



General Assembly

Distr.: Limited
10 February 2012

Original: English

**United Nations Commission
on International Trade Law**
Working Group I (Procurement)
Twenty-first session
New York, 16-20 April 2012

Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

Note by the Secretariat

Addendum

This addendum sets out a proposal for the Guide text to accompany Chapter V of the UNCITRAL Model Law on Public Procurement, comprising an introduction and commentary on two-stage tendering (article 48), and on related articles in Chapter II (articles 30 and 33).



GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

Part II. Article-by-article commentary

Chapter V: Procedures for two-stage tendering, request-for-proposals with dialogue, request-for-proposals with consecutive negotiations, competitive negotiations and single-source procurement

A. Introduction

Executive Summary

1. Chapter V of the Model Law sets out the procedures for five of the various procurement methods that are alternatives to open tendering: two-stage tendering [\[**hyperlink**\]](#), request-for-proposals with dialogue [\[**hyperlink**\]](#), request-for-proposals with consecutive negotiations [\[**hyperlink**\]](#), competitive negotiations [\[**hyperlink**\]](#) and single-source procurement [\[**hyperlink**\]](#). There is no one typical use of these methods, though they have a common feature in that discussions, dialogue or negotiations between the procuring entity and suppliers or contractors is envisaged.

2. In the case of two-stage tendering and request-for-proposals with dialogue, the main circumstances indicating the use of either method are that, first, it is not feasible for the procuring entity to determine and describe its needs with the precision and detail required by article 10 of the Model Law, and, secondly, the procuring entity assesses that interaction with suppliers or contractors is necessary (a) to refine its statement of needs and present them in a common description (two-stage tendering) or (b) to define its statement of needs and invite proposals to meet them (request-for-proposals with dialogue). These methods are also both available where tendering has failed; request-for-proposals is also available in other circumstances, as the commentary to that procurement method notes.

3. In the case of request-for-proposals with consecutive negotiations, the circumstances indicating the use of the method are that the procuring entity needs to consider and negotiate the financial aspects of proposals only after assessing their technical and quality aspects; the negotiations take place only with suppliers or contractors submitting responsive proposals.

4. Competitive negotiations and single-source procurement are highly exceptional procurement methods, available in limited circumstances that are quite different from the above Chapter V procurement methods. Competitive negotiations and single-source procurement should not therefore be considered as alternatives to the other methods described above. They are included in Chapter V essentially because they involve interaction between the procuring entity and suppliers or contractors. The circumstances indicating the use of these methods are varied: the

main uses are for urgent or extremely urgent procurement, where there is an exclusive supplier or need for consistency with previous purchases, and in order to accommodate procurement involving classified information or special security needs. Negotiations take place with all participants (competitive negotiations, on a concurrent basis) or with the only participant (single-source procurement).

5. The interaction between the procuring entity and suppliers or contractors in two-stage tendering (called discussions) and request-for-proposals with dialogue (called dialogue) do not involve the type of bargaining that characterises negotiations in request-for-proposals with consecutive negotiations, competitive negotiations, and single-source procurement.

Enactment: policy considerations

6. As the circumstances in which the Chapter V procurement methods can be used vary widely, the majority of the policy issues arising in each method are discussed in the commentary to each such method itself. However, there are some issues of general application that can be identified.

7. The first main policy consideration is that enacting States should provide for a method of procurement that allows the procuring entity to interact with potential suppliers or contractors or the commercial market where it is not feasible for it to provide a description of its needs and the terms and conditions of the procurement as required by article 10 [\[**hyperlink**\]](#) and the requirements for disclosure in the solicitation documents (such as in article 39 on open tendering [\[**hyperlink**\]](#)). One way of identifying what is available in the market is for the procuring entity to engage a participant in the market concerned or other consultant to draft the above items, in a procedure separate from the procurement at issue (which may then be open tendering, generally with pre-qualification). There are several risks to this approach, which may compromise value for money and efficiency. First, there may be additional administrative time and cost arising from conducting two procedures rather than one. Secondly, the fact that this interaction is limited to one supplier or consultant raises the risk of failing to identify the latest market possibilities. Thirdly, the rules on unfair competitive advantage under article 21 [\[**hyperlink**\]](#) prevent the consultant from participating in the subsequent procurement: suppliers may be unwilling to participate in the consultancy because of those rules, and from the procuring entity's perspective, one supplier cannot be engaged both in the design and the ultimate delivery. Consequently, an alternative to this approach is appropriate.

