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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 a proposal for articles 14-23 of chapter I (General provisions) and for chapter II (Methods of procurement) of the revised Model Law (chapter II comprises articles 24-29).

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

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\* This document was submitted less than ten weeks before the opening of the session because of the Commission's request for inter-session informal consultations on the entire text (A/64/17, para. 281).



## **CHAPTER I. GENERAL PROVISIONS** *(continued)*

### **[Article 14. Clarifications and modifications of solicitation documents<sup>1, 2</sup>**

(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 presenting submissions. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely presentation of submissions 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 presenting submissions, 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 solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their submissions.]

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<sup>1</sup> This article was moved from the chapter on Tendering. The Working Group may wish to consider establishing limits to the extent of modification permitted under paragraph (2), of this article. It may draw on the concept of a “material change in the procurement”, as defined in article 2 of this draft, in this regard.

<sup>2</sup> The Guide to this article will refer to the provisions of the Model Law that deal with the extension of the deadline for presenting submissions and will make it 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 are known to the procuring entity (A/CN.9/668, para. 168).

## Article 15. Submission securities<sup>3</sup>

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a submission security:

(a) The requirement shall apply to all such suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the submission security and the confirmer, if any, of the submission security, as well as the form and terms of the submission security, must be acceptable to the procuring entity;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a submission security shall not be rejected by the procuring entity on the grounds that the submission security was not issued by an issuer in this State if the submission security and the issuer otherwise conform to requirements set forth in the solicitation documents (, unless the acceptance by the procuring entity of such a submission security would be in violation of a law of this State or) unless the procuring entity requires a submission security, in cases of domestic procurement, to be issued by an issuer in this State;<sup>4</sup>

(d) Prior to presenting a submission, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a submission security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the submission security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required submission security; any requirement that refers directly or indirectly to conduct by the supplier or contractor presenting the submission shall not relate to conduct other than:

(i) Withdrawal or modification of the submission after the deadline for presenting submissions, or before the deadline if so stipulated in the solicitation documents;

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<sup>3</sup> The Guide to this article will refer to the use in some jurisdictions of alternatives to a submission security, such as bid securing declarations that the procuring entity may, in appropriate cases, require all suppliers or contractors to sign in lieu of requiring them to furnish submission securities. Under this type of declarations, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for the contingencies that normally are secured by a submission security. Sanctions however should not include debarment since the latter should not be concerned with commercial failures. These alternatives aim at promoting more competition in procurement, by increasing participation in particular of small and medium enterprises that otherwise might be prevented from participation because of formalities and expenses involved in connection with presentation of a submission security.

<sup>4</sup> This wording has been included to reflect a cross-reference in article 23 of the 1994 Model Law. That article has been deleted in this draft revised Model Law, and its provisions included within various articles governing domestic procurement, for ease of reading.

- (ii) Failure to sign the procurement contract if required by the procuring entity to do so;
  - (iii) Failure to provide a required security for the performance of the contract after the successful submission has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.
- (2) The procuring entity shall make no claim to the amount of the submission security, and shall promptly return, or procure the return of, the security document, after whichever of the following that occurs earliest:
- (a) The expiry of the submission security;
  - (b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;
  - (c) The termination of the procurement proceedings without the entry into force of a procurement contract;
  - (d) The withdrawal of the submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

## **Article 16. Prequalification proceedings**

- (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 [9] shall apply to prequalification proceedings.
- (2) If the procuring entity engages in prequalification proceedings, it shall cause an invitation to pre-qualify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to pre-qualify is to be published). [Unless decided otherwise by the procuring entity in domestic procurement,]<sup>5</sup> the invitation to pre-qualify 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.
- (3) The invitation to pre-qualify 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

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<sup>5</sup> This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

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 [9 (2)];

(d) A declaration to be made in accordance with article [8];

(e) The means, manner and [modalities]<sup>6</sup> of obtaining the prequalification documents;

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

(g) [Unless decided otherwise by the procuring entity in domestic procurement,]<sup>7</sup> the currency and terms of payment for the prequalification documents and, subsequent to prequalification, for the solicitation documents;

(h) [Unless decided otherwise by the procuring entity in domestic procurement,]<sup>8</sup> 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.

