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## **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 commentary on request-for-proposals with dialogue (article 49), and on related articles in Chapter II (articles 30 and 35).



# 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 (continued)**

#### **B. Procurement methods (continued)**

##### **2. Request-for-proposals with dialogue**

###### General description and policy considerations

1. Request-for-proposals with dialogue is a procedure designed for the procurement of relatively complex items and services. The typical use for this procurement method is procurement aimed at seeking innovative solutions to technical issues such as saving energy, achieving sustainable procurement, or infrastructure needs. In such cases, there may be different technical solutions: the material may vary, and may involve the use of one source of energy as opposed to another (wind vs. solar vs. fossil fuels).

2. The procurement method involves a dialogue, the nature of which is set out in the introduction to this Chapter [\[\\*\\*hyperlink\\*\\*\]](#); in summary, the objective is to enable suppliers and contractors to understand, through the dialogue with the procuring entity, the needs of the procuring entity as outlined in its request for proposals. The dialogue, which may involve several phases, is an interaction between the procuring entity and the suppliers or contractors on both the technical and quality aspects of how their proposals meet the needs of the procuring entity, and the financial aspects of their proposals. The dialogue may involve a discussion of the financial implications of particular technical solutions, including the price or price range. However, as in two-stage tendering, it is not intended to involve binding negotiations or bargaining from any party to the dialogue.

3. Methods based on this type of dialogue have proved to be beneficial to the procuring entity in the procurement of relatively complex items and services where the opportunity cost of not engaging in negotiations with suppliers is high, while the economic gains of engaging in the process are evident. They are appropriate for example in the procurement of architectural or construction works, where there are many possible solutions to the procuring entity's needs and in which the personal skill and expertise of the supplier or contractor can be evaluated only through negotiations. The complexity need not be at the technical level: in infrastructure projects, for example, there may be different locations and types of construction as the main variables. The method has enabled the procuring entity in such situations to identify and obtain the best solution to its procurement needs.

4. In this regard, it should be recalled that were the procuring entity to discuss potential technical solutions with one potential supplier or contractor, and as a result formulate a statement of its technical requirements as in two-stage tendering, that supplier or contractor would be considered to have a conflict of interest during the discussions with the procuring entity and a subsequent unfair competitive advantage compared with other suppliers or contractors during the subsequent procurement procedure. As explained in article 21 and the commentary thereto [\[\\*\\*hyperlinks\\*\\*\]](#), the supplier or contractor concerned should be excluded from the procurement. The request-for-proposals with dialogue procedure therefore can avoid the undesirable situation where a potentially responsive supplier is excluded from participating in the procurement concerned.

5. Since the dialogue normally involves complex and time-consuming procedures, the method should be utilized only when its benefits are appropriate, and not for simple items that are usually procured through procurement methods not involving interaction with suppliers. The procurement method is, for example, not intended to apply to cases where negotiations are required because of urgency or because there is an insufficient competitive base (in such cases, the use of competitive negotiations or single-source procurement is authorized under the revised Model Law). It does not address the type of negotiations that seek only technical improvements and/or price reductions, as are envisaged in request-for-proposals with consecutive negotiations. Nor it is intended to apply in situations in which two-stage tendering proceedings should be used in accordance with paragraph (1) of this article — i.e. when the procuring entity needs to refine its procurement needs and envisages formulating a single set of terms and conditions (including specifications) for the procurement, against which tenders can be presented.

6. As with all procurement methods under the Model Law, the use of this method is not intended exclusively for any type of procurement (be it procurement of goods, construction or services). Also in common with all procurement methods under the Model Law, the procuring entity will be able to choose this procurement method when the conditions for use are satisfied, and when it assesses that the method is best suited to the given circumstances. As the commentary in the introduction to Chapter V notes [\[\\*\\*hyperlink\\*\\*\]](#), rules and guidance from the public procurement agency or other similar body may assist the procuring entity in that assessment.

7. The method requires the procuring entity to issue a statement of needs with minimum technical requirements, to understand technical solutions that are proposed and to evaluate them on a comparative basis, and so may require capacity in procurement officials that is not required in other procurement methods, particularly to avoid the method's use as an alternative to appropriate preparation for the procurement. A particular risk is that the responsibility of defining procurement needs may be shifted to suppliers and contractors or the market. Although the suppliers or contractors, not the procuring entity, make proposals to meet the procuring entity's needs, they should not take a lead in defining those needs.

