⁷ Based on article 36 (1), the first sentence, of the 1994 Model Law.

⁸ The paragraph is new and was introduced further to the Working Group's decision to introduce a standstill period in article 36 of the 1994 Model Law (see A/CN.9/664, paras. 45-55 and 72).

contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the suppliers or contractors or would impede fair competition;⁹ and

(c) The period before the entry into force of the procurement contract during which the suppliers or contractors concerned may seek review of the decisions of the procuring entity related to the ascertainment of the successful submission (the standstill period). The standstill period shall be sufficiently long, but not shorter than [10/20]¹⁰ days, to allow the suppliers or contractors concerned to seek where necessary the effective review in accordance with chapter VII of this Law, and shall run from the date of the dispatch of the notice referred to in this paragraph to all suppliers or contractors participating in the procurement proceedings.

(3) Paragraph (2) of this article shall not apply [to awards where the contract price is less than [...]]¹¹ or] where the procuring entity certifies that urgent public interest considerations require the procurement to proceed without a standstill period. The certification, which shall state the grounds for the finding that such urgent considerations exist, shall be made a part of the record of the procurement proceedings and shall be conclusive with respect to all levels of review under chapter VII of this Law except judicial review.¹²

(4) Upon expiry of the standstill period, or in the absence of an applicable standstill period, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission unless otherwise determined by the review body or ordered by a competent court.¹³

(5) Unless a written procurement contract and/or approval by a higher authority is/are required, a procurement contract in accordance with the terms and conditions of the accepted submission enters into force when the notice of acceptance is

⁹ The paragraph is based on the relevant provisions of the EU Directive 2007/66/EC of 11 December 2007 (see article 2a. Standstill period). The provisions on limitations of disclosure are based on similar provisions found in several provisions of the 1994 Model Law (see e.g., article 12 (3) (a)).

¹⁰ The duration could be aligned with the provisions of articles [53 and 54] (see A/CN.9/WG.I/WP.66/Add.4). See however the relevant footnotes to articles [53 and 54] wherein the Working Group is invited to consider shortening this duration, such as to the 10-day period contemplated by EU Directive 2007/66/EC of 11 December 2007.

¹¹ The provisions are based on article 2b of the EU Directive 2007/66/EC of 11 December 2007. The Working Group may wish to consider whether the threshold should be the same as in article [20 (3)] of the Model Law, as the draft provisions indicate. The Working Group may wish to consider the other exceptions to the standstill period. For example, the EU Directive allows derogation from the standstill period in other cases where prior publication of a contract notice is not required (such as negotiated procedures without the prior publication of a contract notice).

¹² The paragraph is new. The provisions therein reflect the Working Group's decision at its fourteenth session (A/CN.9/664, para. 72).

¹³ The paragraph is new. It is based on provisions of article 36 (1) and (4) of the 1994 Model Law, with the consequential changes in the light of the introduction of a standstill period and the provisions on review in chapter VII of the revised Model Law.

dispatched¹⁴ to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in force.¹⁵

(6) Where the solicitation or equivalent documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:

(a) The procuring entity (the requesting ministry) and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation or equivalent documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity (the requesting ministry). Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity (the requesting ministry) nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.¹⁶

(7) Where the solicitation or equivalent documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation or equivalent documents shall specify the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation or equivalent documents shall not extend the period of effectiveness of submissions specified in the solicitation or equivalent documents or the period of effectiveness of the security required under article [14] of this Law.¹⁷

(8) If the supplier or contractor whose submission has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful submission in accordance with the applicable provisions from among the remaining submissions that are in force, subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining submissions. The

¹⁴ See the current Guide to Enactment text to article 36, paragraph 5, for the rationale behind linking the effects of legal acts under this article to dispatch rather than receipt of the notices.

¹⁵ The paragraph is based on provisions of article 36 (4), the first sentence, of the 1994 Model Law, with the consequential changes to reflect the proposed revisions to the Model Law. The second sentence of article 36 (4) of the 1994 Model Law was placed in paragraph (9) of this article to make the rule on dispatches applicable to all notices sent by the procuring entity under this article, not only to the notice of acceptance.

¹⁶ The paragraph is based on article 36 (2) of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law.

