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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 31-33 of chapter II (Tendering proceedings) and chapter III (Conditions for use and procedures of restricted tendering, two-envelope tendering, and request for quotations) of the proposed revised Model Law.

The Working Group's attention is drawn to draft articles 32, 34 and 35, consideration of which was deferred by the Working Group to a later stage.

The Secretariat's comments are set out in the accompanying footnotes.

This note in addition consolidates the provisions from the 1994 Model Law relevant to proposed chapter IV (Conditions for use and procedures of two-stage tendering, request for proposals and competitive negotiation), with consequential changes in the light of the revisions agreed to be made so far to the 1994 Model Law. A proposal for a consolidated article on request for proposals and competitive negotiations, which the Working Group had before it but did not consider at its fifteenth session (A/CN.9/668, paras. 210-212) is set out in A/CN.9/WG.I/WP.69/Add.4. Any additional proposals for a revised chapter IV submitted by delegations as indicated at the Working Group's fifteenth session (A/CN.9/668, para. 279) will be made available for consideration by the Working Group at the session.



CHAPTER II. TENDERING PROCEEDINGS *(continued)*

SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 31. Opening of tenders¹

(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, in accordance with the manner, modalities and procedures specified in the solicitation documents.²

(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.

(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].³

¹ The Working Group, at its fifteenth session, approved the draft article, which is based on article 33 of the 1994 Model Law and the text of paragraph (2) preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 38), without change (A/CN.9/668, para. 177). It was agreed that the Guide should highlight that the modalities for the opening of tenders established by the procuring entity (time, place where applicable, and other factors) should allow for the presence of suppliers or contractors (A/CN.9/668, para. 178).

² This paragraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

³ The Working Group may recall that the provisions of article 22 (1) (b) require the equivalent details of all those that submitted tenders to be recorded, and may wish to include a note in the Guide to explain that any late tenders would be returned unopened, but their (late) submission would be noted in the record.

Article 32. Examination, evaluation and comparison of tenders⁴

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

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity [may] [shall]⁵ regard a tender as responsive [only]⁶ if it conforms to [all requirements set forth in the solicitation documents] [the relevant requirements set forth in the solicitation documents] [the description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement [set out in the solicitation documents in accordance with article 11 of this Law]];⁷

(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 out 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.⁸

⁴ The Working Group, at its fifteenth session, deferred the consideration of this article, which is based on article 34 of the 1994 Model Law, in the light of the divergent views expressed regarding the drafting suggestions thereto (A/CN.9/668, paras. 180-181). As was requested by the Working Group, the drafting suggestions were placed in square brackets in the present draft for further consideration by the Working Group. The Secretariat was also requested to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (ibid). The results of the research are reflected in document A/CN.9/WG.I/WP.68, sections II.A and B.

⁵ The Working Group may wish to consider replacing the word “may” appearing in the 1994 text with the word “shall”, to ensure that responsiveness is ascertained objectively. The Working Group may consider that the use of the word “may” in this context might allow unintended and undesirable subjectivity, and provides a description of what a responsive tender might be, rather than a definition of a responsive tender.

⁶ The Working Group may consider that the word “only” is unnecessary if the word “shall” is used in this provision, as to which, see footnote 5 above.

⁷ The Working Group, at its fifteenth session, deferred the consideration of these alternative texts in square brackets and requested the Secretariat to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (a) and 181). The results of the research are reflected in document A/CN.9/WG.I/WP.68, section II.A.

⁸ The Working Group may wish to consider whether the assessment of responsiveness is a step that should be regulated in some or all other procurement methods, and how it compares with

- (3) The procuring entity shall reject 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;
 - (d) In the circumstances referred to in articles [17 and 18].
- (4) (a) The procuring entity shall evaluate and compare the tenders that have not been rejected 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) [Where price is the only award criterion,]⁹ The tender with the lowest tender price, subject to any margin of preference applied pursuant to article [12]; or
 - (ii) [Where there are price and other award criteria,]¹⁰ If the procuring entity has so stipulated in the solicitation documents, the [lowest]¹¹ evaluated tender ascertained on the basis of the evaluation criteria specified in the solicitation documents in accordance with 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.