8. Article 49 contains detailed rules regulating the procedures for this procurement method, which are designed to include safeguards against possible abuses or improper use of this method and robust controls. Nonetheless, they also preserve the necessary flexibility and discretion on the part of the procuring entity

in the use of the method, without which the benefits of the procedure disappear. The provisions have been aligned with the UNCITRAL instruments on privately financed infrastructure projects (see paragraphs ... below) [\[\\*\\*hyperlink\\*\\*\]](#).<sup>1</sup>

9. The safeguards in particular aim at: (a) transparency by requiring proper notification of all concerned about the essential decisions taken in the beginning, during and at the end of the procurement proceedings, at the same time preserving confidentiality of commercially sensitive information as required under article 24 [\[\\*\\*hyperlink\\*\\*\]](#); (b) objectivity, certainty and predictability in the process, in particular by requiring that all methods of limiting or reducing a number of participants in the procurement proceedings are made known from the outset of the procurement, and also by regulating the extent of permissible modifications to the terms and conditions of the procurement and by prohibiting negotiations after the submission of best and final offers (“BAFOs”); (c) promoting effective competition through the same mechanism; (d) enhancing participation and ensuring the equitable treatment of suppliers and contractors by requiring that the dialogue be held on a concurrent basis and be conducted by the same representatives of the procuring entity, by regulating communication of information from the procuring entity to the participating suppliers or contractors during the dialogue stage and by setting rules for the stages following the completion of the dialogue; and (d) accountability by requiring comprehensive record-keeping in supplementing provisions of article 25 [\[\\*\\*hyperlink\\*\\*\]](#).

10. Similarly, suppliers or contractors will not be willing to participate if their proposals, which have a commercial value, are subsequently turned into a description available to all potential participants. The procedures for the method, as explained above, provide safeguards since they do not envisage the issue of a complete set of terms and conditions of the procurement against which proposals can be presented at any stage of this procurement method (by contrast with the position in two-stage tendering under article 48 [\[\\*\\*hyperlink\\*\\*\]](#)). A single set of minimum requirements and an ordered list of evaluation criteria are made available at the outset of the procurement, which cannot be varied during the proceedings.

11. The procedure itself involves two stages. At the first stage, the procuring entity issues a solicitation setting out a description of its needs expressed as terms of reference to guide suppliers in drafting their proposals. The needs can be expressed in functional, performance or output terms but are required to include minimum technical requirements. By comparison with two-stage tendering (which is a procedurally similar but substantively different method), it is not intended that the procedure will involve the procuring entity in setting out a full technical description of the subject-matter of the procurement.

12. The second stage of the procedure involves the dialogue, which is to be conducted “concurrently”. This term is used in the text to stress that all suppliers and contractors are entitled to an equal opportunity to participate in the dialogue, and there are no consecutive discussions. The term also seeks to avoid the impression that the dialogue is to be conducted at precisely the same time with all suppliers or contractors, which would presuppose that different procurement

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<sup>1</sup> The UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and the UNCITRAL Legislative Guide on the same subject, available as of the date of this report at [www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html).

officials or negotiating committees composed of different procurement officials, are engaged in dialogue. Such a stance has been considered undesirable as it may lead to the unequal treatment of suppliers and contractors. For guidance on the conduct of the dialogue, see paragraphs [...] below.

13. Upon conclusion of the dialogue, the suppliers and contractors make BAFOs to meet those needs. BAFOs may be similar in some respects while significantly different in others, in particular as regards proposed technical solutions. The method therefore gives the procuring entity the opportunity of comparing different technical solutions to and alternatives and options for its needs.

**Article 30(2). Conditions for use of request-for-proposals with dialogue**  
[\*\*hyperlink\*\*]

14. Article 30(2) provides the conditions for use of request-for-proposals with dialogue. The Model Law regulates this procurement method in considerable detail to mitigate the risks and difficulties that it can involve where used inappropriately or without the degree of care and capacity required to use it effectively. The conditions in paragraph (2) may mitigate concerns over the inappropriate use of this procurement method, by effectively preventing its use to procure items that should be procured through tendering or other, less flexible, methods of procurement.

15. Paragraph (2) (a) of the article sets out the condition for what is expected to be the main use of request-for-proposals with dialogue: that it is not objectively feasible for the procuring entity to formulate a complete description of the subject matter of the procurement at the outset of the procedure, and the procuring entity assesses that it needs to engage in dialogue with suppliers or contractors capable of delivering the subject matter of the procurement in order to come to acceptable solutions to satisfy its needs. In practice, the procuring entity must be able to describe its broad needs at the outset of the procurement at the level of functional (or performance or output) requirements. This requirement reflects the fact that inadequate planning is likely to mean that the procurement will be unsuccessful; it is also needed so as to provide the minimum technical requirements that article 49 calls for and to allow the effective participation of suppliers or contractors.