8. Two-stage tendering, as the commentary to that article below [\[**hyperlink**\]](#) discusses, allows the technical and quality aspects (but not the financial aspects) of the procuring entity's needs to be discussed between the procuring entity and potential suppliers within the framework of a transparent and structured process, which results in a single, common description of the needs, the technical requirements and specifications and other terms and conditions to be issued after the discussions; suppliers and contractors then submit tenders against the description. In this regard, the procuring entity will be responsible for producing that description and will examine and evaluate tenders against it. The successful use of the method presupposes that the participants will in fact disclose their proposed technical

solutions and that the procuring entity is able to amalgamate them to finalize the description of its needs and other terms and conditions.

9. Request-for-proposals with dialogue is procedurally similar to two-stage tendering as the commentary below [\[**hyperlink**\]](#) indicates, but with several distinguishing features. The method allows the technical, quality and financial aspects of the procuring entity's needs to be discussed between the procuring entity and potential suppliers, again within the framework of a transparent and structured process. The process results in a request for best and final offers (BAFOs) to meet the procuring entity's needs, but there is no single, common set of technical specifications beyond stated minimum technical requirements. The BAFOs can present a variety of technical solutions to those needs; in this sense, the suppliers and contractors are responsible for designing the technical solutions. The procuring entity examines those solutions to ascertain whether they meet its needs; evaluating them on a competitive but equal basis is a more complex procedure than in two-stage tendering.

10. Given the need to provide for a mechanism to allow the procuring entity to seek input from the market on the way of responding to its needs, enacting States are encouraged to provide for at least one of two-stage tendering or request-for-proposals. Circumstances for which two-stage tendering has proved to be appropriate include the procurement of technically complex items, the supply and installation of plant, building roads and the procurement of specialist vehicles (further examples are set out below [\[**hyperlink**\]](#)). In these examples, formulating detailed specifications from the outset of the procurement may be possible but, after discussions with suppliers, the procuring entity may refine some technical aspects of the subject matter reflecting the information supplied (such as on more sophisticated materials or methods available in the market). The method requires the capacity to explain the procuring entity's needs and assess the resulting input from suppliers, and structures to avoid the abusive selection of the technical solution from a favoured supplier as the preferred one.

11. Circumstances for which request-for-proposals with dialogue has proved productive include infrastructure projects (for example the provision of accommodation with different technical construction methods and scope, and different commercial issues), and some high-technology procurement where the market is developing rapidly. The method requires the capacity to engage in the type of dialogue envisaged, notably as regards the presentation and explanation of needs, the examination and evaluation of different technical solutions, and structures to avoid the possibility of abuse in favouring certain suppliers by providing different information to each of them during the dialogue. Enacting States should be aware that some multilateral development banks may have a general difficulty with authorizing the use of this method in projects financed by them.

12. A second major policy consideration, reflecting the inherent lack of transparency in negotiated procurement, is to provide a structure and procedural safeguards for the use of procurement methods involving negotiations. (Negotiations in this sense involve bargaining between the procuring entity and suppliers or contractors.) The first method concerned is request-for-proposals with consecutive negotiations. Circumstances in which this method has proved effective in practice include advisory services such as legal and financial, design, environmental studies, engineering works, and the provision of office space for

government officials. The method requires the capacity to negotiate — in the sense of bargaining as set out above — with the private sector regarding the financial or commercial aspects of the proposals. Enacting States should be aware that some multilateral development banks may not authorize the use of this method other than for advisory services procurement in projects financed by them.

13. The common feature of the remaining procurement methods under Chapter V — the highly exceptional competitive negotiations and single-source procurement — is also that such negotiations are also envisaged. The circumstances in which these methods may be used are varied, and particular issues arising in their use, are set out in the commentary below [\[**hyperlink**\]](#). Enacting States should ensure that the safeguards set out in the procedures are not watered down, so as to avoid compromising the main objectives of the Model Law.

