



General Assembly

Distr.: Limited
22 September 2010

Original: English

**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 VI (Auctions) of the revised Model Law, comprising articles 47 to 51.

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



CHAPTER VI. AUCTIONS

Article 47. Procedures for soliciting participation in procurement by means of an auction

(1) The procuring entity shall solicit bids by issuing an invitation to the auction in accordance with the provisions of article [29 bis]. The invitation shall include:

- (a) The name and address of the procuring entity;
- (b) A description of the subject matter of the procurement, in conformity with article [10] of this Law, 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 they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
- (d) A declaration pursuant to article [8] of this Law;
- (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 criteria and procedure for examination of bids against the description of the subject matter of the procurement;¹
- (g) The criteria and procedure for evaluation of bids in conformity with article [11 (5)] of this Law, including any mathematical formula that will be used in the evaluation procedure during the auction;²
- (h) [deleted];³
- (i) The manner in which the bid price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;
- (j) The currency or currencies in which the bid price is to be formulated and expressed;⁴

¹ The accompanying Guide text will explain that the examination might take place after the auction, as provided in article 51.

² The reference to “any criteria that cannot be varied during the auction” used in the end of this provision in the previous drafts was deleted since it seems referring to examination/responsiveness criteria already covered by subparagraph (f) of this paragraph.

³ Reference to possibility of submitting bids for a portion or portions of the subject matter of the procurement was deleted since this would imply holding several separate auctions within the same procurement proceedings.

⁴ 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.

(k) The minimum number of suppliers or contractors required to register for the auction in order for the auction to be held, which shall be sufficient to ensure effective competition;⁵

(l) If any limitation on the number of suppliers or contractors that can be registered for the auction is imposed in accordance with paragraph (2) of this article, the relevant maximum number and the criteria and procedure, in conformity with the provisions of this Law, that will be followed in selecting it;

(m) How the auction can be accessed, including appropriate information for connection to the auction;⁶

(n) The deadline by which the suppliers and contractors shall register for the auction and the requirements for registration;

(o) The date and time of the opening of the auction and the requirements for identification of bidders at the opening of the auction;

(p) [deleted];⁷

(q) The criteria governing the closing of the auction;

(r) Other rules for the conduct of the auction, including the information that will be made available to the bidders in the course of the auction, the language in which it will be made available⁸ and the conditions under which the bidders will be able to bid;

(s) 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;

⁵ The accompanying Guide text will address the issues of objectivity and fairness of treatment, as was suggested in the Working Group, and reasons for not setting any minimum in the Model Law as is done for example in request for proposals proceedings.

⁶ The phrase “including appropriate information for connection to the auction” replaced the phrase “information about the equipment being used and technical specifications for connection” used in the previous drafts, as the former is more technology neutral. The accompanying Guide text will specify technical aspects that should be provided (such as website, any particular software, features, capacity, the equipment being used and technical specifications for connection).

⁷ The provisions reading “whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage)” were deleted on the understanding that there will be no need for separate stages if there is no exclusion of bidders at the end of each stage. The Working Group may wish to consider that, even if the possibility of holding a multi-staged auction is to be preserved, information at this level of detail can be provided in the rules for the conduct of the auction referred to in subparagraph (r) of this paragraph.

⁸ The Secretariat’s understanding is that the accompanying Guide text should note (so as to be consistent with the Working Group’s decisions on similar provisions regarding language) that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, but that an indication of the language or languages may still be important in some multilingual countries (see A/CN.9/690, para. 22 (b)).

(t) The means by which suppliers or contractors may seek clarifications of information relating to the procurement proceedings;⁹

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings before and after the auction,¹⁰ without the intervention of an intermediary;

(v) [deleted];¹¹

(w) 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 the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(x) Any formalities that will be required after the auction for a procurement contract to enter into force, including, where applicable, ascertainment of qualifications or responsiveness in accordance with article [51] of this Law and the execution of a written procurement contract pursuant to article [20] of this Law;¹²

(y) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the procurement proceedings.¹³

(2) The procuring entity may impose a maximum number of suppliers or contractors that can be registered for the auction only to the extent that capacity limitations in its communication system so require.¹⁴ The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify

⁹ The additional standard provisions used in this context throughout the Model Law reading “and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors” were omitted here since they will be inappropriate in the auction setting where preserving the anonymity of bidders is paramount. The accompanying Guide text will elaborate on this discrepancy.

¹⁰ The phrase “before and after the auction” was added in the light of article 50 (2) (d) of the current draft.

¹¹ Reference to any commitments to be made by the supplier or contractor outside the procurement contract was deleted pursuant to A/CN.9/690, para. 39 (h).

¹² The additional standard provisions used in this context throughout the Model Law reading “and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval” were omitted here in the light of the conditions for the use of stand-alone auctions. It is unlikely that approval by a higher authority or the Government would be required for procurement of subject matter envisaged by article 28 (1) of the current draft.