the establishment of a threshold under draft revised article 35 (Two-envelope tendering). At the fifteenth session, a suggestion was made to include a cross reference to revised draft article 11 in paragraph 3 (c) of this article (A/CN.9/668, para. 179 (b)). The current scope of revised draft article 11 does not allow for an appropriate cross reference, as it refers to the description of the subject matter of the procurement and the terms and conditions of the procurement contract rather than the assessment of responsiveness. The Working Group may therefore wish to consider whether draft revised article 11 should include a provision on the assessment of responsiveness, in addition to its provisions on the description of the subject matter of the procurement (so doing would also align article 11 with the proposed provisions on evaluation in draft revised article 12).

⁹ The Working Group, at its fifteenth session, deferred the consideration of the suggestion to add this phrase in the beginning of this subparagraph and requested the Secretariat to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (d) and 181). The results of the research are reflected in document A/CN.9/WG.I/WP.68, section II.B.2.

¹⁰ Ibid.

¹¹ The Working Group, at its fifteenth session, deferred the consideration of an alternative term to the lowest evaluated tender, such as the best evaluated tender, and requested the Secretariat to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (c), 181 and 220). The results of the research are reflected in document A/CN.9/WG.I/WP.68, section II.B.1. See, also, the provisions of revised draft article 12, in A/CN.9/WG.I/WP.69/Add.1.

(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].

Article 33. Prohibition of negotiations with suppliers or contractors¹²

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.

¹² The Working Group, at its fifteenth session, approved the draft article, which is based on article 35 of the 1994 Model Law, without change (A/CN.9/668, para. 182).

CHAPTER III. CONDITIONS FOR USE AND PROCEDURES FOR RESTRICTED TENDERING, TWO-ENVELOPE TENDERING, AND REQUEST FOR QUOTATIONS

Article 34. Restricted tendering¹³

OPTION 1¹⁴

(1) The procuring entity may, where necessary for reasons of [economy and efficiency] [economy or efficiency] [economic efficiency],¹⁵ engage in procurement by means of restricted tendering in accordance with this article, when:

(a) The subject matter of the procurement, by reason of its highly [complex or]¹⁶ specialized nature, is available only from a limited number of suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

(2) (a) When the procuring entity engages in restricted tendering on the grounds referred to in paragraph 1 (a) of this article, it shall solicit tenders from all suppliers and contractors from whom the subject matter of the procurement is available;

(b) When the procuring entity engages in restricted tendering on the grounds referred to in paragraph 1 (b) of this article, it shall select suppliers or contractors

¹³ The Working Group, at its fifteenth session, deferred the consideration of all options for this article (A/CN.9/668, para. 192). It was agreed however that the opening phrase referring to higher-level approval would be deleted in all options (A/CN.9/668, para. 189). The Working Group, at that session, requested the Secretariat to draft option 3, based on the proposal made at the session that would align the provisions of the Model Law on restricted tendering with the provisions on selective tendering procedures in article X of the WTO Agreement on Government Procurement (A/CN.9/668, para. 188).

¹⁴ Based on the merged articles 20 and 47 of the 1994 Model Law. Paragraph (1) is based on article 20 of the 1994 Model Law. Paragraphs (2)-(4) are based on article 47 of the 1994 Model Law.

¹⁵ The Working Group may wish to consider which of the three terms in square brackets should be retained in the provisions, in the light of the proposed article 7 (3) (that uses the term “economic efficiency”) and the existing provisions of the Model Law (that are not consistent in the use of the other two terms) (see articles 20 and 48 (2)).