14. The methods of solicitation in Chapter V procurement methods do not raise new issues; enacting States are directed to the commentary to Chapter II, Part II [\[**hyperlink**\]](#) and to the introduction to Chapter IV [\[**hyperlink**\]](#), addressing the issues arising out of direct solicitation in particular.

Issues of implementation and use

15. It will be evident that assessing whether the conditions for use of the procurement methods in Chapter V applies involves significant discretion on the part of the procuring entity; regulations, rules or guidance can assist in enhancing objectivity in the assessment of the circumstances concerned, which will take place at the planning stage. The procurement system should therefore also require the procurement planning stage to be fully documented and recorded.

16. A second issue that arises in all these procurement methods is the capacity to engage in discussions, dialogue or negotiations — both to explain the procuring entity's needs in a way that can be fully and equally understood by all participants, and to assess the resulting tenders, proposals and BAFOs. An aspect of this capacity is that the procuring entity must have the facility to engage successfully in negotiations with the private sector such that its needs are properly met. Where there is no or limited in-house expertise in these matters, the regulations, or rules and guidance from the public procurement agency or other body should address external expert assistance that can be provided centrally or from other sources to assist the procuring entity.

17. These capacity outlined in the preceding section require more elucidation than a Model Law can provide. Enacting States should recognize that regulatory and procedural safeguards alone will not be sufficient. They must be supported by an appropriate institutional framework, measures of good governance, high standards of administration and highly-skilled procurement personnel. The experience of the multilateral development banks has indicated that putting in place the institutional frameworks and safeguards that are a prerequisite for the use of the Chapter V procurement methods have proved to be among the most difficult reforms to implement.¹

¹ The Working Group should note that the advice of experts in consultations was that restricting this commentary to request-for-proposals with dialogue, in the manner in which the commentary

18. Enacting States should note the particular importance of the provisions of article 24 [\[**hyperlink**\]](#) on confidentiality in the context of all procurement methods under chapter V. The risks of revealing, inadvertently or otherwise, commercially sensitive information of competing suppliers or contractors (not limited to price) are an inherent feature of the chapter V procurement methods other than single-source procurement. Other risks include the provision of important information to favoured suppliers or to some but not all suppliers. Enacting States are encouraged to include oversight measures, including audit, to assess the use of the methods in practice, and to formulate guidance on appropriate managerial tools for the effective use of these procurement methods.² The importance of such safeguards should not be underestimated if the integrity of, and fairness and public confidence in, the procurement process is to be preserved, and the participation of suppliers or contractors in the ongoing and any future procurement proceedings involving interaction is to be ensured.

B. Guidance on Chapter V procurement methods

19. In order to assist the reader, the commentary to each of the Chapter V procurement methods below includes a general description of each method and its main policy issues, and commentary on its conditions for use, its solicitation rules, and on the procedural articles for each such method. The procedures are set out in Chapter V itself, but as the conditions for use and solicitation rules are set out in Chapter II, the commentary also cross-refers to the issues raised by the relevant provisions in Chapter II [\[**hyperlink**\]](#), expanding on that commentary where necessary.

Two-stage tendering

General description and main policy issues

20. The rationale behind the two-stage procedure used in this method of procurement is to combine two elements: first, to allow the procuring entity, through the examination of the technical aspects of tenders and optional discussions on them, to refine and finalize the terms and conditions of the procurement that the procuring entity may not have been able to formulate adequately — that is, in the level of detail required by article 10 of the Model Law [\[**hyperlink**\]](#) — at the outset of the procurement. The second is to ensure that the high degree of objectivity and competition provided by the procedures for open tendering proceedings under chapter III [\[**hyperlink**\]](#) will apply to the selection of the successful tender under two-stage tendering proceedings.

21. This procurement method is of long standing in various systems (including the previous version of the Model Law, and in procurement under the guidelines of the multilateral development banks). Examples of its successful use include

was originally drafted, was unnecessarily restrictive. Accordingly, the commentary as drafted now applies to all Chapter V procurement methods. The Working Group may wish to consider the text from this perspective.

