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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 draft articles 15-22 of chapter I (General provisions) and draft articles 23-30 of chapter II (Tendering proceedings) of a revised text of the Model Law. Draft articles 31-33 of chapter II are set out in document A/CN.9/WG.I/WP.69/Add.3.

The Secretariat draws the attention of the Working Group to the following provisions, the consideration of which was deferred by the Working Group at its fifteenth session to a later stage: draft articles 16 (1), 19 (2) and (11), 21, 22 and 30.

The Secretariat's comments are set out in the accompanying footnotes and, where in the text, in square brackets.



CHAPTER I. GENERAL PROVISIONS

(*continued*)

Article 15. Prequalification proceedings¹

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the solicitation, suppliers and contractors that are qualified. The provisions of article [10] shall apply to prequalification proceedings.²

(2) If the procuring entity engages in prequalification proceedings, it shall cause an invitation to prequalify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to prequalify is to be published). The invitation to prequalify 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, except where the procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law.³

(3)⁴ The invitation to prequalify shall contain, at a minimum, the following information:

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

(b) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [10 (2)];

(d) 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;

(e) The means, manner and modalities of obtaining the prequalification documents;⁵

¹ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 94-110).

² The paragraph has been revised pursuant to the Working Group's decisions at its fifteenth session (A/CN.9/668, paras. 95 and 96).

³ The Working Group, at its fifteenth session, approved the paragraph without change (A/CN.9/668, para. 97).

⁴ Ibid.

⁵ This subparagraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

(f) The price, if any, charged by the procuring entity for the prequalification documents and, subsequent to prequalification, for the solicitation documents;

(g) Except procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law, the currency and terms of payment for the prequalification documents and, subsequent to prequalification, for the solicitation documents;

(h) Except procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law, the language or languages in which the prequalification documents are available and in which, subsequent to prequalification, the solicitation documents will be available;

(i) The manner, modalities and deadline for the submission of applications to prequalify. The deadline for the submission of applications to prequalify shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity.⁶

(4) The procuring entity shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of providing them to suppliers or contractors.⁷

(5)⁸ The prequalification documents shall include, at a minimum the following information:

(a) Instructions for preparing and submitting prequalification applications;

(b) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(c) 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 prequalification proceedings, without the intervention of an intermediary;

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

(e) If already known, the manner, modalities and deadline for presenting submissions;⁹

(f) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings.

⁶ This subparagraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

⁷ The Working Group, at its fifteenth session, approved the paragraph without change (A/CN.9/668, para. 97).

⁸ Ibid.

⁹ This subparagraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

(6) 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.¹⁰

(7) The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.¹¹

(8) Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.¹²

(9) 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.¹³

(10) The procuring entity shall upon request promptly¹⁴ communicate to suppliers or contractors that have not been prequalified the grounds therefor.^{15, 16}

Article 16. Rejection of all submissions¹⁷

(1) The procuring entity may reject all submissions [cancel the procurement]¹⁸ at any time prior to the acceptance of a submission.¹⁹ The procuring entity shall [upon request] communicate to any supplier or contractor that presented a submission, the

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ The Working Group, at its fifteenth session, approved the paragraph with a minor consequential change (A/CN.9/668, para. 105).

¹⁴ The Working Group agreed that the Guide should explain that the notice ought to be given prior to the solicitation (A/CN.9/668, para. 106).

¹⁵ The paragraph has been revised pursuant to the Working Group's decisions at its fifteenth session (A/CN.9/668, paras. 106-108). See further A/CN.9/WG.I/WP.68/Add.1, under section II.H.

¹⁶ The last paragraph of this draft article that was before the Working Group at its fifteenth session was removed to the proposed article 10, pursuant to the preference expressed during the Working Group's deliberations at its fifteenth session (A/CN.9/668, para. 109).

¹⁷ The Working Group, at its fifteenth session, deferred the approval of the draft article, which is based on article 12 of the 1994 Model Law, as revised at that session to a later date (A/CN.9/668, para. 116).

¹⁸ The Working Group may wish to consider whether the procuring entity would require an express authorization to cancel the procurement before submissions are received, and whether, if so, the reference to rejecting all submissions would become superfluous.