¹⁷ The paragraph is based on article 36 (3) of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law.

provisions of this article shall then apply to the supplier or contractor that presented that submission.¹⁸

(9) The notices under this article are dispatched when they are properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by means specified in accordance with article [8] of this Law.¹⁹

(10) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.²⁰

(11) The provisions of this article shall apply, as appropriate, to the selection of the party or parties to the closed framework agreements in accordance with articles [...] of this Law as well as to the award of procurement contracts under open and closed framework agreements in accordance with articles [...] of this Law.²¹

Article 20. Public notice of awards of procurement contract and framework agreement²²

(1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name of the supplier or contractor to whom the procurement contract was awarded or, in the case of the framework agreement, name(s) of the supplier(s) or contractor(s) with whom the framework agreement was concluded.²³

¹⁸ The paragraph is based on article 36 (5) of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law.

¹⁹ The paragraph is based on provisions of article 36 (4), the second sentence, of the 1994 Model Law, with the consequential changes to reflect the proposed revisions to the Model Law. The provisions were placed in a paragraph to make the rule on dispatches applicable to all notices sent by the procuring entity under this article, not only to the notice of acceptance.

²⁰ The paragraph is based on article 36 (6) of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law.

²¹ The paragraph is new and based on the provisions of article 2b of the EU Directive 2007/66EC of 11 December 2007, except that the EU directive requires the standstill period only for contracts concluded under framework agreements with the second stage competition and under dynamic purchasing systems.

²² Based on article 14 of the 1994 Model Law, which was amended to reflect the revisions to the Model Law.

²³ The paragraph is based on article 14 (1). Provisions related to framework agreements as well as provisions on disclosure of the name(s) of the supplier(s) or contractor(s) were added. See A/CN.9/WG.I/WP.66, para. 60. The Working Group may wish to include further amendments to reflect the requirements for framework agreements here or in the framework agreements provisions, such as: "Where the contract price under a framework agreement exceeds [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations], the procuring entity shall promptly publish notice of the award of the procurement contract(s). The procuring entity shall also publish, in the same manner, [quarterly] notices of all procurement contracts issued under a framework agreement or in any other manner set out in the framework agreement".

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1).²⁴

(3) Paragraph (1) is not applicable to awards where the contract price is less than [...].²⁵

Article 21. Confidentiality²⁶

(1) The procuring entity shall treat submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors.

(2) Any discussions, communications and negotiations between the procuring entity and a supplier or contractors pursuant to articles in chapter IV of this Law shall be confidential. Unless required by law or by a court order or permitted in solicitation or equivalent documents, no party to the negotiations shall disclose to any other person any technical, price or other information relating to the negotiations without the consent of the other party.

Article 22. Record of procurement proceedings²⁷

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

(a) A brief description of the subject matter of the procurement;²⁸

(b) The names and addresses of suppliers or contractors that presented submissions, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;²⁹

(c) The procuring entity's decision as to the means of communication to be used in the procurement proceedings;³⁰

(d) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented submissions;³¹

²⁴ Reproduces article 14 (2).

²⁵ Reproduces article 14 (3).

²⁶ The article is new and based on the provisions of article 45 of the Model Law and model provision 24 of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects.

²⁷ The article is based on article 11 of the 1994 Model Law, with the consequential changes in the light of the proposed revisions to the Model Law. The Working Group deferred the consideration of article 11 of the 1994 Model Law as a whole until after all other revisions to the Model Law had been agreed upon. See A/CN.9/WG.I/WP.66, para. 61.

²⁸ Based on article 11 (1) (a) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

²⁹ Based on article 11 (1) (b) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. The Working Group may wish to consider the amendments to this subparagraph in the light of the provisions on framework agreements.

³⁰ The new subparagraph is as preliminarily approved by the Working Group at its ninth session (subparagraph (b) bis, A/CN.9/595, paras. 49-51).

³¹ Based on article 11 (1) (c) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

(e) The price, or the basis for determining the price, and a summary of the other principal terms and conditions of each submission and of the procurement contract, where these are known to the procuring entity;³²

(f) A summary of the evaluation and comparison of submissions, including the application of any margin of preference pursuant to article [12 (4)];³³

(g) If all submissions were rejected pursuant to article [16] of this Law, a statement to that effect and the grounds therefor, in accordance with article [16 (1)];³⁴

(h) If, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;³⁵

(i) The information required by articles [17 and 18], if a submission was rejected pursuant to those provisions;³⁶

(j) The statement of the grounds and circumstances required under article [7 (9)];³⁷

(k) 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];³⁸

[(l) In the procurement of services by means of chapter IV, the statement required under article 41 (2) of the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;]³⁹

³² Based on article 11 (1) (d) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. The Working Group may wish to consider the amendments to this subparagraph in the light of the provisions on framework agreements.