² Query whether to make a reference to the use of independent “probity officers” who can observe the conduct of the interaction. Human interaction as an opportunity for corruption is a key feature of UNCAC.

procurement of high-technology items, such as large passenger aircraft, information or communication technology systems, technical equipment and infrastructure procurement, including large complex facilities or construction of a specialized nature. In such situations, it may be evident that obtaining best value for money is unlikely if the procuring entity draws up a complete description of the procurement setting out all the technical specifications, all quality and performance characteristics of the subject-matter, all relevant competencies of the suppliers or contractors, and all terms and conditions of the procurement at the outset and without examining what market suppliers can offer.

22. In the first stage, the procuring entity issues the solicitation documents with a full or partially-developed set of technical specifications and details of other characteristics, competencies and terms as above. Prospective suppliers and contractors are invited to submit initial tenders in response to the solicitation documents. Those initial tenders will propose technical solutions as to the exact capabilities and possible variations of what is available in the market, and may propose refinements to technical specifications or to the other characteristics, competencies or terms, or both.

23. The procuring entity may seek clarifications from and discuss the initial tenders with responsive suppliers under articles 16 and 48, respectively [\[**hyperlinks**\]](#), and uses the information obtained in this way to inform its decision on the final, single set of technical specifications and definitive scope of work.

24. At the second stage, suppliers or contractors present their final tenders (which then include price commitments) against the final single technical solution and the final and complete description of the procurement, which are issued as part of the request to present final tenders. Thus the procuring entity remains responsible for the design of the technical solution and determining the scope of work and setting the terms and conditions of the procurement throughout the procedure; the responsibility for the delivery of that design and fulfilment of the terms and conditions are subsequently borne by the supplier or contractor that is awarded the procurement contract. In this context, it should be noted that the initial statement of needs in the solicitation documents is likely to focus on the functional aspects of the items to be procured, so that the second stage allows for the technical aspects to be refined and included in the final request for tenders.

25. The procuring entity is not permitted to solicit price commitments from prospective suppliers or contractors for their respective proposed solutions at the first stage of the procedure; suppliers and contractors do not make price commitments at that stage, and the procuring entity may not request such information from a bidder during the discussions.

26. The reference to holding “discussions” reflects the iterative nature of the process. In addition, the term distinguishes the nature of talks that may be held in this method — which may not include the tender price or other financial aspects of the procurement — from the bargaining that may take place in other procurement methods regulated by chapter V of the Model Law. Allowing bidders to assist in defining the technical specifications and scope of work (as well as the absence of seeking or obtaining price commitments from bidders at any stage of the proceedings) is a way in which this method differs from other methods available

under chapter V. Nonetheless certain quality requirements may have a commercial impact, such as the acquisition or transfer of intellectual property rights: such aspects can properly form part of the terms and conditions of the procurement and be discussed with suppliers. For example, there may be a requirement in the solicitation documents for solutions to the use of intellectual property (for example, such rights could be licensed or acquired). If so, these requirements form part of the technical aspects of the procurement. Otherwise, the related costs for the use of the intellectual property concerned will be simply part of the tender price submitted at the second stage. Such discussions will allow the procuring entity to estimate what premium must be paid for a particular refinement and what benefits might be obtained for paying that premium, and thereby inform its decision on whether or not to include such a refinement in the amended statement of technical specifications and scope of work.

27. The flexibility and potential benefits described above are not risk-free. In particular, there is a risk that the procuring entity may tailor the final terms and conditions of the procurement to one particular supplier (regardless of whether discussions are held or not, though it should be acknowledged that this risk is also present in open tendering proceedings, particularly where informal market consultations precede the procurement). The transparency provisions applicable to all tendering proceedings should mitigate the risks of distorting the procurement to favour a particular supplier.

28. This method is a structured one. The rules of open tendering regulate the solicitation procedure and the selection of the successful tender in two-stage tendering (see articles 33 and 48 of the Model Law [\[**hyperlinks**\]](#), and the commentary in Part II of Chapter II, and in paragraphs [**](#) of that addressing open tendering under Chapter III [\[**hyperlinks**\]](#)).