¹⁹ The two opening phrases in this sentence were deleted pursuant to the Working Group's decisions at its fifteenth session (A/CN.9/668, paras. 112 and 113).

grounds for its rejection of all submissions[, but is not required to justify those grounds].²⁰

(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.²¹

(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 submissions²²

(1) The procuring entity may reject a submission if the procuring entity has determined that the submitted price with [and/or] the 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 the 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,²³ 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.

²⁰ The words in two sets of square brackets in the paragraph were proposed to be deleted at the Working Group's fifteenth session. The Working Group deferred the consideration of the proposed revisions to a later date (A/CN.9/668, paras. 114-116). See further A/CN.9/WG.I/WP.68/Add.1, under section II.H.

²¹ The Working Group may wish to consider the effect of this provision in conjunction with the revised provisions on remedies and enforcement in chapter VII of the revised Model Law, which render a decision to reject all submissions subject to review.

²² The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 120), but noted that other reasons for rejection (such as money-laundering) would be discussed in the Guide.

²³ The Working Group may wish to consider whether the term "reasonable" might be capable of different interpretations, and whether an alternative formulation, such as "on the basis of all the information provided by the supplier or contractor and in the submission" might be less subject to subjective interpretation.

Article 18. Rejection of a submission on the ground of inducements from suppliers or contractors or on the ground of conflicts of interest²⁴

(1) A procuring entity shall reject a submission if:

(a) 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;²⁵ or

(b) The supplier or contractor has gained an unfair competitive advantage as the result of a conflict of interest in violation of the applicable standards.²⁶

(2) The rejection of the submission under this article and the grounds therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.²⁷

Article 19. Acceptance of submissions and entry into force of the procurement contract²⁸

(1) Unless rejected in accordance with the provisions of this Law, the procuring entity shall accept the successful submission.²⁹

(2) [Except in the case of single-source procurement,] the procuring entity shall promptly notify all suppliers or contractors whose submissions were evaluated of its intended decision to accept the successful submission. The notice shall contain, at a minimum, the following information:³⁰

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

²⁴ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 121-125).

²⁵ The Working Group, at its fifteenth session, approved the paragraph, which reproduced in the relevant part article 15 of the 1994 Model Law, with the deletion of the opening phrase referring to the higher-level approval (A/CN.9/668, para. 122).

²⁶ The provisions are new and were included further to the Working Group's decisions at the fifteenth session (A/CN.9/668, paras. 123-124).

²⁷ The Working Group, at its fifteenth session, approved the paragraph, which reproduced in the relevant part article 15 of the 1994 Model Law, without change (A/CN.9/668, paras. 121-125).

²⁸ The Working Group deferred the approval of the draft article as proposed to be revised at the fifteenth session to a later stage pending in particular the consideration of the revised paragraphs (2) and (11) (A/CN.9/668, paras. 126-145).

²⁹ The Working Group, at its fifteenth session, approved the paragraph, which is based on article 36 (1), the first sentence, of the 1994 Model Law, without change (A/CN.9/668, para. 127).

³⁰ The paragraph is as proposed to be revised at the Working Group's fifteenth session (A/CN.9/668, para. 129).

(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 confidential information] [any 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 suppliers or contractors or would impede³¹ fair competition];³² 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, 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 to all the suppliers or contractors concerned in accordance with this paragraph.³³

(3) Paragraph (2) of this article shall not apply to awards where the contract price is less than [...] 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.³⁴

(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.³⁵

³¹ The Working Group may wish to consider alternative terms used by the WTO GPA and in Directive 2004/18/EC, such as “prejudice” (used consistently in the GPA when referring to legitimate commercial interests) and “harm” (used in the Directive). If so, the Working Group may wish to instruct the Secretariat to make consequential changes throughout the text (such as in the provisions addressing the record of the procurement and review).

³² At the Working Group’s fifteenth session, the point was made that the exceptions to the disclosure provisions in that paragraph were drafted too broadly, might inhibit transparency, and should be redrafted to refer only to confidential information. In response, it was noted that the language proposed was similar to the language found in the WTO GPA (article XVIII (4)) and Directive 2004/17/EC, article 49 (2); and Directive 2004/18/EC, articles 35 (4), 41 (3) and 69 (2). The Working Group agreed to consider whether to revise the wording at a future session. See further A/CN.9/WG.I/WP.68, under section E. It was also agreed that the Guide would explain that the phrase “to impede fair competition” should be interpreted as encompassing the risks of hampering competition not only in the procurement proceedings in question but also in subsequent procurements (A/CN.9/668, para. 131).

