



# General Assembly

Distr.: Limited  
20 September 2010

Original: English

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**United Nations Commission  
on International Trade Law  
Working Group I (Procurement)  
Nineteenth session  
Vienna, 1-5 November 2010**

## **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 chapter V of the revised Model Law (Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)), comprising articles 42-46.

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



## **CHAPTER V. PROCEDURES FOR TWO-STAGE TENDERING, REQUEST FOR PROPOSALS WITH DIALOGUE, REQUEST FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS, COMPETITIVE NEGOTIATIONS AND SINGLE-SOURCE PROCUREMENT<sup>1</sup>**

### **Article 42. Two-stage tendering<sup>2</sup>**

(1) The provisions of chapter III 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 present, 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 discussions with suppliers or contractors whose tenders have not been rejected pursuant to provisions of this Law,<sup>3</sup> concerning any aspect of their tenders. When the procuring entity engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors.

(4) (a) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite all suppliers or contractors whose tenders were not rejected at the first stage to present final tenders with prices with respect to a single description of the subject matter of the procurement;

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<sup>1</sup> The title of the chapter was revised pursuant to A/CN.9/690, para. 149.

<sup>2</sup> The accompanying Guide text will discuss the variants of the two-stage tendering used in practice, and will explain that the article accommodates the essential characteristics of this method, and will explain the risks of collusion posed by this procurement method.

<sup>3</sup> The accompanying Guide text will cross-refer to the relevant provisions, highlighting that this procedure involves an assessment of responsiveness. The Working Group may wish to consider, as suggested during the intersessional consultations, that this provision itself should contain a specific cross-reference to the provisions of article 37 (3) (a) to (c) and article 19 of this draft (no mention is made of article 37 (3) (d) since it also refers to article 18 (rejection of the submission as abnormally low), which is not applicable here since no tender price is known to the procuring entity at this stage of examination).

(b) In formulating that description,<sup>4</sup> the procuring entity may delete or modify any aspect of the technical or quality characteristics of the subject matter of the procurement as set out in the solicitation documents and add any new characteristic that conforms to the requirements of this Law;

(c) The procuring entity may delete or modify any criterion for examining or evaluating tenders set out in the solicitation documents and may add any new criterion that conforms to the requirements of this Law, to the extent only that the deletion or modification is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement;<sup>5</sup>

(d) Any deletion, modification or addition made pursuant to subparagraphs (b) or (c) of this paragraph shall be communicated to suppliers or contractors in the invitation to present final tenders;

(e) A supplier or contractor not wishing to present 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;<sup>6</sup>

(f) The final tenders shall be evaluated<sup>7</sup> in order to ascertain the successful tender as defined in article [37 (4) (b)] of this Law.

<sup>4</sup> Suggestions were made during the intersessional consultations to refer in these provisions to article [22] of this Law. Since article 22 in the relevant part is applicable not only to this subparagraph but also to subparagraphs (c) and (d) as well as to paragraph (3) above, the Secretariat's understanding is that making a cross-reference to article 22 only in this provision will be misleading. Since article 22 is of general application, the Working Group may wish to consider that cross-references to it, where appropriate, in the accompanying Guide text alone would be sufficient. As regards specifically this article, the accompanying Guide text would explain which provisions of article 22 are relevant to paragraph (3), which to subparagraphs (b) and (c) and which to subparagraphs (d), of paragraph (4). The overall objective is to emphasize, that not only during the discussions, but also in revising the solicitation documents and communicating revisions to the suppliers or contractors, the procuring entity should respect the confidentiality of the suppliers or contractors' technical proposals used in the first stage, consistent with requirements of article 22 of the Law. It will highlight the importance of this safeguard to ensure participation of suppliers or contractors in this type of two-stage procurement proceedings.

<sup>5</sup> The accompanying Guide text will explain that changes to technical or quality characteristics may necessarily require changes to the examination and/or evaluation criteria, as otherwise the examination and/or evaluation criteria at the second stage would not reflect the applicable technical and quality criteria.

<sup>6</sup> The accompanying Guide text will explain the application of the article on tender securities in the context of two-stage proceedings, in particular at which stage of the proceedings tender securities may be required.

<sup>7</sup> Amended pursuant to A/CN.9/690, para. 18.