(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 pre-qualify 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.

(5) 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

<sup>6</sup> The experts consulted by the Secretariat questioned whether the Working Group's decision to use the term "modalities" as a more technological neutral substitute for the term "place" would make the text more difficult to understand. The term "modalities" has been used throughout this draft revised Model Law.

<sup>7</sup> This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

<sup>8</sup> Id.

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;

(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 presentation of applications to pre-qualify and to the prequalification proceedings.

(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 presentation of applications to pre-qualify. 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 presentation of its application to pre-qualify. 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.

(7) The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set forth in the invitation to pre-qualify and in the prequalification documents.<sup>9</sup>

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

(9) The procuring entity shall promptly notify each supplier or contractor presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any member of the general public, upon request, the names of all suppliers or contractors that have been pre-qualified, [unless the procuring entity decides to withhold this information in order to protect classified information in procurement involving classified information].<sup>10</sup>

(10) The procuring entity shall upon request promptly communicate to suppliers or contractors that have not been pre-qualified the reasons therefore.

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<sup>9</sup> A/64/17, para. 178.

<sup>10</sup> The closing wording was added pursuant to the instructions at the Commission's forty-second session to the Secretariat to prepare drafting suggestions for consideration by the Working Group that would accommodate sensitive type of procurement, by envisaging in particular special measures for protection of classified information in this type of procurement (A/64/17, paras. 264-265).

## **[Article 17. Cancellation of the procurement]**

(1) The procuring entity may cancel the procurement<sup>11</sup> at any time prior to the acceptance of the successful submission.<sup>12</sup>

(2) The decision of the procuring entity to cancel the procurement and reasons for the decision shall be recorded in the record of the procurement proceedings and [upon request]<sup>13</sup> promptly communicated to any supplier or contractor that presented a submission.<sup>14</sup> The procuring entity shall in addition promptly publish a notice of the cancellation of the procurement in the same manner, publication and media in which the solicitation for the procurement concerned was published.<sup>15</sup>

(3) 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,<sup>16</sup> [ , provided that the circumstances giving rise to the cancellation [were not foreseeable by] [did not arise as a consequence of dilatory or irresponsible conduct on the part of] the procuring entity].

## **Article 18. Rejection of abnormally low submissions**

(1) The procuring entity may reject a submission if the procuring entity has determined that the submitted price with<sup>17</sup> 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;

<sup>11</sup> A/64/17, paras. 183-185.

<sup>12</sup> During the Secretariat's consultations with experts, it was suggested that the following text could be added to paragraph (1): "[ , provided that the circumstances giving rise to the cancellation [were not foreseeable by] [did not arise as a consequence of irresponsible or dilatory conduct on the part of] the procuring entity]". The consultations also indicated that even in such circumstances, the public interest might be better served if the procurement were cancelled, but that such cancellation should entail consequences (such as compensation for the costs of tendering). The Working Group may wish therefore to include the suggested wording in paragraph (3), in conjunction with the issue of liability, rather than in paragraph (1). The Guide to this article would suggest safeguards for consideration by an enacting State in order to prevent possible abusive recourse by the procuring entity to the right provided for in this article.

<sup>13</sup> A/64/17, paras. 195-196.

<sup>14</sup> A/64/17, paras. 193-198. The Guide to this article will explain that the procuring entity in this case must also return unopened any unopened submissions that it received before its decision to cancel the procurement.

<sup>15</sup> A/64/17, para. 191.

<sup>16</sup> A/64/17, paras. 199-208. The Working Group may wish to consider whether cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened (according to the experts consulted by the Secretariat, it has always been recognized that suppliers or contractors present their submissions at their own risk, and bear the related expenses, but that this position changes once submissions have been opened).

<sup>17</sup> A/64/17, paras. 210, 211.