Article 30(1). Conditions for use of two-stage tendering [\[hyperlink**\]](#)**

29. Article 30(1) provides for conditions for use of two-stage tendering. Subparagraph (a) deals with the procurement of technically sophisticated and complex items. The need for use of the procurement method in these circumstances may become clear at the procurement planning stage, as noted above [\[**hyperlink**\]](#). After its examination of the initial tenders, the procuring entity may hold discussions with suppliers and contractors whose proposed technical solutions met the minimum requirements set out by the procuring entity.

30. Subparagraph (2)(b) deals with a different situation — where open tendering was engaged in but it failed. (This condition also allows the use of request for proposals with dialogue, under subparagraph (2)(d).) In such situations, the procuring entity must analyse the reasons for the failure of open tendering. Where it concludes that its difficulties in formulating sufficiently precise terms and conditions of the procurement were the reasons for the failure, it may consider that a two-stage procedure in which suppliers are involved is the appropriate course. The reasons for the earlier failure should also guide the procuring entity in selecting between two-stage tendering under subparagraph (1)(b) and request for proposals with dialogue under subparagraph (2)(d): if formulating a single set of terms and conditions (including a single technical solution) for the procurement will be possible and appropriate, two-stage tendering will be the appropriate procurement method. The procuring entity will be able to engage with suppliers or contractors in

order to be able to formulate those terms and conditions as necessary. (By contrast, the procuring entity may conclude that it is not possible or not appropriate to formulate a single technical solution, in which case request for proposals with dialogue may be the better course — see the guidance to that procurement method at [...].[\[**hyperlink**\]](#))

Article 33. Solicitation in two-stage tendering [\[hyperlink**\]](#)**

31. Solicitation in two-stage tendering proceedings is regulated by the rules governing open tendering under article 33 [\[**hyperlink**\]](#), as article 48 [\[**hyperlink**\]](#) applies the provisions of Chapter III to two-stage tendering [\[**hyperlink**\]](#). (The application of Chapter III is subject to derogations under that article 48.) A key feature of open tendering — public and unrestricted solicitation of participation by suppliers or contractors — is therefore required in two-stage tendering.

32. This requirement involves public, unrestricted and international solicitation as the default rule, as that concept is further explained in the commentary to part II of Chapter II [\[**hyperlink**\]](#). There are no exceptions to the requirement for public and unrestricted solicitation (though where pre-qualification procedures precede open tendering, as is permitted by article 18 [\[**hyperlink**\]](#)), the solicitation is then addressed only to pre-qualified suppliers. In that case, pre-qualification procedures also require an open invitation to participate, so that the principle of open solicitation is preserved).

33. There are limited exceptions to the requirement for international solicitation under article 33(4), also as explained in the commentary to part II of Chapter II [\[**hyperlink**\]](#). These exceptions are permitted only to accommodate domestic and low-value procurement. In all other cases, therefore, the invitation to tender must be advertised both in the publication identified in the procurement regulations, and internationally in a publication that will ensure effective access by suppliers and contractors located overseas.

34. Further guidance on solicitation is set out in the commentary to part II of Chapter II [\[**hyperlink**\]](#).

Article 45. Two-stage tendering [\[hyperlink**\]](#)**

35. Article 48 regulates the procedures for two-stage tendering. Paragraph (1) serves as a reminder that the rules of open tendering apply to two-stage tendering, save where modification is required by the procedures particular to the latter method. Some of the open tendering rules will be applicable without modification, such as the procedures for soliciting tenders (article 36 [\[**hyperlink**\]](#)), the contents of invitation to tender (article 37 [\[**hyperlink**\]](#)) and the provision of the solicitation documents (article 38 [\[**hyperlink**\]](#)). Some other rules of chapter III will require modification in the light of the specific features of two-stage tendering described in paragraphs (2) to (4) of article 48. For example, the provisions of article 38 referring to price in the solicitation documents will not be relevant when initial tenders are solicited. The provisions of article 41 on the period of effectiveness of tenders and modification and withdrawal of tenders are to be read together with paragraph (4) (d) of article 48, which allows a supplier or contractor not wishing to present a final tender to withdraw from the proceedings without

forfeiting any tender security (on the justification for the deviation from the applicable open tendering rules, see paragraph ** below [**hyperlink**]).