¹⁶ At the Working Group’s fifteenth session, some preference was expressed for retaining option 1 on the ground that restricted tendering would be useful, in addition to the situations covered by option 2 (the value of the procurement would be disproportionate to the time and cost required to examine and evaluate a large number of tenders), for procurement of specialized products. There was no discussion at the session on whether complex projects would always involve specialized items, and thus whether recourse to restricted tendering could be justified on the basis of complexity alone. If the Working Group considers that the text should provide flexibly for highly complex and specialized procurement, it might wish to retain option 1 accordingly (A/CN.9/668, para. 185).

from whom to solicit tenders in a non-discriminatory manner,¹⁷ and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(3) The procuring entity shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).¹⁸ The notice shall contain at a minimum the information listed in article 25 of this Law.¹⁹ The notice shall not confer any rights on suppliers or contractors, including any right to have a tender evaluated.²⁰

(4) The provisions of chapter II of this Law, except article [24], shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

OPTION 2²¹

(1) The procuring entity may, where necessary for reasons of [economy and efficiency] [economy or efficiency] [economic efficiency],²² engage in procurement by means of restricted tendering in accordance with this article when [the subject matter of the procurement, by reason of its highly specialized nature, is available only from a limited number of suppliers or contractors, or when]²³ the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

(2) The procuring entity shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner,²⁴ and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

¹⁷ The Working Group may wish further to consider how to provide appropriate guidance on what “non-discriminatory” means in this context, and the criteria that might be used to select participants. The Working Group may recall its decision that there should be no mandatory prequalification under the draft proposed Model Law, but that prequalification could be used to limit access to a specific procurement (A/CN.9/668, para. 95), a notion reflected in option 3 for this article, below. In addition, the Working Group has noted that the nature of the procurement may present objective criteria for selection (A/CN.9/668, para. 190). It has also been observed that in the types of procurement in which the second ground for the use of restricted tendering applies, qualification criteria alone might be insufficient to limit access to reasonable numbers of participants.

¹⁸ In this regard, the Working Group may note that this provision requires domestic publication (as under article 24 (1)), but not international publication (as under article 24 (2)). An alternative formulation might be to delete paragraph (3) of this article and replace the reference to article 24 in paragraph (4) with a reference to article 24 (2).

¹⁹ The second sentence in paragraph (3) was included further to the Working Group’s decision at its fifteenth session (A/CN.9/668, para. 191).

²⁰ The Working Group may wish to consider the effect of this provision in conjunction with revised articles on remedies and enforcement in chapter VII of the revised Model Law.

²¹ The reasons for proposing option 2 are set out in document A/CN.9/WG.I/WP.66, paras. 38-40.

²² The Working Group may wish to consider which of the three terms in square brackets should be retained in the provisions, in the light of the proposed article 7 (3) (that uses the term “economic efficiency”) and the existing provisions of the Model Law (that are not consistent in the use of the other two terms) (see articles 20 and 48 (2)).

²³ The text in square brackets was included further to the suggestion made at the Working Group’s fifteenth session (A/CN.9/668, para. 186).

²⁴ See footnote 17, above.

(3) The procuring entity shall cause a notice of the restricted-tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall contain at a minimum the information listed in article 25 of this Law. The notice shall not confer any rights on suppliers or contractors, including any right to have a tender evaluated.²⁵

(4) The provisions of chapter II of this Law, except article [24], shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

OPTION 3²⁶

Article 34. Tendering with pre-selection

(1) The procuring entity may, where necessary for reasons of [economy and efficiency] [economy or efficiency] [economic efficiency],²⁷ engage in procurement by means of tendering with pre-selection in accordance with this article when the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

(2) Where a procuring entity intends to use tendering with pre-selection, the procuring entity shall engage in prequalification proceedings in accordance with article 15 of this Law except:

(a) The invitation to pre-qualify and the prequalification documents shall state, in addition to the information listed in article 15 (3) and (5), that the procuring entity intends upon completion of the prequalification proceedings to solicit tenders only from a limited number of pre-qualified suppliers or contractors that best meet the prequalification criteria;

(b) The invitation to pre-qualify and the prequalification documents shall in addition state the maximum number of pre-qualified suppliers or contractors from whom the tenders will be solicited, which shall be at least [5], and the manner in which the selection of that number will be carried out;²⁸

(c) The procuring entity shall rate the suppliers or contractors that meet the prequalification criteria on the basis of the criteria applied to assess their

²⁵ The Working Group may wish to consider the effect of this provision in conjunction with revised articles on remedies and enforcement in chapter VII of the revised Model Law. See, also, footnote 18, above.