(b) The procuring entity has taken account of any information provided by the supplier or contractor and the information in the submission, but continues, on the basis of such information<sup>18</sup> to hold those concerns; and

(c) The procuring entity has recorded the 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 reasons for the decision shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

### **Article 19. Rejection of a submission on the grounds of inducements from suppliers or contractors, an unfair competitive advantage or conflicts of interest**

(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;

(b) The supplier or contractor has an unfair competitive advantage in violation of the applicable standards;

(c) The supplier or contractor has a conflict of interest in violation of the applicable standards.<sup>19</sup>

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

### **Article 20. Acceptance of the successful submission and entry into force of the procurement contract**

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

(2) The procuring entity shall promptly notify all suppliers or contractors whose submissions were [examined]<sup>20</sup> of its intended decision to accept the successful

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<sup>18</sup> A/64/17, para. 212.

<sup>19</sup> A/64/17, paras. 214-222. The Guide will explain references to the standards in both subparagraphs (b) and (c) and stress that those standards evolve over time. The Guide will also encourage the dialogue between the procuring entity and an affected supplier or contractor.

<sup>20</sup> The word "examined" replaced the word "evaluated" used in the earlier drafts in order to extend the protection provided for by these provisions to suppliers or contractors whose submissions were rejected as non-responsive.



submission. The notice shall be sent individually<sup>21</sup> and simultaneously<sup>22</sup> to each such supplier or contractor and shall contain, at a minimum, the following information:

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

(b) The contract price or, where necessary, a summary of other characteristics and relative advantages of the successful submission, provided that the procuring entity shall not disclose any information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition<sup>23</sup> or would compromise essential national security or essential national defence;<sup>24, 25</sup> and

(c) The duration of the standstill period, which shall be at least ([...] (a specific number of days is to be determined by an enacting State)),<sup>26</sup> and shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors whose submissions were examined.<sup>27</sup>

[(3) Paragraph (2) of this article shall not apply to awards where the contract price is less than [...]<sup>28</sup> or where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period. The decision of the procuring entity that such urgent considerations exist and the reasons for the decision shall be recorded in the record of the procurement proceedings and shall be conclusive with respect to all levels of review under chapter VIII of this Law except for judicial review.]<sup>29</sup>

(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

<sup>21</sup> The word “individually” was added in the light of A/64/17, para. 231.

<sup>22</sup> The word was added in the light of the suggestions made to add it in other similar instances.

<sup>23</sup> The Guide to this provision will 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).

<sup>24</sup> Reference to national security and national defence was added pursuant to A/64/17, para. 225.

<sup>25</sup> In conjunction with these provisions, it was suggested at the Commission’s forty-second session that the issues of debriefing of unsuccessful suppliers or contractors might be usefully addressed in the Guide rather than regulated in the Model Law (A/64/17, para. 240).

<sup>26</sup> A/64/17, para. 237.

<sup>27</sup> A/64/17, para. 230. The Guide to this provision will explain considerations that should be taken into account in establishing the minimum duration of the standstill period in the Law, including the impact that the duration of the standstill period would have on overall objectives of the revised Model Law as regards transparency, accountability, efficiency and equitable treatment of suppliers or contractors and the impact of a lengthy standstill period on the costs that would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate.

<sup>28</sup> The Guide to this provision will draw the attention of an enacting State to align the threshold in this provision with the thresholds found in other provisions of the Model Law referring to low-value procurement, such as those justifying recourse to domestic procurement or to request for quotations proceedings.

<sup>29</sup> Consideration of the paragraph in the context of framework agreements was deferred (A/64/17, paras. 242-243).

to the supplier or contractor that presented that submission, unless the review body or a competent court orders otherwise.

(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.

(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:

(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 [15] of this Law.

[(8) If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract required, or fails to provide any required security for the performance of the contract, the procuring entity may cancel the procurement under article 17 (1) or may decide to award the procurement contract to the next submission still in force which the procuring entity ascertains to be successful in accordance with the criteria and procedures set out in this Law and in the solicitation documents. In the latter case, the provisions of this article shall apply *mutatis mutandis* to such submission.<sup>30</sup>]

(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 or contractor, by any reliable means specified in accordance with article [7] of this Law.

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<sup>30</sup> A/64/17, paras. 245, 246.

(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.

[(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].]<sup>31</sup>

### **[Article 21. Public notice of awards of procurement contract and framework agreement**

(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:

(a) Awards where the contract price is less than [...] [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations];

(b) In order to protect classified information in procurement involving classified information, when so decided by the procuring entity.<sup>32</sup>

(3) The procuring entity shall publish [quarterly] [periodic] notices of all procurement contracts referred to in paragraph (2) (a) of this article.<sup>33</sup>

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

<sup>31</sup> The consideration of the paragraph was deferred (A/64/17, para. 247). Views have so far 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 very short.