36. Some provisions of chapter III, such as article 42 [**hyperlink**] on the opening of tenders and the provisions of article 43 [**hyperlink**] on the evaluation of tenders, will be applicable only to final tenders submitted in response to the revised set of terms and conditions for the procurement. The provisions on the presentation of tenders in article 40 [**hyperlink**] and on the examination of tenders in article 43 [**hyperlink**] will, on the other hand, be applicable to both initial and final tenders. The provisions of article 44, prohibiting negotiation with suppliers or contractors after tenders have been submitted, should be interpreted in the context of the interaction in two-stage tendering being discussions rather than negotiations as described above. The prohibition of negotiations per se applies throughout two-stage tendering proceedings (including to the period after final tenders have been submitted, should the procuring entity seek clarification of the submission under article 16, as also explained in the commentary to that article [**hyperlink**]).

37. Paragraph (2) contains specific rules for the solicitation of initial tenders. They modify the rules on solicitation of chapter III [**hyperlink**]. At this stage, the procuring entity may solicit proposed solutions with respect to any terms and conditions of the procurement other than tender price. In the light of the conditions for use of this procurement method (see article 30(1) [**hyperlink**], as explained by the commentary in paragraphs ** above [**hyperlink**]), it is expected that the procuring entity will solicit various solutions relating in the first place to the technical and quality requirements for the subject-matter of the procurement and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

38. The article does not provide for any specific rules on presentation and examination of initial tenders. The relevant provisions of chapter III [**hyperlink**] apply. In particular, the applicable provisions of article 43(3) [**hyperlink**] will regulate the instances in which initial tenders will be rejected: they are where the supplier or contractor that presented a tender is not qualified; where the tender presented is not responsive; where it includes a tender price; or where a supplier or contractor is excluded from the procurement proceedings on the grounds specified in article 21 [**hyperlink**] (inducement, unfair competitive advantage or conflicts of interest). Other grounds for rejection specified in article 43(3) [**hyperlink**] are not applicable; they apply to situations when tender prices are examined, which is not the case at this first stage of two-stage tendering. All suppliers whose tenders are not rejected are entitled to participate further in the procurement proceedings.

39. Paragraph (3) provides for the possibility of holding discussions with suppliers or contractors whose tenders have not been rejected, concerning any aspect of their tenders. Discussions may involve any aspect of the procurement but price and are of a non-bargaining nature (on this point, see the guidance in paragraphs ** above [**hyperlink**]). Discussions will not always be necessary: the procuring entity may be able to refine and finalize the terms and conditions of the procurement itself, on the basis of the initial tenders received. The provisions of paragraph (3) require that, when the procuring entity decides to engage in discussions, it must extend an equal opportunity to discuss to all suppliers or contractors concerned. An “equal

opportunity” in this context means that the suppliers or contractors are treated as equally as the requirement to avoid disclosure of confidential information and the need to avoid collusion allow. The rules or guidance from the public procurement agency or other similar body should focus on this key aspect of the two-stage tendering process. In addition, the rules or guidance should highlight the need to record the details of the discussions in the record of the procurement required under article 25 [\[**hyperlink**\]](#).

40. Paragraph (4) regulates the procedural steps involved at the subsequent stages of the two-stage tendering to the extent that they are different from the rules of open tendering in chapter III of the Model Law. It also regulates issues arising from the preparation and issue of a final revised set of terms and conditions, such as the extent of permissible changes to the terms and conditions originally advertised.

41. Subparagraph (4)(a) imposes the obligation on the procuring entity to extend the invitation to present final tenders, following the issuance of a revised set of terms and conditions for the procurement, to all suppliers or contractors whose tenders were not rejected at the first stage. Final tenders are equivalent to the tenders submitted in open tendering: that is, they will be assessed for responsiveness to the solicitation and will include prices.