³³ The paragraph is as proposed to be revised at the Working Group’s fifteenth session (A/CN.9/668, para. 133).

³⁴ The Working Group, at its fifteenth session, approved the paragraph as revised at that session (A/CN.9/668, paras. 135-138).

³⁵ The Working Group, at its fifteenth session, approved the paragraph without change (A/CN.9/668, para. 140).

(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 successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in force.³⁶

(6) Where the solicitation 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:³⁷

(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 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.

(7) Where the solicitation 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 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 documents shall not extend the period of effectiveness of submissions specified in the solicitation documents or the period of effectiveness of the submission security required under article [14] of this Law.³⁸

(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] [remain valid], subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining submissions. The provisions of this article shall then apply to the supplier or contractor that presented that submission.³⁹

(9) The notices under this article are dispatched when they are promptly and properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

or contractor, by any reliable means specified in accordance with article [8] of this Law.⁴⁰

(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.⁴¹

(11) The provisions of this article shall apply 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].⁴²

Article 20. Public notice of awards of procurement contract and framework agreement⁴³

(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.

(2) Paragraph (1) is not applicable to awards where the contract price is less than [...] and to awards of procurement contracts under framework agreements unless 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 also publish quarterly notices of all procurement contracts issued under an open framework agreement.

(3) The procurement regulations may provide for the manner of publication of the notices required by paragraphs (1) and (2) of this article.

⁴⁰ The paragraph has been revised pursuant to the request of the Working Group, at its fifteenth session, to reflect that the dispatch of the notices referred to in the article should be made promptly and by reliable means (A/CN.9/668, paras. 132 and 140).

⁴¹ The Working Group, at its fifteenth session, approved the paragraph without change (A/CN.9/668, para. 140).

⁴² The Working Group, at its fifteenth session, deferred the consideration of the paragraph. At that session, views varied as regards the advisability of providing for a standstill period at the stage of the award of procurement contracts under framework agreements (A/CN.9/668, paras. 141-144). An option might be to provide for a short standstill period, which might alleviate the concerns expressed regarding the speed of award appropriate for framework agreements, and which given the more limited concerns that the award of a procurement contract thereunder may pose, may also provide sufficient time for suppliers. In electronic framework agreements, the period could be extremely short.

⁴³ The Working Group, at its fifteenth session, approved the draft article, which is based on article 14 of the 1994 Model Law, as revised at that session (A/CN.9/668, paras. 147-148).

Article 21. Confidentiality⁴⁴

(1) Without prejudice to articles 19 (2), 20, 22 and 31 of this Law, the procuring entity shall treat applications to prequalify and submissions in such a manner as to avoid the [inappropriate]⁴⁵ 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 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 proceedings⁴⁶

(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;⁴⁷

(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;⁴⁸

(c) The procuring entity's decision as to the means of communication to be used in the procurement proceedings;⁴⁹

⁴⁴ The article is as proposed to be revised at the Working Group's fifteenth session (A/CN.9/668, paras. 150-151). The Working Group deferred the consideration of the revised article to a later stage (A/CN.9/668, para. 152).

⁴⁵ At the fifteenth session, the Working Group noted that, where clarifications and modifications of tenders are concerned, and at the public opening of tenders, some disclosure might be necessary, but agreed to reconsider the matter at a future date, together with the guidance that the Guide should provide on the matter (A/CN.9/668, paras. 150 and 151).

⁴⁶ The Working Group, at its fifteenth session, deferred the consideration and the approval of the draft article until after all outstanding issues had been resolved (A/CN.9/668, para. 157). The draft 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 may wish to consider deferring further the consideration of this article until after all outstanding issues in the revised Model Law have been resolved. The Working Group may also wish to consider the provisions on the record of procurement proceedings together with the issues raised in A/CN.9/WG.I/WP.68 and Add.1, sections II, E, F and H.

⁴⁷ 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.

⁴⁸ 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.

⁴⁹ 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).