<sup>32</sup> The provisions were added to provide for exemptions from public disclosure in procurement involving classified information where necessary in order to protect the relevant classified information (A/64/17, para. 265).

<sup>33</sup> Further to consultations with experts, the provisions on periodic publication of notices of procurement contracts are proposed to be extended to all low-value awards. In the previous draft, the provisions applied only to awards of contracts under an open framework agreement.

## **[Article 22. Confidentiality**

(1) Without prejudice to articles 20 (2), 21, 23 and 36 of this Law, the procuring entity shall treat applications to pre-qualify and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors [or to any other person not authorized to have access to this type of information].<sup>34</sup>

(2) Any discussions, communications, negotiations and dialogues between the procuring entity and a supplier or contractors pursuant to articles in chapter V of this Law shall be confidential. Unless required by law or ordered by [the review body or a competent court]<sup>35</sup> or permitted in the solicitation documents, no party to any discussions, communications, negotiations or dialogues shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogues without the consent of the other party.<sup>36</sup>

(3) In procurement involving classified information, the procuring entity may impose on suppliers or contractors requirements aimed at protecting the classified information, and may demand that suppliers or contractors ensure compliance with such requirements by their subcontractors.<sup>37]</sup>

## **[Article 23. Documentary record of procurement proceedings<sup>38</sup>**

(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;

(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 (in the case of the framework agreement procedure, the name and address of the supplier or contractor with whom the framework agreement is concluded);<sup>39</sup>

(c) A statement of the reasons and circumstances relied upon by the procuring entity for the decision as regards means of communication and any requirement of form;

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<sup>34</sup> A/64/17, paras. 248, 249. Reference to any other person not authorized to have access to this type of information is proposed to be added further to the results of the Secretariat's consultations with experts. This addition is in line with similar provisions found in article 34 (8) of the 1994 Model Law (article 37 (8) of the present draft). The Guide would explain the ambit of this reference as referring to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized to have access to information in question under applicable provisions of law of the enacting State.

<sup>35</sup> To be considered in conjunction with article 23 (4).

<sup>36</sup> A/64/17, paras. 250-252.

<sup>37</sup> A/64/17, paras. 248, 253-266.

<sup>38</sup> The entire article was considerably redrafted further to the suggestions made at the Commission's forty-second session (A/64/17, paras. 267-280) and the Secretariat's consultations with experts. The title of the article was changed in the light of the proposed new paragraph (5).

<sup>39</sup> A/64/17, para. 267 (a).

(d) In the case of domestic procurement, a statement of the reasons and circumstances relied upon by the procuring entity for recourse to the domestic procurement;

(e) If the procuring entity uses a method of procurement other than tendering, the statement of the reasons and circumstances relied upon by the procuring entity for the use of such other method;

[(f) In the case of the use of a chapter V procurement method, the statement of the reasons and circumstances relied upon by the procuring entity for the use of the specific procurement method under that chapter;]<sup>40</sup>

(g) In the case of recourse to an electronic reverse auction, the statement of the reasons and circumstances relied upon by the procuring entity for the use of the auction, as well as information about the date and time of the opening and closing of the auction, and the reasons and circumstances on which the procuring entity relied to justify the rejection of the bids submitted during the auction;<sup>41</sup>

(h) If the procurement was cancelled<sup>42</sup> pursuant to article [17] of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision to cancel the procurement;

(i) 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 reasons therefore;

[(j) If request for expression of interest was issued in accordance with articles [cross-references to articles regulating request for proposals proceedings], a summary of each expression of interest received by the procuring entity and the procuring entity's decision as regards each of them;]<sup>43</sup>

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

(l) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented applications to pre-qualify, if any, or submissions;

(m) 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 (in the case of the framework agreement procedure, a summary of the principal terms and conditions of the framework agreement);<sup>44</sup>

(n) A summary of the evaluation and comparison of submissions, including the application of any margin of preference pursuant to article 11 (2) (b);

<sup>40</sup> Reproduces article 11 (1) (j) of the 1994 Model Law. To be considered together with chapter V. A/64/17, para. 267 (e).