²⁶ Based on the proposal made at the Working Group's fifteenth session, which in turn draws on the provisions of article X of the WTO Agreement on Government Procurement and article IX of the WTO revised Agreement on Government Procurement. The option is presented for the consideration by the Working Group for the first time, further to the request made at the Working Group's fifteenth session (A/CN.9/668, para. 188).

²⁷ The Working Group may wish to consider which of the three terms in square brackets should be retained in the provisions, in the light of the proposed article 7 (3) (that uses the term "economic efficiency") and the existing provisions of the Model Law (that are not consistent in the use of the other two terms) (see articles 20 and 48 (2)).

²⁸ As regards certain criteria that might be applied to identify the relevant suppliers, see footnote 17, above.

qualifications and draw up the list of suppliers or contractors that will be invited to present tenders upon completion of the prequalification proceedings. In drawing up the list, the procuring entity shall apply only the manner of rating that is set forth in the invitation to pre-qualify and the prequalification documents. The procuring entity shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition;

(d) The procuring entity shall promptly notify each supplier or contractor whether or not it has been selected and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been selected. The procuring entity shall upon request communicate to suppliers or contractors that have not been selected the grounds therefore.

(3) The procuring entity shall invite all selected suppliers or contractors to submit their tenders. Where the solicitation documents are not made publicly available from the date of publication of the invitation to pre-qualify, the procuring entity shall ensure that those documents are made available at the same time to all the selected suppliers or contractors.

(4) The provisions of chapter II of this Law shall apply to the subsequent stages of the tendering with pre-selection proceedings, except to the extent that those provisions are derogated from in this article.

Article 35. Two-envelope tendering²⁹

(1) [(Subject to approval by ... (the enacting State designates an organ to issue the approval),)]³⁰ the procuring entity may engage in procurement by means of two-envelope tendering in accordance with this article [where quality and technical aspects of tenders are to be evaluated separately from price].³¹

(2) The procuring entity may solicit tenders through open solicitation or in cases specified in article [34 (1)] through direct solicitation.³²

(3) In the case of open solicitation, the provisions of chapter II of this Law[, other than [articles 31 (2) and (3),]] shall apply to the proceedings under this article, except to the extent that those provisions are derogated from in this article.³³

²⁹ The Working Group, at its fifteenth session, after a debate on whether the provisions should be retained in the revised Model Law, decided to retain the draft article, which was based on article 42 (2) of the 1994 Model Law, but deferred its consideration to a later stage (A/CN.9/668, para. 201). The article proposed in this document has been redrafted to make the intended scope and purpose of the article clearer, in the light of the deliberations at the Working Group's fifteenth session (A/CN.9/668, paras. 193-201).

³⁰ The Working Group may wish to consider whether this phrase should be retained, in the light of its decisions at the fifteenth session to remove the requirement of higher-level approval in other similar instances. The Working Group decided at that session that it would consider whether the requirement should be imposed on a case-by-case basis (A/CN.9/668, para. 122).

³¹ Based on article 19 (1) (a) (i) of the 1994 Model Law. The Working Group may wish to consider which conditions should be imposed for the use of this method.

³² Based on provisions of article 37 of the 1994 Model Law.

³³ Based on the thrust of chapter IV of the 1994 Model Law. The Working Group may wish to consider whether the transparency provisions of article 31 should apply to proceedings under

(4) In the case of direct solicitation, the provisions of article [34 (2) and (3)] and the provisions of chapter II of this Law[, other than articles [24 and 31],] shall apply to proceedings under this article, except to the extent that those provisions are derogated from in this article.³⁴

(5) The solicitation documents shall call upon suppliers or contractors to submit simultaneously to the procuring entity tenders in two envelopes: one envelope containing quality and technical aspects of the tender and the other envelope containing the tender price.

(6) The procuring entity shall establish a threshold with respect to quality and technical aspects of the tenders in accordance with the evaluation criteria other than price as set out in the solicitation documents in accordance with article 12 of this Law.³⁵

(7) The procuring entity shall open the envelopes containing quality and technical aspects of tenders. The procuring entity shall rate the quality and technical aspects of each tender in accordance with the criteria and the relative weight and manner of application of those criteria as set forth in the solicitation documents pursuant to [article 12] of this Law.³⁶ [The envelopes containing the quality and technical aspects of those] [Those] tenders that attain a rating below the threshold [shall be returned to the suppliers or contractors that submitted them, and their tenders] shall be considered to be non-responsive.