(d) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented submissions;⁵⁰

(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;⁵¹

(f) A summary of the evaluation and comparison of submissions, including the application of any margin of preference pursuant to article [12 (3) (b)];⁵²

(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)];⁵³

(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;⁵⁴

(i) The information required by articles [17 and 18], if a submission was rejected pursuant to those provisions;⁵⁵

(j) The statement of the grounds and circumstances required under article [7 (8)];⁵⁶

(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, information about the grounds and circumstances on which the procuring entity relied to justify the rejection of the bids submitted during the auction and [any other information that the Working Group decides to add];⁵⁷

⁵⁰ Based on article 11 (1) (c) of the 1994 Model Law, with consequential changes in the light of the proposed new definitions in article 2.

⁵¹ 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.

⁵² 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.

⁵³ 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.

⁵⁴ Reproduces article 11 (1) (g) of the 1994 Model Law.

⁵⁵ 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).

⁵⁶ Based on articles 11 (1) (i), (k) and (l) of the 1994 Model Law, which were merged in the light of provisions of the proposed new article 7.

⁵⁷ The 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) and incorporating the suggestions made at the Working Group's fifteenth session (A/CN.9/668, para. 155). The Working Group is to consider whether any other information should be added in lieu of the words in the square brackets.

[(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;]⁵⁸

(m) A summary of any requests for clarification of the prequalification documents, or solicitation documents, the responses thereto, as well as a summary of any modification of those documents;⁵⁹

(n) In procurement proceedings in which the procuring entity, in accordance with article 9 (1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;⁶⁰

(o) [other information required to be included in the record in accordance with the provisions of this Law is to be added].⁶¹

(2) Subject to article [31 (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.⁶²

(3) Subject to article [31 (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.⁶³

(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

⁵⁸ Reproduces article 11 (1) (j) of the 1994 Model Law. To be considered together with chapter IV.

⁵⁹ 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.

⁶⁰ Reproduces article 11 (1) (l) of the 1994 Model Law.

⁶¹ 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. In addition, some other information not listed in the 1994 Model Law may be added. See, in this regard, the issues raised in A/CN.9/WG.I/WP.68/Add.1, section H.

⁶² 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.

⁶³ Based on article 11 (3), the 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.

commercial interests of the suppliers or contractors or would impede 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.⁶⁴

(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.^{65]}

CHAPTER II. TENDERING PROCEEDINGS⁶⁶

SECTION I. SOLICITATION OF TENDERS

Article 23. Domestic tendering⁶⁷

Where the procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law, the procuring entity shall not be required to employ the procedures set out in articles 14 (1) (c),⁶⁸ 24 (2),⁶⁹ 25 (h) and (i),⁷⁰ and 27 (j), (k) and (s),⁷¹ of this Law.⁷²

Article 24. Procedures for soliciting tenders⁷³

(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).

⁶⁴ 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.

⁶⁵ Reproduces article 11 (4) of the 1994 Model Law. The Working Group may wish to consider this provision, which was taken from article 11 (4) of the 1994 Model Law, in the light of its decisions as regards remedies and enforcement.

⁶⁶ 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 1994 Model Law, except as marked to reflect the revisions made to the Model Law.

⁶⁷ The Working Group, at its fifteenth session, approved the draft article, which is based on article 23 of the 1994 Model Law, without change (A/CN.9/668, para. 158).

⁶⁸ Corresponds to the reference to article 32 (1) (c) in article 23 of the 1994 Model Law.

⁶⁹ Corresponds to the reference to the same article in article 23 of the 1994 Model Law.

⁷⁰ Corresponds to the references to articles 25 (1) (h) and 25 (1) (i) in article 23 of the 1994 Model Law.

⁷¹ Corresponds to the references to articles 27 (j), 27 (k) and 27 (s) in article 23 of the 1994 Model Law.

⁷² 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.

⁷³ The Working Group, at its fifteenth session, approved the draft article, which is based on article 24 of the 1994 Model Law, without change (A/CN.9/668, para. 159).

(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.⁷⁴

Article 25. Contents of invitation to tender⁷⁵

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

- (a) The name and address of the procuring entity;
- (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;
- (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 (2)];
- (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, manner and modalities of obtaining the solicitation documents;⁷⁶
- (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 manner, modalities and deadline for the submission of tenders.

Article 26. Provision of solicitation documents⁷⁷

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

⁷⁴ 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 draft article 15 (2).

⁷⁵ The Working Group, at its fifteenth session, approved the draft article, which is based on article 25 (1) of the 1994 Model Law, with amendments to subparagraph (j) (A/CN.9/668, paras. 161-162).