<sup>41</sup> A/64/17, para. 267 (d).

<sup>42</sup> A/64/17, para. 267 (c).

<sup>43</sup> Proposed to be added further to the results of the Secretariat's consultations with experts.

<sup>44</sup> Proposed amendments to this subparagraph in the light of the provisions on framework agreements. Proposed amendments to this subparagraph in the light of the provisions on framework agreements.

(o) If any socio-economic factors were considered in the procurement proceedings, information about such factors and the manner in which they were applied;<sup>45</sup>

(p) The information required in articles [18 and 19] if a submission was rejected pursuant to those provisions;

(q) If no standstill period was applied, a statement of the reasons and circumstances relied upon by the procuring entity for non-application of a standstill period in accordance with article 20 (3);

[(r) In the case of review in conjunction with the procurement proceedings under chapter VIII of this Law, a summary of the claim, review proceedings and decision taken at each level of the review when more than one level of review was involved;]<sup>46</sup>

[(s) In procurement involving classified information, a statement of the reasons and circumstances relied upon by the procuring entity for measures and requirements taken for the protection of the classified information, including any exemptions from the provisions of this Law calling for public disclosure;]<sup>47</sup>

(t) [other information required to be included in the record in accordance with the provisions of this Law is to be added (e.g., recourse to direct solicitation where there is an option between open and direct solicitation (article 11 (1) (k) of the 1994 Model Law))].<sup>48</sup>

(2) Subject to article [36 (3)], the portion of the record referred to in subparagraphs [(a) to (f)]<sup>49</sup> of paragraph (1) of this article shall, on request, be made available to any person after the successful submission has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract (in the case of the framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement).

(3) Subject to article [36 (3)], the portion of the record referred to in subparagraphs [(g) to (p)], of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that presented submissions, or applied for prequalification, after the successful submission has been accepted or procurement proceedings have been terminated without resulting in a procurement contract (in the case of the framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement). Disclosure of the portion of the record referred to in subparagraphs [(k) to (n)], may be ordered at an earlier stage by [the review body or a competent court].<sup>50</sup>

<sup>45</sup> Added pursuant to A/64/17, paras. 165 and 267 (b).

<sup>46</sup> Proposed to be added further to the results of the Secretariat's consultations with experts.

<sup>47</sup> Proposed to be added further to the results of the Secretariat's consultations with experts and A/64/17, para. 136.

<sup>48</sup> 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.

<sup>49</sup> The scope of information from the record that can be disclosed to public is proposed to be expanded further to the results of the Secretariat's consultations with experts.

<sup>50</sup> To be considered in conjunction with paragraph (4) of this article (A/64/17, para. 274).

(4) Except when ordered to do so by [a competent court] [a competent authority] [a competent court or a competent authority] [a competent court or administrative organ referred to in article 63 of this Law] [a competent court and/or competent authority or administrative agency],<sup>51</sup> and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information from the record of the procurement proceedings<sup>52</sup> if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition<sup>53</sup> or would compromise essential national security or essential national defence;

(b) Information relating to the examination, evaluation and comparison of submissions, and submission prices, other than the summary referred to in paragraph [(1) (n)] of this article.

(5) The procurement entity shall record, file and preserve all documents relating to the procurement proceedings as specified by the procurement regulations and according to provisions of other applicable law.<sup>54</sup>

## **CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE**

### **Article 24. Methods of procurement**

(1) The procuring entity may conduct procurement by means of:

- (a) Open tendering;
- (b) Restricted tendering;
- (c) Request for quotations;
- (d) [Request for proposals without negotiation];
- (e) Two-stage tendering;
- (f) Request for proposals with dialogue;

<sup>51</sup> A/64/17, paras. 269-274.

<sup>52</sup> A/64/17, para. 275.

<sup>53</sup> The Guide to this provision will 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).