16. Similarly, the situation described in subparagraph (b) refers to procurement in which a tailor-made solution is needed (for example, an information technology system for the archiving of legal records, which may need particular features such as long-term accessibility), and where technical excellence is an issue. The third condition, in subparagraph (c), refers to procurement for the protection of essential security interests of the State. This condition would usually cover the security and defence sectors where the need may involve the procurement of highly complex subject matter and/or conditions for supply, at the same time requiring measures for the protection of classified information.

17. The last condition for use of this method, in subparagraph (d), is the same as one of the conditions for use of two-stage tendering — open tendering was engaged in but it failed. In such situations the procuring entity must analyse the reasons for the failure of open tendering. Where it concludes that using open tendering again or using any of the procurement methods under chapter IV of this Law [\*\*hyperlink\*\*] would not be successful, it may also conclude that it faces difficulties in formulating sufficiently precise terms and conditions of the procurement at the outset of the

procurement. The reasons for the earlier failure should guide the procuring entity in selecting between two-stage tendering under subparagraph (1)(b) of this article and request-for-proposals with dialogue under subparagraph (2)(d) of this article. In order to use request-for-proposals with dialogue proceedings, the procuring entity would have to conclude that formulating a complete single set of terms and conditions of the procurement would not be possible or would not be appropriate, and therefore dialogue with suppliers or contractors is necessary for the procurement to succeed.

18. Apart from imposing exhaustive conditions for use of this procurement method, the revised Model Law refers to the possibility of requiring external approval for the use of this procurement method. If an enacting State decides to provide for ex ante approval by a designated authority for such use, it must enact the opening phrase put in parenthesis in the chapeau provisions of paragraph (2). (For a discussion of the general policy considerations regarding ex ante approval mechanisms, see Section \*\* of the general commentary above [\*\*hyperlink\*\*].) The exceptional reference to an ex ante approval mechanism was made in this case to signal to enacting States that higher measures of control over the use of this procurement method may be justifiable in the light of the particular features of this procurement method that make it at risk of abusive behaviour, which may be difficult to mitigate in some enacting States. If the provisions are enacted, it will be for the enacting State to designate an approving authority and its prerogatives in the procurement proceedings, in particular whether these prerogatives will end with granting to the procuring entity the approval to use this procurement method or also extend to some form of supervision of the way proceedings are handled.

**Article 35. Solicitation in request-for-proposals procurement methods, and its particular application to request-for-proposals with dialogue [\*\*hyperlink\*\*]**

19. Article 35 regulates solicitation in request-for-proposals procurement methods. The default rule under the Model Law is for public and unrestricted solicitation in these methods, as that term is explained in Section \*\* of the guidance to Part II of Chapter II [\*\*hyperlink\*\*]. Public and unrestricted solicitation involves an advertisement to invite participation in the procurement, the issue of the solicitation documents to all those that respond to the advertisement, and the full consideration of the qualifications and submissions of suppliers and contractors that submit tenders or other offers.

20. In request-for-proposals proceedings, the provisions allow the default rule to be relaxed and direct solicitation to be used where the subject-matter of the procurement is available from a limited number of suppliers or contractors, a situation that is likely to arise in the circumstances in which request-for-proposals with dialogue is available. The relaxation of the default rule is also is contingent upon soliciting proposals from all such suppliers and contractors (see article 35(2)(a) [\*\*hyperlink\*\*], and upon a prior public advance notice of the procurement under article 35(3) [\*\*hyperlink\*\*]. For a discussion of these requirements and their consequences, notably arising from the risk of unknown

suppliers emerging as a result of the advance notice, see the commentary on solicitation in the introduction to Chapter IV [\[\\*\\*hyperlink\\*\\*\]](#).<sup>2</sup>

21. Where request-for-proposals with dialogue proceedings are preceded by pre-qualification proceedings, solicitation is subject to separate regulation under article 18 [\[\\*\\*hyperlink\\*\\*\]](#), the provisions of which also require international solicitation in the same manner as is required in article 33 [\[\\*\\*hyperlink\\*\\*\]](#). Further guidance is set out in the commentary to the guidance to those articles [\[\\*\\*hyperlink\\*\\*\]](#). After the pre-qualification proceedings have been completed, the request for proposals must be provided to all pre-qualified suppliers.