³³ Based on article 11 (1) (e) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

³⁴ Based on article 11 (1) (f) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2.

³⁵ Reproduces article 11 (1) (g) of the 1994 Model Law.

³⁶ Based on article 11 (1) (h) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. In addition, the subparagraph was amended to reflect the introduction of the article on the abnormally low submissions (see article 17 of the revised Model Law).

³⁷ Based on articles 11 (1) (i), (k) and (l), which were merged in the light of provisions of the proposed new article 7.

³⁸ The new subparagraph is as preliminarily approved by the Working Group at its eleventh and twelfth sessions (subparagraph (i) bis, A/CN.9/623, para. 100, and A/CN.9/640, para. 91). The Working Group is to consider whether any other information should be added in lieu of the words in the square brackets.

³⁹ Reproduces article 11 (1) (j). To be considered together with chapter IV.

(m) A summary of any requests for clarification of the prequalification documents, or solicitation or equivalent documents, the responses thereto, as well as a summary of any modification of those documents;⁴⁰

(n) Other information required to be included in the record in accordance with the provisions of this Law.⁴¹

(2) Subject to article [32 (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 submission has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.⁴²

(3) Subject to article [32 (3)], the portion of the record referred to in subparagraphs [(d) to (h), and (m)], of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that presented a submission, or applied for prequalification, after a submission 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 [(d) to (f), and (m)], may be ordered at an earlier stage by a competent court.⁴³

(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 submissions, and submission prices, other than the summary referred to in paragraph [(1) (f)] of this article.⁴⁴

(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.⁴⁵

⁴⁰ Based on article 11 (1) (m) of the 1994 Model Law, with the consequential changes in the light of the proposed new definitions in article 2. Further provision “to reflect information that will be required as part of the record under the revised Model Law may be necessary”.

⁴¹ The Working Group may wish to include further specific provision, such as regarding framework agreements if it decides that technological constraints may limit the number of suppliers that may be admitted to an open framework agreement.

⁴² Based on article 11 (2) of the 1994 Model Law, with the consequential changes in the cross references and changes in the light of the proposed new definitions in article 2.

⁴³ Based on article 11 (3), first two sentences, of the 1994 Model Law, with the consequential changes in the cross references and changes in the light of the proposed new definitions in article 2. Reflecting suggestions made at the Working Group’s twelfth session (A/CN.9/640, para. 90), the remaining provisions from paragraph (3) were placed in the new paragraph (4), with the consequential renumbering of the old paragraph (4) to paragraph (5). The restructured provisions were presented to the Working Group for consideration in document A/CN.9/WG.I/WP.59. The Working Group did not consider them in detail.

⁴⁴ Based on article 11 (3), the last sentence, of the 1994 Model Law, with the consequential changes in the cross reference and changes in the light of the proposed new definitions in article 2. See the immediately preceding footnote for further information.

⁴⁵ Reproduces article 11 (4) of the 1994 Model Law. The Working Group may wish to consider this

CHAPTER II. TENDERING PROCEEDINGS⁴⁶

SECTION I. SOLICITATION OF TENDERS

Article 23. Domestic tendering⁴⁷

In domestic solicitation under article [7 (2) (c)] of this Law, the procuring entity shall not be required to employ the procedures set out in articles 14 (1) (c),⁴⁸ 24 (2),⁴⁹ 25 (h) and (i),⁵⁰ and 27 (j), (k) and (s),⁵¹ of this Law.⁵²

Article 24. Procedures for soliciting tenders⁵³

(1) A procuring entity shall solicit tenders by causing an invitation to tender to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to tender is to be published).

(2) The invitation to tender shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.⁵⁴

Article 25. Contents of invitation to tender⁵⁵

The invitation to tender shall contain, at a minimum, the following information:

- (a) The name and address of the procuring entity;

provision, which was taken from article 11 (4) of the 1994 Model Law, in the light of its decisions as regards remedies and enforcement.

⁴⁶ The provisions of chapter II of the 1994 Model Law were included in article 7 and the relevant articles of chapters III and IV of the revised Model Law. Chapter II reproduces the provisions of chapter III of the Model Law, except as marked to reflect the revisions made to the Model Law.

⁴⁷ Based on article 23 of the 1994 text, which was amended in the light of article 7 (2) (c) of the revised Model Law. The cross-references were updated in the light of the proposed revisions to the Model Law.

⁴⁸ Corresponds to the reference to article 32 (1) (c) in article 23 of the 1994 Model Law.