<sup>54</sup> This paragraph was added at the suggestion of experts during consultations with the Secretariat, and reflects a requirement in the United Nations Convention against Corruption that States parties must “take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents” (Article 9 (3)). The Guide to this article could explain the need for preservation of documents, and cross refer to any applicable rules on documentary records and archiving. If the enacting State considers that applicable internal rules and guidance should also be stored with the documents for a particular procurement, it could include those items in the regulations.

- (g) Request for proposals with consecutive negotiations;
- (h) Competitive negotiation

under the conditions of articles 25-27.

- (2) The procuring entity may have recourse to an electronic reverse auction under the conditions of article 28.
- (3) The procuring entity may have exceptional recourse to single-source procurement under the conditions of article 29.
- (4) The procuring entity may engage in a framework agreement procedure in accordance with the provisions of chapter VII where it engages in procurement involving open solicitation.<sup>55</sup>

### **Article 25. General rules applicable to the selection of a procurement method**

- (1) Except as otherwise provided by this Law, a procuring entity shall conduct procurement by means of open tendering.
- (2) A procuring entity may use a method of procurement other than open tendering only in accordance with articles 26 to 29, and shall select such other method of procurement as appropriate in the circumstances of the particular procurement, and shall seek to maximize competition to the extent practicable.
- (3) If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under article [23] a statement of the reasons and circumstances on which it relied to justify the use of that method.

### **Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)**

- (1) A procuring entity may engage in procurement by means of restricted tendering, request for quotations and request for proposals without negotiation where it is feasible to provide [a detailed description of the subject matter of the procurement],<sup>56</sup> but where the use of open tendering would not be appropriate for the reasons provided in paragraphs (2) to (4) of this article.

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<sup>55</sup> The Working Group at its fifteenth session decided that no reference should be made to framework agreements in the earlier draft of the provisions on choice of procurement method, because a framework agreement is not a procurement method (A/CN.9/668, para. 68). The Working Group may wish therefore to consider whether conditions for use of framework agreements should appear in this chapter II (with a consequent change to the title of this article), or elsewhere in the Model Law, in order to reflect its earlier decision that a framework agreement should be used only in conjunction with open solicitation.

<sup>56</sup> The Working Group may wish to consider whether reference to “a detailed description of the subject matter of the procurement” is sufficiently flexible to allow for performance/output specifications. The Guide may provide relevant explanations, such as that the reference is not intended to exclude performance/output specifications, which in practice could also be



(2) The procuring entity may, engage in procurement by means of restricted tendering in accordance with article 39 when:

(a) The subject matter of the procurement, by reason of its highly complex or 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,

provided that the procuring entity selects such a method for the purposes of maximizing [economic efficiency] [economy and efficiency]<sup>57</sup> in the procurement concerned.

(3) A procuring entity may engage in procurement by means of a request for quotations in accordance with article 40 for the procurement of readily available goods or services that are not specially produced or provided to the particular description 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 threshold amount set out in the procurement regulations.

(4) The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article 41 where the procuring entity will consider the [commercial] [financial] [price]<sup>58</sup> aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposal.

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formulated in detailed terms.

<sup>57</sup> The suggestion of experts during consultations with the Secretariat was that, in order to ensure consistency with the preamble (which refers to economy and efficiency), and because the terms “economy” and “efficiency” are not synonyms, the term “economy and efficiency” should be used throughout the text.

<sup>58</sup> The Working Group may wish to consider which of the suggested terms is the most appropriate in this context. The 1994 Model Law refers in this context only to “price”. It is proposed that the issue is considered in conjunction with article 41 of the draft.

**Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, and competitive negotiations)<sup>59</sup>**

(1) A procuring entity may engage in procurement by means of two-stage tendering in accordance with article 42, request for proposals with dialogue in accordance with article 43, or request for proposals with consecutive negotiations in accordance with article 44 in the following circumstances:

(a) It is not feasible for the procuring entity to formulate a sufficiently comprehensive description of the subject matter of the procurement in accordance with article [11] and it engages in the method concerned in order to obtain the most satisfactory solution to its procurement needs;

(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 reasons of national defence or national security, where the procuring entity determines that the selected method is the most appropriate method of procurement;<sup>60</sup> or

(d) When open tendering was engaged in but no tenders were submitted or the procurement was cancelled by the procuring entity pursuant to article [17, 19 or 37 (3)],<sup>61</sup> and when, in the judgement of the procuring entity, engaging in new open tendering proceedings or a procurement method under chapter IV would be unlikely to result in a procurement contract.