42. Subparagraph (4)(b) addresses the extent of permissible changes to the terms and conditions of the procurement originally announced. No changes to the subject-matter of the procurement itself are permitted, for the simple reason that such changes would alter those terms and conditions of the procurement that are considered to be so essential for the advertised procurement that their modification would have to lead to the new procurement. Paragraphs [**](#) of the commentary to request-for-proposals with dialogue explains this policy consideration in more detail [\[**hyperlink**\]](#).

43. However, changes (such as deletions, modifications or additions) are permitted to the technical and quality aspects of that subject-matter and to the criteria for examining and evaluating tenders, under certain conditions that aim at limiting the discretion of the procuring entity in this respect. In the light of the objective of the Model Law of providing for the fair and equitable treatment of all suppliers and contractors, changes to the technical and quality aspects made following the first stage of the procedure may not change the description of the subject-matter of the procurement as originally announced. If a change in the description of the subject-matter is needed, new procurement proceedings must be held to allow new suppliers or contractors to participate (including suppliers or contractors whose initial tenders have been rejected or that would now become qualified). Article 15(3) [\[**hyperlink**\]](#) is relevant in this context: it requires the procuring entity to re-advertise the procurement if, as a result of clarifications and modifications of the solicitation documents, the information about procurement published when first soliciting participation of suppliers or contractors in the procurement proceedings has become materially inaccurate (for the guidance to article 15(3), see paragraphs [...] of the commentary to Chapter I [\[**hyperlink**\]](#)).

44. Subparagraph (4)(b)(i) addresses the extent of permissible changes to the description of the subject matter of the procurement. They refer primarily to technical and quality aspects of the subject matter of the procurement in the light of the main aim of the two-stage tendering — to enhance the precision of technical and

quality specifications of the subject matter of the procurement, to narrow down the possible options to the one that would best meet the procuring entity's needs, and on that basis to finalize a single set of terms and conditions of the procurement. The types of changes that are envisaged include alterations in technical characteristics — such as the grade of building material components, wood or steel fixings, the quality of wood for flooring, the manner in which to mitigate acoustic problems in sports facilities. This type of refinement is sometimes termed “value engineering”.

45. Changes to the technical or quality aspects of the subject-matter of the procurement may imply changes to the examination and/or evaluation criteria. Subparagraph (b)(ii) therefore provides that those changes may be introduced to the examination and evaluation criteria that are necessary as a result of changes made to the technical or quality aspects of the subject-matter of the procurement. Other changes to the examination and/or evaluation criteria at the second stage would mean that these criteria would no longer reflect the applicable technical and quality aspects, as well as raising a risk of abuse, and so are not permitted.

46. Subparagraph (c) requires any changes made to the terms and conditions of the procurement as originally announced to be communicated to suppliers or contractors, through the medium of the invitation to present final tenders.

47. Subparagraph (d) permits suppliers or contractors to refrain from submitting a final tender without forfeiture of any tender security that may have been required for entry into the first stage. The latter provision is included to enhance participation by suppliers or contractors since, upon the deadline for submission of initial tenders, the suppliers or contractors cannot be expected to know what changes to the terms and conditions of the procurement may subsequently be made. In the light of the features of this procurement method, tender securities most likely will be required however in the context of presentation of final tenders rather than of initial tenders.

48. Subparagraph (e) subjects the procedural steps involved in examination and evaluation of final tenders and determination of the successful tender to the rules of open tendering in chapter III of the Model Law [\[**hyperlink**\]](#).

49. As regards confidentiality in the context of this procurement method, the risks of revealing, inadvertently or otherwise, commercially sensitive information of competing suppliers or contractors may arise not only at the stage of discussions but also in the formulation of the revised set of the terms and conditions of the procurement. Examples include the use of requirements, symbols and terminology to describe the revised technical and quality aspects of the subject matter, which may inadvertently reveal the source of information, and the communication of changes made to the terms and conditions originally advertised to the suppliers or contractors (required under subparagraph (4)(c)). In conformity with the requirements of article 24 [\[**hyperlink**\]](#), the procuring entity must respect the confidentiality of the suppliers' or contractors' technical proposals throughout the process.