**Article 43. Request for proposals with dialogue<sup>8</sup>**

(1) The procuring entity shall solicit proposals by issuing an invitation to participate in the request for proposals with dialogue proceedings in accordance with article [29 quater] of this Law except as otherwise provided for in that article.

(2) The invitation shall include:

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

(b) A description of the subject matter of the procurement to the extent known, and the desired or required time and location for the provision of such subject matter;

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

(d) The intended stages of the procedure;

(e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article [9] of this Law;

(f) The minimum requirements that proposals must meet in order to be considered responsive in accordance with article [10] of this Law, and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;

(g) A declaration pursuant to article [8] of this Law;

(h) The means of obtaining the request for proposals and the place where it may be obtained;

(i) The price, if any, charged by the procuring entity for the request for proposals;

(j) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals;<sup>9</sup>

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<sup>8</sup> The accompanying Guide text will explain that this procurement method is available for all types of procurement, including the procurement of non-quantifiable advisory services. It will further explain that in the latter type of procurement, regulations could provide additional steps or provisions. For example, proposals need not contain financial elements or prices where the cost is not an evaluation criterion or not a significant evaluation criterion. As regards evaluation criteria in such type of procurement, the Guide could explain that for non-quantifiable advisory services, they usually include (i) the service-provider's experience for the specific assignment, (ii) the quality of the understanding of the assignment under consideration and of the methodology proposed, (iii) the qualifications of the key staff proposed, (iv) transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the description of the assignment, and (v) when applicable, the extent of participation by nationals among key staff in the performance of the services.

<sup>9</sup> Amended pursuant to A/CN.9/690, para. 22(b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency of payment in domestic procurement, if it would be unnecessary in the circumstances.

(k) The language or languages in which the requests for proposals are available;<sup>10</sup>

(l) The manner, place and deadline for presenting proposals.<sup>11</sup>

(3) For the purpose of limiting the number of suppliers or contractors from whom to request proposals, the procuring entity may engage in pre-selection proceedings. The provisions of article [16] of this Law shall apply mutatis mutandis to the pre-selection proceedings, except to the extent that those provisions are derogated from in this paragraph:

(a) The procuring entity shall specify in the pre-selection documents that it will request proposals only from a limited number of pre-selected suppliers or contractors that best meet the qualification criteria specified in the pre-selection documents;

(b) The pre-selection documents shall set out the maximum number of pre-selected suppliers or contractors from whom the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing such a number the procuring entity shall bear in mind the need to ensure the effective competition;

(c) The procuring entity shall rate the suppliers or contractors that meet the qualifications criteria specified in the pre-selection documents according to the manner of rating that is set out in the invitation to pre-selection and the pre-selection documents.

(d) The procuring entity shall pre-select suppliers or contractors that acquired the best rating up to the maximum number indicated in the pre-selection documents but at least three if possible;

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

(4) The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request for proposals with dialogue proceedings has been issued in accordance with the provisions of article [29 quater] of this Law, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article [16] of this Law;

<sup>10</sup> Amended pursuant to A/CN.9/690, para. 22(b). The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, and will add that an indication of the language or languages may still be important in some multilingual countries.

<sup>11</sup> Some amendments were made in the listing to align it with the list in article 41 of the current draft.

(c) Where pre-selection proceedings have been engaged in, to each pre-selected supplier or contractor in accordance with the procedures and requirements specified in the pre-selection documents;

(d) In the case of direct solicitation, to each supplier or contractor selected by the procuring entity;

that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.<sup>12</sup>

(5) The request for proposals shall include, in addition to the information referred to in paragraphs (2)(a) to (f) and (l) of this article, the following information:

(a) Instructions for preparing and presenting proposals;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;

(c) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;<sup>13</sup>

(d) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(e) The means by which, pursuant to article [14] of this Law, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(f) Any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that will not be the subject of dialogue during the procedure;

(g) Where the procuring entity intends to limit the number of suppliers or contractors that it will invite to participate in the dialogue, the minimum number of suppliers or contractors, which shall be not lower than three, if possible, and, where appropriate, the maximum number and the criteria and procedure, in conformity with the provisions of this Law, that will be followed in selecting it;

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<sup>12</sup> Amended to align with the similar wording found elsewhere in the current draft.