(2) A procuring entity may engage in competitive negotiations, in accordance with the provisions of article 45 of this Law, in the circumstances specified in paragraph (1) (b) to (d) of this article<sup>62</sup> and, [(subject to approval by ... (the

<sup>59</sup> This draft places competitive negotiations on a par with two-stage tendering and request for proposals with dialogue. This approach has been retained to reflect the 1994 text. However, as commented by experts in consultation with the Secretariat, the transparency provisions and degree of flexibility in two-stage tendering and request for proposals with dialogue are not present in competitive negotiation. The latter, in the light of its mainly unregulated nature, may be considered for use as an alternative to single-source procurement. Enacting States may be invited to consider whether competitive negotiation should be enacted other than for the reasons set out in subparagraph (1) (c) and paragraph (2) by reference to whether or not they enact some or all of the procurement methods in chapter V. If the Working Group agrees with the reasoning of the experts, it may consider that the conditions for use would be better reflected in article 29, with appropriate amendments to that article.

<sup>60</sup> 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.

<sup>61</sup> Corresponding to cross-references in article 19 (1) (d) of the 1994 Model Law to articles 12, 15 and 34 (3) of that text.

<sup>62</sup> The Guide would address the overlap between this and other procurement methods (those in section I of chapter V and single-source procurement), and would invite enacting States to consider whether the more transparent procedures in two-stage tendering and request for proposals procedures could be enacted rather than competitive negotiations in the situations set

enacting State designates an organ to issue the approval),)]<sup>63</sup> when there is an urgent need for the subject matter of the procurement, and engaging in open 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.<sup>64</sup>

## **Article 28. Conditions for use of an electronic reverse auction**

A procuring entity may engage in procurement by means of an electronic reverse auction, or may use an electronic reverse auction in other methods of procurement, as appropriate, in order to determine the successful submission, in accordance with the provisions of chapter VI of this Law, under the following conditions:

- (a) Where it is feasible for the procuring entity to formulate a detailed and precise description of the subject matter of the procurement;
- (b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; and
- (c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

## **Article 29. Conditions for use of single-source procurement**

A procuring entity may engage in single-source procurement in accordance with the provisions of article 46 of this Law in the following exceptional circumstances:

- (a) The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;
- (b) There is an urgent need for the subject matter of the procurement, and engaging in open tendering or any other method 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;<sup>65</sup>

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out in paras. (1) (a) and (c), and that competitive negotiations are normally preferable to single-source procurement in the situations set out in paras. (1) (b) and (2). Thus, enacting States might choose not to enact paras. (1) (a) and (c).

<sup>63</sup> 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).

<sup>64</sup> 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 (A/CN.9/668, para. 56).

<sup>65</sup> The Working Group may wish to consider alternatives to single-source procurement in the case

(c) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(d) In the case of procurement for reasons of essential national defence or national security or essential national defence purposes,<sup>66</sup> where the procuring entity determines that the use of any other method of procurement is not appropriate;

(e) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, where procurement from a particular supplier or contractor is necessary in order to implement a socio-economic policy of this State set out in the procurement regulations, provided that procurement from no other supplier or contractor is capable of promoting that policy.

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of urgency. Currently the Model Law provides for only one alternative – competitive negotiations (see article 19 (2) of the 1994 Model Law and article 27 (2) of this draft). Some experts consulted by the Secretariat suggested that in the case of urgency other than owing to a catastrophic event (article 19 (2) (a) of the 1994 Model Law), the procuring entity should be able to have recourse to a method of procurement not involving negotiations, such as restricted tendering or request for quotations. If such other alternative is envisaged, the Working Group may wish then to consider providing guidance on circumstances that would justify recourse to competitive negotiations as opposed to a method of procurement not involving negotiations, such as restricted tendering, in the case of urgency. It should also be noted in this regard that as a result of amendments introduced to the provisions on single-source procurement (and consequential changes made in article 27 (2) of this draft), a distinction between urgency and emergency (i.e., urgency owing to a catastrophic event) was eliminated.

<sup>66</sup> A/64/17, para. 119.