⁴⁹ Corresponds to the reference to the same article in article 23 of the 1994 Model Law.

⁵⁰ Corresponds to the references to articles 25 (1) (h) and 25 (1) (i) in article 23 of the 1994 Model Law.

⁵¹ Corresponds to the references to articles 27 (j), 27 (k) and 27 (s) in article 23 of the 1994 Model Law.

⁵² The references to articles 25 (2) (c) and 25 (2) (d) in article 23 of the 1994 Model Law were reflected in the relevant provisions of article 15 of the revised Model Law since they were related to prequalification.

⁵³ Reproduces article 24 of the 1994 Model Law, except for the provisions related to invitation to prequalify, which were reflected in the relevant provisions of article 15 of the revised Model Law.

⁵⁴ As noted in A/CN.9/WG.I/WP.66/Add.1, the Working Group may wish to include a definition of “international” publication so as to simplify the drafting of this article and 7 (7) (c).

⁵⁵ Reproduces article 25 of the 1994 Model Law, except for the provisions related to the invitation to prequalify procedure, which were reflected in the relevant provisions of article 15 of the revised Model Law. Other consequential changes were made to this article.

(b) The nature and quantity, and place of delivery of goods to be supplied, the nature and location of construction to be effected, or the nature and location of services to be provided, or the appropriate combination thereof;⁵⁶

(c) The desired or required time for the supply of goods or for the completion of construction, or the timetable for the provision of services, or appropriate combination thereof;

(d) The criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article [10 (1) (b)];

(e) A declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article [9 (1)], as the case may be;

(f) The means of obtaining the solicitation documents and the place from which they may be obtained;

(g) The price, if any, charged by the procuring entity for the solicitation documents;

(h) The currency and means of payment for the solicitation documents;

(i) The language or languages in which the solicitation documents are available;

(j) The place and deadline for the submission of tenders.

Article 26. Provision of solicitation documents⁵⁷

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified [or preselected]⁵⁸ and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors.

Article 27. Contents of solicitation documents⁵⁹

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

(a) Instructions for preparing tenders;

⁵⁶ This formulation amends slightly the 1994 text, so as to remove prescriptive references to goods, construction or services procurement, as does the revision to the following subparagraph.

⁵⁷ Reproduces article 26 of the 1994 Model Law with a change as indicated in the text.

⁵⁸ Consequential change in the light of the proposed amendments to article 15.

⁵⁹ Reproduces article 27 of the 1994 Model Law with changes as indicated in the text and updates of cross references, in the light of the proposed revisions to the Model Law.

(b) The criteria and procedures, in conformity with the provisions of article [10], relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article [33 (6)];

(c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

[draft new sub-paragraph (d) for consideration]

(d) The description of the subject matter of the procurement, in conformity with article [11];⁶⁰ the quantity of goods and/or services to be performed; the location where construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;

[old sub-paragraph (d) to be deleted]

“(d) The nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;”

[draft new sub-paragraph (e) for consideration]

(e) The evaluation criteria in accordance with article [12];⁶¹

[old sub-paragraph (e) to be deleted]

“(e) The criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 34 (4) (b), (c) or (d) and the relative weight of such criteria;”

[continuation of 1994 text, with amendments as noted]

(f) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(g) If alternatives to the characteristics of the subject matter of the procurement,⁶² contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;

⁶⁰ Consequential change in the light of the proposed new definition in article 2 and amendments to article 11.

⁶¹ Consequential change in the light of the proposed new article 12.

⁶² Consequential change in the light of the proposed new definition in article 2.

(h) If suppliers or contractors are permitted to submit tenders for only a portion of the subject matter of the procurement,⁶³ a description of the portion or portions for which tenders may be submitted;

(i) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself,⁶⁴ such as any applicable transportation and insurance charges, customs duties and taxes;

(j) The currency or currencies in which the tender price is to be formulated and expressed;

(k) The language or languages, in conformity with article [29], in which tenders are to be prepared;

(l) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors submitting tenders in accordance with article 14,⁶⁵ and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and materials bonds;

(m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) The manner, place and deadline for the submission of tenders, in conformity with article [30];

(o) The means by which, pursuant to article [28], suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) The period of time during which tenders shall be in effect, in conformity with article [31];

(q) The place, date and time for the opening of tenders, in conformity with article [32];

(r) The procedures to be followed for opening and examining tenders;

(s) The currency that will be used for the purpose of evaluating and comparing tenders pursuant to article [33 (5)] and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Consequential change in the light of the proposed new article 14.