<sup>13</sup> Based on article 38 (j) and (n) of the 1994 Model Law. Amended pursuant to A/CN.9/690, para. 22(b). The accompanying Guide text will note that the procuring entity may decide not to include reference to the currency in domestic procurement, if it would be unnecessary in the circumstances.

(h) The criteria and procedure for evaluating the proposals in accordance with article [11] of this Law;<sup>14</sup>

(i) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

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

(k) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of a standstill period and, if none will apply, a statement to that effect and reasons therefor;

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

(m) 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 proposals and to the procurement proceedings.<sup>15, 16</sup>

(6) (a) The procuring entity shall examine all proposals received against the established minimum requirements and shall reject each proposal that fails to meet these minimum requirements on the ground that it is non-responsive;

(b) Where the limitation on the number of suppliers or contractors that can be invited to participate in the dialogue was established and the number of responsive proposals exceeds that maximum, the procuring entity shall select the maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals;

(c) The notice of rejection and reasons for rejection shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

(7) The procuring entity shall invite each supplier or contractor that presented a responsive proposal, within any applicable maximum, to participate in dialogue. The procuring entity shall ensure that the number of suppliers invited to participate in the dialogue is sufficient to ensure effective competition, and shall be at least three, if possible.

<sup>14</sup> The accompanying Guide text will address the question of sub-criteria and provide the guidance that would be needed to ensure that a true picture of the evaluation criteria is given. Different procurements might require different levels of flexibility in this regard.

<sup>15</sup> Amended pursuant to A/CN.9/690, para. 22(c). The accompanying Guide text will elaborate on the benefit of including information as regards the timetable envisaged for the procedure.

<sup>16</sup> Some amendments were made in the listing to align it with the list in article 41 of the current draft.

(8) The dialogue shall be conducted by the same representatives of the procuring entity on a concurrent basis.

(9) During the course of the dialogue, the procuring entity shall not modify the subject matter of the procurement, nor any qualification or evaluation criterion, nor any minimum requirements established pursuant to paragraph (2) (f) of this article, nor any elements of the description of the subject matter of the procurement or term or condition of the procurement contract<sup>17</sup> that is not subject to the dialogue as notified in the request for proposals.<sup>18</sup>

(10) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that are communicated by the procuring entity to a supplier or contractor shall be communicated at the same time on an equal basis to all other participating suppliers or contractors, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article [22] of this Law.<sup>19</sup>

(11) Following the dialogue, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing, and shall specify the manner, place and deadline for presenting best and final offers.

(12) No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.<sup>20</sup>

(13) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

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<sup>17</sup> Amended to align with paragraphs (2)(f) and (5)(f) of this article.

<sup>18</sup> The accompanying Guide text will explain why other changes need to be permitted in this procurement method, and that the evaluation criteria should be drafted at a level of detail that will avoid arbitrariness. It will further explain that the provisions seek to prevent the procuring entity from making the changes described (but would not prevent suppliers from making changes in their proposals as a result of the dialogue) (A/CN.9/690, para. 22(d)).

<sup>19</sup> The accompanying Guide text will cross-refer to article 22 that addresses consent to disclosure of the confidential information among suppliers.

<sup>20</sup> Added to mitigate one of the concerns raised by multilateral development banks as regards this procurement method.

## Article 44. Request for proposals with consecutive negotiations<sup>21</sup>

(1) The provisions of article [41 (1)-(7)]<sup>22</sup> of this Law shall apply mutatis mutandis to procurement conducted by means of request for proposals with