¹³ It was suggested during the intersessional consultations that the accompanying Guide text should highlight that if there were to be any entry fee for the auction (not recommended in the light of the Working Group’s conclusions at its earlier sessions in the context of discussion of the article 7 provisions and ERAs), at a minimum it must be disclosed at the outset of the procurement.

¹⁴ The phrase “only to the extent that capacity limitations in its communication system so require” replaced the previously used phrase “for technical reasons or capacity limitations”. The Secretariat’s understanding is that there should be no capacity limitations other than arising out of technical reasons. The suggested wording is aligned with article 50 (5) with reference to “its communication system”.

the imposition of such a maximum in the record required under article [23] of this Law.

(3)¹⁵ The procuring entity may decide in the light of the circumstances of the given procurement that the auction shall be preceded by an examination or evaluation of initial bids.¹⁶ In such case, the invitation to the auction shall, in addition to information listed in paragraph (1) of this article, include:

(a) An invitation to present initial bids together with the instructions for preparing initial bids;¹⁷

(b) The manner, place and deadline for presenting initial bids.¹⁸

(4) Where the auction has been preceded by the examination or evaluation of initial bids, the procuring entity shall promptly after the completion of the examination or evaluation of initial bids:

(a) Dispatch the notice of rejection and reasons for rejection to each supplier or contractor whose initial bid was rejected;

(b) Issue an invitation to the auction to each qualified supplier or contractor whose initial bid is responsive, providing all information required to participate in the auction;

(c) Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed.^{19, 20}

¹⁵ The accompanying Guide text will explain that the enacting State may omit the next two paragraphs if it decides to provide in its national public procurement law only for very simple auctions, not involving any pre-auction stage other than registration for the auction. The Guide will point out however that even in this type of auctions, if the procuring entity has to impose a limit on the number of bidders because of capacity limitations in its communication system (see para. (2) of this article), it may prefer to limit the pool to those qualified and responsive bidders rather than to the defined maximum number of the bidders that were registered first.

¹⁶ The accompanying Guide text will note that the ascertainment of qualifications of suppliers is inherent in examination or evaluation of initial bids.

¹⁷ The phrase reading “including the language or languages, in conformity with article [13] of this Law, in which initial bids are to be prepared” that had been included in the end of this provision in the previous drafts was deleted in the current draft. It is the Secretariat’s understanding that it would be sufficient for the accompanying Guide text to refer to this point. To be consistent with the Working Group’s decisions on similar provisions regarding language, the Guide would also point out that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, but that an indication of the language or languages may still be important in some multilingual countries (see A/CN.9/690, para. 22 (b)).

¹⁸ The accompanying Guide text will cross-refer to paragraph (1) (f) and (g) as regards the criteria for examination and evaluation of bids, which will also be applicable to initial bids.

¹⁹ The accompanying Guide text will address the extent of the information on the outcome of the full evaluation that should be provided.

²⁰ The provisions referring to the obligation of the procuring entity to ensure that the number of suppliers or contractors invited to register for the auction is sufficient to ensure effective competition were deleted in the current draft since the procuring entity would have no means to ensure that: all responsive bidders would have to be invited up to any maximum specified in the invitation to the auction. The procuring entity cannot enlarge the pool of responsive bidders if it turned out to be small. In such case, provisions of article 49 (2) would apply.

Article 48. Procedures for soliciting participation in procurement proceedings involving an auction as a phase preceding the award of the procurement contract²¹

(1) Where an auction is to be used as a phase preceding the award of the procurement contract in a procurement method, as appropriate, or in a framework agreement procedure with second stage competition, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings, that an auction will be held and shall provide, in addition to other information required to be included under provisions of this Law, the following information about the auction:

(a) The mathematical formula²² that will be used in the evaluation procedure during the auction;²³

(b) How the auction can be accessed, including appropriate information for connection to the auction.

(2) Before the auction is held, the procuring entity shall issue an invitation to the auction to all suppliers or contractors remaining in the proceedings specifying:

(a) The deadline by which the suppliers and contractors shall register for the auction and requirements for registration;

(b) The date and time of the opening of the auction and requirements for identification of bidders at the opening of the auction;

(c) [deleted];²⁴

(d) Criteria governing the closing of the auction;

(e) Other rules for the conduct of the auction, including the information that will be made available to the bidders in the course of the auction, the language in which it will be made available²⁵ and the conditions under which the bidders will be able to bid.

²¹ The title was shortened pursuant to A/CN.9/690, para. 42 (a).

²² The Working Group, at its eighteenth session, agreed to amend this wording by replacing the narrow reference to a mathematical formula with a broader reference to an automatic evaluation method, including a formula, drawing on the relevant wording of the 2006 version of the GPA (A/CN.9/690, para. 42 (c)). This has been done by an addition to the definition of the auction in article 2, and is addressed in article 50 (2) (b).