(8) Upon completion of the examination, evaluation, comparison and rating of the quality and technical aspects of the tenders, the procuring entity shall open the envelopes containing the price information of only those tenders the quality and technical aspects of which have attained a rating at or above the threshold. The envelopes containing the price information of tenders that attained a rating below the threshold as regards quality and technical aspects shall not be opened [and shall be returned to the suppliers or contractors that submitted them].

(9) The procuring entity shall compare the prices and on that basis identify the successful tender in accordance with the criteria and the procedure set out in the solicitation documents pursuant to article 12. The successful tender shall be:

this article.

³⁴ Ibid. The Working Group may also wish to consider whether the provisions of articles 24 and 31 should be applied.

³⁵ The Working Group may wish to consider whether the reference to establishing a threshold and assessing tenders in the light of it in this article is equivalent to an assessment of responsiveness, as paragraph (7) indicates. If so, it may wish to simplify the provisions by cross-referring to draft revised articles 11 and 32 as appropriate.

³⁶ The Working Group may wish to consider whether there is some overlap between assessing responsiveness and evaluating tenders in the provisions of this and the subsequent paragraph (which are based on article 42 of the 1994 text). If so, it may wish to apply the steps undertaken in normal tendering proceedings, through repetition or cross reference, with additional provisions to reflect the two envelope procedure. In addition, the Working Group may recall that the drafters of the 1994 text stated that the Model Law sought to avoid setting out mechanisms (and focused on principles), and whether some detail could accordingly be discussed in the Guide. For example, the article could include paragraph (1), and a paragraph to state that the provisions of chapter II and articles 34 (2) and (3) apply, with additional provisions to allow for two envelopes and sequential opening. See also the following footnote as regards the evaluation of the tenders.

- (a) The tender with the lowest tender price; or
- (b) The tender with the best combined evaluation in terms of the criteria other than price referred to in paragraph (7) of this article and the price.³⁷

Article 36. Request for quotations³⁸

- (1) A procuring entity may engage in procurement by means of a request for quotations in accordance with this article for the procurement of readily available goods or services that are not specially produced or provided to the particular descriptions³⁹ of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.
- (2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.
- (3) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the subject matters of the procurement themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.
- (4) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

³⁷ At the Working Group's fifteenth session, concern was raised that the provisions of this subparagraph are not aligned with other similar provisions in the Model Law (e.g., article 32 (4) (b) (ii) of this proposed draft). The Working Group may wish to consider the extent of the difference between accepting the "lowest evaluated tender" and the "tender with the best combined evaluation" in terms of the price and other criteria, and whether it is a difference in substance or in terminology. The Working Group may also wish to consider whether, in the light of the drafting history and explanations provided in A/CN.9/WG.I/WP.68, section II.B, there is benefit in retaining the different terminology and possibly different evaluation, whether the benefits of consistency might outweigh the benefits of retaining familiar terms and concepts, or vice versa, and accordingly whether the provisions of (for example) draft revised article 32 (4) (b) (ii) could be applied here. In this regard, the Working Group may wish to consider whether the procedure in this article is likely to be of real benefit where the lowest tender price will be accepted, and whether a simple alternative would be to allow two envelopes to be requested as an option in ordinary tendering proceedings, perhaps also where the evaluation will be based best combined (or lowest evaluated) tender.

³⁸ The Working Group, at its fifteenth session, approved the draft article, which is based on articles 21 and 50 of the 1994 Model Law, as revised at that session (A/CN.9/668, paras. 202-208).

³⁹ The terms "goods and services" in this paragraph are descriptive. The previous terms "specifications or requirements" have been replaced to ensure consistency with draft revised articles 2 and 11 (and the Working Group may wish to consider the extent of cross-referencing for terms introduced into the proposed revised text).