<sup>21</sup> The Working Group has decided that this procurement method should not be limited to advisory services, but that the accompanying Guide text will discuss the history and use of the method, in particular in the projects financed by multilateral development banks, to enable enacting States to decide whether to restrict it when drafting legislation based on the Model Law (A/CN.9/690, para. 26). The suggestions during the intersessional consultations were to the effect that the accompanying Guide text should also discuss the significant negotiating disadvantage caused by consecutive negotiations, in particular through losing benefit of leverage of concurrent negotiations (the procuring entity being at a disadvantage since the first ranked supplier has little incentive to negotiate). The accompanying Guide text, it was suggested, will point out that these disadvantages might be partly mitigated by the solicitation documents fixing a period for the negotiations and by the first ranking supplier facing a risk that negotiations with the procuring entity may be terminated at any time and may succeed with other participating suppliers since they will have incentive to improve their bids to win. The accompanying Guide text will nevertheless point out that the procuring entity may still incur transaction costs and face embarrassment risk if it has to terminate negotiations with the first ranked supplier (the procuring entity will unavoidably face criticism for saving at expense of quality and technical considerations). The Guide should discuss therefore that whether this method is appropriate depends on circumstances (e.g. where the procuring entity can indeed afford to compromise on quality; if it cannot, the article 41 procurement method seems to be the only alternative) as will also depend on circumstances whether the procuring entity would ever want to go to the second, third, fourth, etc., best supplier (if the quality gap between them is very big, the procuring entity can always cancel the procurement). Despite all these disadvantages, the Guide will explain that for the type of procurement intended to be covered by this procurement method, envisaging simultaneous negotiations in this procurement method as the alternative to consecutive negotiations, because of corruption risk, is not appropriate. The accompanying Guide text will also have to discuss why the Working Group decided to abandon the idea of permitting the procuring entity to select the best offer at the end of the consecutive negotiations with all the responsive suppliers, and decided to provide instead that the procuring entity should not be able to award the contract to a supplier with which negotiations had been terminated (A/CN.9/690, para. 30). In this respect, the Working Group may wish to review the adequacy of the explanation in the relevant footnote below.

<sup>22</sup> Although the previous drafts cross-referred to the provisions of article 43, in the light of the amendments made in the conditions for use of this procurement method in article 27 (3) of the current draft, the Secretariat's understanding is that this method should be considered as a variation of the article 41 rather than the article 43 method (which would also be consistent with the approach of the 1994 Model Law (see article 44)). The paragraph in this draft was redrafted accordingly. Although at its eighteenth session the Working Group agreed that pre-selection should be envisaged in this procurement method (A/CN.9/690, para. 31), the Secretariat's understanding is that pre-selection would not be appropriate either in the article 41 or article 44 procurement method. The Working Group agreed to introduce provisions on pre-selection in article 43 on the ground that holding simultaneous negotiations with a large number of qualified suppliers will be time- and cost-consuming, especially in the light of the type of procurement intended to be covered by article 43 (large and complex, similar to the ones covered by the UNCITRAL instruments on privately financed infrastructure projects, where pre-selection is also provided for). The situation is different in the article 41 and 44 procurement methods intended to deal with simpler types of procurement, where the bigger the pool of the responsive bidders the higher are chances of selecting the submission that meets best the needs of a procuring entity. Both of those methods provide for a straightforward procedure for the selection of the successful submission and thus time and cost considerations are not relevant.

consecutive negotiations, except to the extent those provisions are derogated from in this article.

(2) The proposals whose technical and quality characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive.<sup>23</sup> The procuring entity shall rate<sup>24</sup> each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals, and shall:

(a) Promptly communicate to each supplier or contractor presenting the responsive proposal the score of the technical and quality characteristics of its respective proposal and its rating;<sup>25</sup>

(b) Invite the supplier or contractor that has attained the best rating in accordance with those criteria and procedure for negotiations on the financial aspects of its proposal;<sup>26</sup> and

(c) Inform other suppliers or contractors that presented responsive proposals that they may be considered for negotiation if the negotiations with the suppliers or contractors with better ratings do not result in a procurement contract.

(3) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (2)(b) of this article will not result in a procurement contract, the procuring entity shall inform that supplier or contractor that it is terminating the negotiations.<sup>27</sup>

(4) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall

<sup>23</sup> The first sentence was added to align with the corresponding provisions in article 41 (8) of the current draft.

<sup>24</sup> The Working Group may wish to consider whether the terms “rank” and “ranking” should replace the words “rate” and “rating” throughout this article as compared to article 41.

<sup>25</sup> This subparagraph was added to align with the corresponding provisions in article 41 (8) of the current draft.

<sup>26</sup> Amended pursuant to A/CN.9/690, para. 29. The accompanying Guide text will explain, with a cross-reference to paragraph (5) of this article, that no aspects of the proposal that have been considered as part of the assessment of responsiveness and evaluation of quality and technical characteristics of proposals should subsequently be open for negotiation.