22. As explained in the commentary on solicitation in Part II of Chapter II, and in the commentary to article 18 [\[\\*\\*hyperlink\\*\\*\]](#), pre-qualification proceedings identify qualified suppliers or contractors, but are not a method to limit the participating numbers since they involve a pass/fail test as regards qualifications. Inherent in the method is the fact that participating suppliers or contractors will invest significant time and resources in their participation. Participation will be discouraged if there is no reasonable chance of winning the contract to be awarded at the end of the procurement process; the risk for the procuring entity is that too many potential suppliers and contractors may be pre-qualified and all pre-qualified suppliers must be admitted to the proceedings. The procedures for request-for-proposals with dialogue proceedings therefore set out a process that enables the procuring entity to limit the number of participants to an appropriate number — called “pre-selection”, which is described in the following section on procedures. Where pre-selection procedures are followed, the request for proposals must be provided to all pre-selected suppliers.

23. The exceptions to the default rule requiring international solicitation, other than where the procurement process follows pre-qualification proceedings under article 18 [\[\\*\\*hyperlink\\*\\*\]](#), are contained in article 35(1)(b) and (c). Paragraph (1)(c) mirrors the exceptions for open tendering in article 33(4): that is, for domestic and low-value procurement. The commentary to Part II of Chapter II [\[\\*\\*hyperlink\\*\\*\]](#) discusses the policy issues arising in allowing for these latter exceptions; they are grounded in permitting a relaxation of international advertisement where its benefits will be outweighed by its costs, or where it is simply irrelevant.

24. Article 35(2)(c) sets out a distinct third ground that may justify the use of direct solicitation in request-for-proposals proceedings — procurement involving classified information. In such cases, the procuring entity must again solicit proposals from a sufficient number of suppliers or contractors to ensure effective competition.

25. Articles 35(3) and (4) are included to provide for transparency and accountability when direct solicitation is used. Paragraph (3) requires the procuring entity including in the record of procurement proceedings a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings. Paragraph (4) requires the procuring entity,

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<sup>2</sup> The implication is that the procuring entity is not authorized to reject any unsolicited proposals. Does the Working Group consider a discussion of the manner in which the procuring entity should consider any such proposals is required?

where it engages in direct solicitation publish an advance notice of the procurement (under article 33(5) [\[\\*\\*hyperlink\\*\\*\]](#)) (unless classified information would thereby be compromised). The commentary to Part II of Chapter II [\[\\*\\*hyperlink\\*\\*\]](#) discusses the reasons for, contents and form of such notices.

**Article 49. Request-for-proposals with dialogue [\[\\*\\*hyperlink\\*\\*\]](#)**

26. Article 49 regulates the procedures for request-for-proposals with dialogue. The steps involved in this procedure are: (a) an optional request for expressions of interest, which does not confer any rights on suppliers or contractors, including any right to have their proposals evaluated by the procuring entity. In this sense, it resembles an advance notice of possible future procurement referred to in article 6 (2) (for the guidance to article 6, see Section [\\*\\* above \[\\*\\*hyperlink\\*\\*\]](#)); (b) pre-qualification or pre-selection when it is expected that more than the optimum number of qualified candidates would express interest in participating; if neither pre-qualification or pre-selection is involved, open or direct solicitation as regulated by article 35 [\[\\*\\*hyperlink\\*\\*\]](#); (c) issue of the request for proposals to those responding to the open or direct solicitation or to those pre-qualified or pre-selected, as the case may be; (d) concurrent dialogue, which as a general rule is held in several rounds or phases; (e) completion of the dialogue stage with a request for BAFOs; and (f) award. The article regulates these procedural steps in the listed chronology, except for an optional request for expressions of interest, which, as stated, is covered by provisions of article 6 [\[\\*\\*hyperlink\\*\\*\]](#).

27. Paragraph (1), by cross-referring to article 35 [\[\\*\\*hyperlink\\*\\*\]](#), reiterates the default rule that an invitation to participate in the request-for-proposals with dialogue proceedings must as a general rule be publicized as widely as possible to ensure wide participation and competition (unless the solicitation has been preceded by pre-qualification or pre-selection, both of which procedures also include a substantive requirement for wide publicity).

28. When public and unrestricted solicitation without pre-qualification or pre-selection is involved, an invitation to participate in the request-for-proposals with dialogue is issued, which must contain the minimum information listed in paragraph (2). This minimum information is designed to assist suppliers or contractors to determine whether they are interested and eligible to participate in the procurement proceedings and, if so, how they can participate. The information specified is similar to that required for an invitation to tender (article 37 [\[\\*\\*hyperlink\\*\\*\]](#)).