(5) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity.⁴⁰

[CHAPTER IV. CONDITIONS FOR USE AND PROCEDURES OF TWO-STAGE TENDERING, REQUEST FOR PROPOSALS AND COMPETITIVE NEGOTIATION^{41, 42}

Article 37. Conditions for use of two-stage tendering, request for proposals or competitive negotiation⁴³

(1) [(Subject to approval by ... (the enacting State designates an organ to issue the approval),)]⁴⁴ a procuring entity may engage in procurement by means of two-stage tendering, request for proposals, or competitive negotiation, in the following circumstances:

(a) It is not feasible for the procuring entity to formulate detailed specifications for the subject matter of the procurement, or to identify its characteristics in accordance with article [11] and, in order to obtain the most satisfactory solution to its procurement needs:

(i) It seeks tenders, proposals or offers as to various possible means of meeting its needs; and⁴⁵

(ii) Because of the technical character or nature of the subject matter of the procurement, it is necessary for the procuring entity to negotiate with suppliers or contractors;

⁴⁰ See, also, draft revised article 12 as regards the terminology for ascertaining the successful quotation.

⁴¹ The Working Group, at its fifteenth session, deferred the consideration of the entire chapter (A/CN.9/668, para. 212). One delegation agreed to present a conference room paper proposing a revised chapter IV. The Working Group may wish therefore to consider the proposed chapter IV as it would be set out in that conference room paper.

⁴² Without prejudice to the proposal for chapter IV expected to be submitted by a delegation in a conference room paper, the present document consolidates the relevant provisions of the 1994 Model Law with the consequential amendments in the light of the revisions agreed to be made so far to the 1994 text. In addition, at its fifteenth session, the Working Group had before it the proposal for the consolidated articles on competitive negotiation and request for proposals (A/CN.9/668, paras. 210-211). The consideration of that proposal was deferred at that session (ibid., para. 212). That proposal is also set out in this chapter with the Secretariat's suggested amendments in the footnotes.

⁴³ Based on article 19 of the 1994 Model Law, with consequential changes in the light of the proposed revisions to the Model Law and the removal of the definitions of "goods, construction or services".

⁴⁴ The Working Group may wish to consider whether this phrase should be retained, in the light of its decisions at the fifteenth session to remove the requirement of higher-level approval in other similar instances. The Working Group decided, at that session, that it would consider whether the requirement should be imposed on a case-by-case basis (A/CN.9/668, para. 122).

⁴⁵ "And" replaced "or."

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) In the case of procurement for the reasons of national defence or national security, where the procuring entity determines that the selected method is the most appropriate method of procurement;⁴⁶ or

(d) When tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to article [16 and 32 (3)], and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.⁴⁷

(2) [(Subject to approval by ... (the enacting State designates an organ to issue the approval),)]⁴⁸ the procuring entity may engage in procurement by means of competitive negotiation also when there is an urgent need for the subject matter of the procurement, and engaging in tendering proceedings or other methods of procurement because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part.⁴⁹

Article 38. Two-stage tendering⁵⁰

(1) The provisions of chapter II of this Law shall apply to two-stage tendering proceedings except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

(3) The procuring entity may, in the first stage, engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to article [16 and 32 (3)] concerning any aspect of its tender.

⁴⁶ Amended in the light of the expanded scope of the Model Law and in the light of the revisions agreed to be made in the similar provisions appearing in the context of the single-source procurement in the proposed article 7 (7) (a) (iv) (A/CN.9/668, para. 59).

⁴⁷ Amended in the light of the proposed expansion of article 1.

⁴⁸ The Working Group may wish to consider whether this phrase should be retained, in the light of its decisions at the fifteenth session to remove the requirement of higher-level approval in other similar instances. The Working Group decided, at that session, that it would consider whether the requirement should be imposed on a case-by-case basis (A/CN.9/668, para. 122).

⁴⁹ Based on article 19 (2) of the 1994 Model Law, which has been amended in the light of the revisions agreed to be made at the Working Group's fifteenth session to the similar provisions appearing in the context of single-source procurement in the proposed article 7 (7) (a) (ii) (A/CN.9/668, para. 56).