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings;⁶⁶

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) Notice of the right provided under article [52] of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) If the procuring entity reserves the right to reject all tenders pursuant to article [16], a statement to that effect;

(y) Any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article [19], and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(z) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

Article 28. Clarifications and modifications of solicitation documents⁶⁷

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all

⁶⁶ The following phrase has been deleted in this subparagraph: “provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity”, consequent to the deletion of paragraph (2) of article 52 of the 1994 Model Law setting out the exemptions from the review (the reference to article 27 (t) was contained in subparagraph (f) of that paragraph) (see A/CN.9/664, para. 27).

⁶⁷ Reproduces article 28 of the 1994 Model Law.

suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their tenders.

SECTION II. SUBMISSION OF TENDERS

Article 29. Language of tenders⁶⁸

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

Article 30. Submission of tenders⁶⁹

(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to article [28], the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(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;

⁶⁸ Reproduces article 29 of the 1994 Model Law. The Working Group may wish to merge this article with the proposed new article 13 (article 17 of the 1994 text of the Model Law), to become a rule applicable to all submissions rather than only to tenders.

⁶⁹ Reproduces article 30 of the 1994 Model Law.

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

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law.⁷⁰

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders⁷¹

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) 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 submission security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of submission securities provided by them or provide new submission securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose submission security is not extended, or that has not provided a new submission security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its submission security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders.

⁷⁰ The text of paragraph (5) of this article is as preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 28).

⁷¹ Reproduces article 31 of the 1994 Model Law, with replacement of references to “tender” securities with reference to “submission” securities, given proposed new definition in draft article 2 (e).

[article 32. Tender securities is proposed as draft article 14. Securities, and has been placed in chapter I. General provisions, in order to apply its provisions to all procurement methods]⁷²

SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 32. Opening of tenders⁷³

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(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 have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders.⁷⁴

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article [22].

Article 33. Examination, evaluation and comparison of tenders⁷⁵

(1) (a) The procuring entity may ask a supplier or contractor individually for clarifications of its tender⁷⁶ 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.

⁷² See A/CN.9/WG.I/WP.66, para. 57 (c).

⁷³ Reproduces article 33 of the 1994 Model Law, except where marked otherwise and the consequential update of the cross reference.

⁷⁴ The text of paragraph (2) of this article is as preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 38).

⁷⁵ Reproduces article 34 of the 1994 Model Law, except where marked otherwise and the consequential update of the cross reference.

⁷⁶ Previously read "The procuring entity may ask suppliers or contractors for clarifications of their tenders".

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the solicitation documents;⁷⁷

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(3) The procuring entity shall reject⁷⁸ a tender:

(a) If the supplier or contractor that submitted the tender is not qualified;

(b) If the supplier or contractor that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) If the tender is not responsive;⁷⁹

(d) In the circumstances referred to in articles [17 and 18].⁸⁰

(4) (a) The procuring entity shall evaluate and compare the tenders that have not been rejected⁸¹ in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

(b) The successful tender shall be:

(i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to article [12]; or

(ii) If the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of the evaluation criteria specified in the solicitation documents pursuant to article [12].⁸²

[old subparagraphs (c) and (d) were deleted in the light of the proposed new article 12]

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article [27 (s)], for the purpose of evaluating and comparing tenders.

⁷⁷ Previously read "tender solicitation documents".

⁷⁸ The word "reject" replaced the words "not accept" in the light of the use of the word "accept" in the Model Law in the context of the acceptance of the successful submission for the purpose of entering into the procurement contract under article 19 of the revised Model Law (article 36 of the 1994 Model Law).

⁷⁹ The Working Group may wish to include a reference to proposed article 11.

⁸⁰ Previously the reference was only to article 15 on inducement. The revisions cover also situations of abnormally low submissions (article 17 of the revised Model Law).

⁸¹ The words "have not been rejected" replaced the words "have been accepted." See footnote 75.

⁸² Paragraph (b) was amended in the light of the proposed new article 12.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article [15], the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article [10]. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders, subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in articles [19 and 22].⁸³

Article 34. Prohibition of negotiations with suppliers or contractors⁸⁴

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender submitted by the supplier or contractor.

⁸³ The reference in this provision of the 1994 Model Law was only to article 11 on record of procurement proceedings. In the revised provisions, the reference to article 19 was added in the light of the proposed new article 19.

⁸⁴ Reproduces article 35 of the 1994 Model Law.