⁷⁶ This subparagraph was revised to ensure that it is technologically neutral.

⁷⁷ The Working Group, at its fifteenth session, approved the draft article, which is based on article 26 of the 1994 Model Law, with a consequential change (A/CN.9/668, paras. 163-164).

procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified 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 documents⁷⁸

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

- (a) Instructions for preparing tenders;
- (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;
- (d) The description of the subject matter of the procurement, in conformity with article [11]; 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;
- (e) Information about the evaluation criteria, the evaluation procedure and the assessment of responsiveness of tenders, as specified in article [12 (4) (a)];⁷⁹
- (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, 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;
- (h) If suppliers or contractors are permitted to submit tenders for only a portion of the subject matter of the procurement, 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

⁷⁸ The Working Group, at its fifteenth session, approved the draft article, which is based on article 27 of the 1994 Model Law (A/CN.9/668, para. 166).

⁷⁹ Although it was agreed at the Working Group's fifteenth session that the reference to relative weights should be added in this subparagraph (A/CN.9/668, para. 165), the Working Group may wish to consider whether the proposed wording with the cross reference to article 12 (4) (a) should be sufficient and would ensure consistency throughout the Model Law. The proposed article 12 (4) (a) contains the requirement to disclose in the solicitation documents the relative weights where applicable (in the price-only procurements, this point is moot) along with other information. Unnecessary confusion may arise if the reference in paragraph (e) is made only to the relative weights and not to the other information specified in article 12 (4) (a).

of the subject matter of the procurement itself, 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 [13], 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, 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 material 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, modalities and deadline for the submission of tenders, in conformity with article [29];⁸⁰

(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 [30];

(q) The manner, modalities, date and time for the opening of tenders, in conformity with article [31];⁸¹

(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 [32 (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;

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

(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;

⁸⁰ The Working Group may wish to add a requirement for a reasonable period to allow suppliers to prepare their tenders, as it has provided in the context of framework agreements. Suggested text is provided in proposed revised article 29 (1), but the Working Group may also wish to make appropriate reference in this article.

⁸¹ This subparagraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

(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 [56] 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) 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;

(y) 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 documents⁸²

(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 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

⁸² The Working Group, at its fifteenth session, approved the draft article, which reproduces article 28 of the 1994 Model Law, without change (A/CN.9/668, para. 167). It was agreed that the Guide commentary accompanying the article should refer to the provisions that dealt with the extension of the deadline for presenting submissions (article 29 (2) of the current draft). It was also pointed out that in the context of electronic procurement it should be made clear that any obligation of the procuring entity to debrief individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors were known to the procuring entity (A/CN.9/668, para. 168).

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. Submission of tenders⁸³

(1) Without prejudice to paragraphs (2) to (5) of this article, the procuring entity shall fix in the invitation to tender in accordance with article 25 (j) and in the solicitation documents in accordance with article 27 (n) the manner, modalities and deadline for the submission of tenders. The deadline for the submission of tenders shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and submit their tenders, taking into account the reasonable needs of the procuring entity.⁸⁴

(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)⁸⁵ (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 provide to the supplier or contractor a receipt showing the date and time when its tender was received;⁸⁶

⁸³ The Working Group, at its fifteenth session, approved the draft article, which is based on article 30 of the 1994 Model Law, with the revisions to paragraph (1) (A/CN.9/668, para. 171).

⁸⁴ The provisions of the paragraph were revised to make them technologically neutral and consistent throughout the Model Law.

⁸⁵ 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).

⁸⁶ The Working Group, at its fifteenth session, accepted the suggestion that the Guide in the context of this subparagraph should discuss the nature of the receipt to be provided, and should state that the certification of receipt provided by the procuring entity would be conclusive (A/CN.9/668, para. 173).

(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.

(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 30. Period of effectiveness of tenders; modification and withdrawal of tenders⁸⁷

(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 tender 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 tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender 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 tender 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.

⁸⁷ The Working Group, at its fifteenth session, deferred the consideration of the draft article, which is based on article 31 of the 1994 Model Law, in the light of divergent views expressed regarding the suggestion to delete the second sentence of paragraph (2) (a) (A/CN.9/668, paras. 175-176). For the discussion of the drafting history of the provisions, see A/CN.9/WG.I/WP.68/Add.1, section G.