<sup>27</sup> The accompanying Guide text to this and other provisions in this article referring to the notion “termination of negotiations” will explain that this notion means to encompass the rejection of a supplier’s final price proposal and the consequent exclusion of that supplier from further participation in the procurement proceedings. Thus no procurement contract could be awarded to the supplier(s) with whom the negotiations were terminated pursuant to article 44 (3) and (4). The Guide will further point out that UNCITRAL carefully considered views that this approach might be viewed as excessively rigid, since only at the end of the process would the procuring entity know which was in fact the best offer, and further views that, although the procuring entity should not be permitted to reopen negotiations, to avoid open-ended negotiations that could lead to abuse and cause delay, it should be permitted to accept that best offer (and award the contract to the supplier that had proposed it). UNCITRAL however chose to impose the prohibition in article 44 (6), in order not to overemphasize competition on financial aspects in types of procurement for which this procurement method is primarily designed (such as in the procurement of architectural and engineering services) where considerations of technical quality are particularly important (A/CN.9/690, para. 30, and the relevant wording from the 1994 Guide to Enactment).

invite the other suppliers or contractors still participating in the procurement proceedings for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

(5) During the course of the negotiations, the procuring entity shall not modify the subject matter of the procurement, nor any qualification, examination or evaluation criterion, including any established minimum requirements, nor any elements of the description of the subject matter of the procurement or term or condition of the procurement contract other than financial aspects of proposals that are subject to the negotiations as notified in the request for proposals.<sup>28</sup>

(6) The procuring entity may not reopen negotiations with any supplier or contractor with which it has terminated negotiations.<sup>29</sup>

### **Article 45. Competitive negotiations<sup>30</sup>**

(1) The provisions of article [29 ter] of this Law shall apply to the procedure preceding the negotiations.<sup>31</sup>

(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 before or during the negotiations shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article [22] of this Law.

(3) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present, by a specified date, a best and final offer with respect to all aspects of their proposals.<sup>32</sup>

<sup>28</sup> Amended pursuant to A/CN.9/690, para. 29, and in the light of the deletion of the definition “material change”. The provisions draw on article 43 (9) of the current draft.

<sup>29</sup> Amended pursuant to A/CN.9/690, para. 30. The Guide will explain what is meant by “termination” of negotiations. See the relevant footnote above.

<sup>30</sup> The accompanying Guide text will explain that this method is an alternative to single-source procurement rather than to the other methods in chapter V of the Model Law, and that it primarily aims to address situations of urgency. The Guide will explain that in selecting between competitive negotiations and single-source procurement under appropriate circumstances, the procuring entity will have to take into account the requirement of article 25 (2) of the Law to maximize competition, and the need to assess the level of urgency (A/CN.9/690, paras. 33 and 34).

<sup>31</sup> Amended pursuant to the new article 29 ter that incorporates what was the first sentence in this paragraph.

<sup>32</sup> It was suggested during the intersessional consultations that this paragraph should be deleted as no request of best and final offers will follow this type of negotiations. The Secretariat draws the Working Group’s attention that the provisions are based on article 49 (4) of the 1994 Model Law, which the Working Group has not so far decided to amend. The Working Group may wish to consider that the deletion of this paragraph may eliminate the only safeguard against abuses in this procurement method. In particular, the referred stage puts all participating suppliers on an equal footing as regards receiving information about termination of negotiations. It also leaves traces for the audit as regards all actual offers that were before the procuring entity and that it should have considered in making the selection in accordance with paragraph (4) of this

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

### **Article 46. Single-source procurement**

The provisions of article [29 ter] of this Law shall apply to the procedure preceding the solicitation of a proposal or price quotation from a single supplier or contractor. The procuring entity shall engage in negotiations with the supplier or contractor from which a proposal or price quotation is solicited unless such negotiations are not feasible in the circumstances of the procurement concerned.<sup>33</sup>

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article. Without that stage, much discretion is given to the procuring entity to decide with whom to conclude the contract, with no transparency and verifiable traces in the process that would allow effective challenge.

<sup>33</sup> Amended pursuant to A/CN.9/690, paras. 36 and 37, and new article 29 ter that incorporates what was the old first sentence of this article. The first sentence of this article in the current draft was revised accordingly. The accompanying Guide text will elaborate on the utility for the procuring entity to negotiate and request, when feasible and necessary, market data or costs clarifications, in order to avoid unreasonably priced proposals or quotations. It will also underscore single-source procurement as the method of last resort after all other alternatives had been exhausted, and will encourage the use of framework agreements to anticipate urgent procurement (A/CN.9/690, para. 36).