²³ Reference to “any criteria that cannot be varied during the auction” used in the end of this provision in the previous drafts was deleted. See the relevant footnote above as regards article 47 (1) (g).

²⁴ See the relevant footnote above regarding the stages of the auction.

²⁵ The Secretariat’s understanding is that the accompanying Guide text should note (so as to be consistent with the Working Group’s decisions on similar provisions regarding language) that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances, but that an indication of the language or languages may still be important in some multilingual countries (see A/CN.9/690, para. 22 (b)).

Article 49. Registration for the auction and timing of holding of the auction

- (1) Confirmation of registration for the auction shall be communicated promptly to each registered supplier or contractor.
- (2) If the number of suppliers or contractors registered for the auction is insufficient to ensure effective competition,²⁶ the procuring entity may cancel the auction. The cancellation of the auction shall be communicated promptly to each registered supplier or contractor.
- (3) The period of time between the issuance of the invitation to the auction and the auction shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.²⁷

Article 50. Requirements during the auction

- (1) The auction shall be based on:
 - (a) Price, where the procurement contract is to be awarded to the lowest priced bid; or
 - (b) Price and other criteria specified to suppliers or contractors under articles [47 and 48] of this Law, as applicable, where the procurement contract is to be awarded to the most advantageous bid.
- (2) During the auction:
 - (a) All bidders shall have an equal and continuous opportunity to present their bids;
 - (b) There shall be automatic evaluation of all bids in accordance with the criteria, procedure and formula provided to suppliers or contractors under articles [47 and 48] of this Law, as applicable;
 - (c) Each bidder must receive, instantaneously and on a continuous basis during the auction, sufficient information allowing it to determine the standing of its bid vis-à-vis other bids;²⁸

²⁶ Amended pursuant to A/CN.9/690, para. 45.

²⁷ The accompanying Guide text will explain that this period must be sufficiently long also to allow effective review of the terms of solicitation under chapter VIII of this Law. According to the relevant provisions of that chapter in the current draft, the terms of solicitation can be challenged only up to the deadline for presentation of submissions, which in simple auctions (with no pre-auction examination or evaluation of initial bids) will mean up to the opening of the auction.

²⁸ The accompanying Guide text will highlight the risks of collusion that might arise where information about other bids is provided. It will also highlight risks of suppliers being able to reverse engineering others' bids in more complex auctions using the provided mathematical formula. It will discuss difficulties of preventing that and difficulties of ensuring meaningful bidding process and automatic evaluation while not revealing commercially sensitive information. It will also highlight difficulties of preserving anonymity of bidders, despite the provisions of this article and the chapter as a whole, in procurement of subject matters for which more or less stable pool of providers exists, albeit competition among them may be ensured. The

(d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.

(3) The procuring entity shall not disclose the identity of any bidder during the auction.

(4) The auction shall be closed in accordance with the criteria specified to suppliers or contractors under articles [47 and 48] of this Law, as applicable.

(5) The procuring entity shall suspend or terminate the auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.²⁹

Article 51. Requirements after the auction

(1) The bid that at the closure of the auction is the lowest priced bid or the most advantageous bid, as applicable, shall be the successful bid.

(2) In procurement by means of an auction where the auction was not preceded by examination or evaluation of initial bids,³⁰ the procuring entity shall ascertain after the auction the responsiveness of the successful bid and the qualifications of the supplier or contractor submitting it. The procuring entity shall reject that bid if it is found to be unresponsive or the supplier or contractor submitting it is found unqualified. Without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)] of this Law, the procuring entity shall select the bid that was the next lowest priced or next most advantageous bid at the closure of the auction, provided that that bid is ascertained to be responsive and the supplier submitting it is ascertained to be qualified.

(3) Where the successful bid at the closure of the auction appears to the procuring entity to be abnormally low and gives rise to concerns of the procuring entity as to the ability of the bidder that presented it to perform the procurement contract, the procuring entity may follow the procedures described in article [18] of this Law. If the procuring entity rejects the bid as abnormally low under article [18], it shall select the bid that at the closure of the auction was the next lowest priced or next most advantageous bid. This provision is without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)] of this Law.³¹

Guide therefore should provide examples of existing good practices to mitigate all these risks.

²⁹ The accompanying Guide text will note that the effect of the termination of the auction may be cancellation of the procurement.

³⁰ The accompanying Guide text will note that the ascertainment of qualifications of suppliers is inherent in examination or evaluation of initial bids.

³¹ During the intersessional consultations, the suggestions were made that the accompanying Guide text should explain the nature of bids (binding/non-binding and under which conditions) and applications of provisions of this Law on a standstill period and review in the context of the auctions.