⁵⁰ Based on article 46 of the 1994 Model Law.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of the descriptions of the subject matter of the procurement.⁵¹ In formulating those descriptions,⁵² the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the subject matter of the procurement, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article [32 (4) (b)].⁵³

Article 39. Request for proposals⁵⁴

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.⁵⁵

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of [economy and efficiency] [economy or efficiency] [economic efficiency]⁵⁶ the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.⁵⁷

⁵¹ The phrase “descriptions of the subject matter of the procurement” replaced the word “specifications” in the light of the proposed new definition in article 2.

⁵² Ibid.

⁵³ The Working Group may wish to consider whether the Model Law should provide for another type of the two-stage procedures for requesting proposals envisaged in the PFIPs instruments that resemble two-stage tendering except that (i) no exclusion of price in initial proposals is required, and (ii) negotiations subsequent to the submission of the proposals against the final single set of specifications are allowed (see A/CN.9/WG.I/WP.66, para. 22 (c) and the PFIPs model legislative provisions 10-17).

⁵⁴ The Working Group may wish to consider whether to revise this article incorporating the provisions of articles 43, 44 and 48 of the 1994 Model Law and conforming to the relevant provisions in the PFIPs instruments.

⁵⁵ The Working Group may wish to consider the juxtaposition of this and the following article and whether the order of the articles should be revised.

⁵⁶ The Working Group may wish to consider which of the three terms in square brackets should be retained in the provisions, in the light of the proposed article 7 (3) (that uses the term “economic efficiency”) and the existing provisions of the Model Law (that is not consistent in the use of the other two terms) (see articles 20 and 48 (2)).

⁵⁷ The Working Group is invited to consider the effect of this last statement in the light of the deletion of the exceptions from review. One of the exceptions in article 52 (2) of the 1994 Model Law (in subparagraph (e)) referred to a refusal by the procuring entity to respond to an expression of interest in participating in request for proposals proceedings pursuant to article 48 (2). Thus the intention of the drafters of the 1994 Model Law was to explicitly

(3) A request for proposals issued by a procuring entity shall include at least the following information:

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

(b) The description of the subject matter of the procurement, in conformity with article [11], including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;⁵⁸

(c) The information about the evaluation criteria, the evaluation procedure and the assessment of responsiveness of proposals, as specified in article [12 (4) (a)];⁵⁹ and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(4) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals as specified in the request for proposals in accordance with paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(5) The procuring entity [may] [shall]⁶⁰ engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the conditions of article 21 of this Law are satisfied and the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.⁶¹

(6) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(7) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) Only the criteria set forth in the request for proposals shall be considered;⁶²

(b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(8) The successful proposal shall be the proposal that best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the

exclude these cases from review and liability on the part of the procuring entity. Similar considerations apply to options 1 and 2 of the proposed new article 34 (3) (see above).

⁵⁸ Amended in the light of the proposed new article 11.

⁵⁹ Amended in the light of the proposed new article 12.

⁶⁰ The Working Group may wish to consider whether the word “may” is appropriate in this context (the wording of the 1994 Model Law).

⁶¹ Based on article 48 (7) as amended in the light of the proposed new article 21.

⁶² The Working Group may wish to consider how provisions of the proposed article 12 should apply in the context of negotiated procurement.

proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.^{63, 64}

Article 40. Competitive negotiation⁶⁵

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(4) The successful offer shall be the offer that best meets the needs of the procuring entity.⁶⁶

⁶³ Revised in the light of the proposed new article 19.

⁶⁴ The procedures described in paragraphs (5) to (8) of this article, which are based on article 48 (7) to (10) of the 1994 Model Law, resemble the procedures of the selection procedure with simultaneous negotiations of article 43 of the 1994 Model Law. Since chapter IV of the 1994 Model Law provides in addition for selection procedure with consecutive negotiation (article 44), the Working Group may wish to consider expanding the provisions on negotiation in this revised article by providing for two types of negotiations in the context of request for proposals. The Working Group may wish to read the draft revised article in conjunction with articles 43 and 44 of the 1994 text.

⁶⁵ Based on article 49 of the 1994 Model Law.

⁶⁶ A definition of the successful proposal was added for the purposes of the proposed amended article 19 and the relevant proposed new definition in article 2. See, however, proposed amended article 12 and the comments thereto.