29. Paragraph (2) lists the required minimum information and does not preclude the procuring entity from including additional information that it considers appropriate; a full statement of its needs and the terms and conditions is required in order to allow suppliers or contractors to prepare high-quality proposals, which the procuring entity can assess on an equal basis. The procuring entity should take into account however that it is the usual practice to keep the invitation brief and include the most essential information about procurement; that information is also most relevant to the initial stage of the procurement proceedings. All other information about the procurement, including further detail of the information contained in the invitation, is included in the request-for-proposals (see paragraph (5) of this article). This approach helps to avoid repetitions, possible inconsistencies and confusion in the content of the documents issued by the procuring entity to suppliers or

contractors. It is in particular advisable in this procurement method since some information may become available or be refined later in the procurement proceedings (to the extent permitted by paragraph (9) of the article).

30. Paragraph (3) regulates pre-selection proceedings, as an option for the procuring entity to limit a number of suppliers or contractors from which to request proposals. The provisions have been aligned generally with the provisions on pre-selection found in the UNCITRAL instruments on privately financed infrastructure projects [\[\\*\\*hyperlink\\*\\*\]](#). Pre-selection proceedings allow the procuring entity to specify from the outset of the procurement that only a certain number of best qualified suppliers or contractors will be admitted to the next stage of the procurement proceedings. This tool is available as an option where it is expected that many qualified candidates will express interest in participating in the procurement proceedings. The Model Law provides for this possibility only in this procurement method: it is considered justifiable in the light of the significant time and cost that would be involved in examining and evaluating a large number of proposals. It is therefore an exception to the general rule of open participation as described in [...] above.

31. Pre-selection is held in accordance with the rules applicable to pre-qualification proceedings. The provisions of article 18 [\[\\*\\*hyperlink\\*\\*\]](#) therefore apply to pre-selection, to the extent that they are not derogated from in paragraph (3) (to reflect the nature and purpose of pre-selection proceedings). For example, to ensure transparency and the equitable treatment of suppliers and contractors, paragraph (3) requires the procuring entity from the outset of the procurement to specify that the pre-selection proceedings will be used, the maximum number of pre-selected suppliers or contractors from which proposals will be requested, the manner in which the selection of that number of suppliers or contractors will be carried out and criteria that will be used for ranking suppliers or contractors, which should constitute qualification criteria and should be objective and non-discriminatory.

32. The maximum number of suppliers to be pre-selected must be established by the procuring entity in the light of the circumstances of the given procurement to ensure effective competition. When possible, the minimum should be at least three. If the procuring entity decides to regulate the number of suppliers or contractors to be admitted to the dialogue (see paragraph (5) (g) of the article), the maximum number of suppliers or contractors from which proposals will be requested should be established taking into account the minimum and maximum numbers of suppliers or contractors intended to be admitted to the dialogue phase as will be specified in the request-for-proposals under paragraph (5) (g) of this article. It is recommended that the maximum number of suppliers or contractors from which proposals will be requested should be higher than the maximum to be admitted to the dialogue phase, in order to allow the procuring entity to select from a bigger pool the most suitable candidates for the dialogue phase. To enable effective challenge, the provisions require promptly notifying suppliers or contractors of the results of the pre-selection and providing to those that have not been pre-selected reasons therefor.

33. Paragraph (4) specifies the group of suppliers or contractors to which the request for proposals is to be issued. Depending on the circumstances of the given procurement, this group could constitute the entire group of suppliers or contractors that respond to the invitation; or, if pre-qualification or pre-selection was involved,

to only those that were pre-qualified or pre-selected; in the case of direct solicitation, the group would comprise only those that are directly invited. The provisions also contain a standard clause in the Model Law that the price that may be charged for the request-for-proposals may reflect only the cost of providing the request-for-proposals to the suppliers or contractors concerned.

34. Paragraph (5) contains a list of the minimum information that should be included in the request for proposals in order to assist the suppliers or contractors in preparing their proposals and to enable the procuring entity to compare them on an equal basis. The list is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (see article 39 [\[\\*\\*hyperlink\\*\\*\]](#)) and contents of the request for proposals in request-for-proposals without negotiation proceedings (see article 48 (4) [\[\\*\\*hyperlink\\*\\*\]](#)). The differences reflect the specific procedures of this procurement method.

35. Information about the proposal price may not be relevant in procurement of non-quantifiable advisory services where the cost is not a significant evaluation criterion and in such cases initial proposals need not contain financial aspects or price. Instead, in the context of evaluation criteria referred to in subparagraph (h), the emphasis in this type of procurement will be placed on the service-provider's experience for the specific assignment, the quality of the understanding of the assignment under consideration and of the methodology proposed, the qualifications of the key staff proposed, transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the description of the assignment, and when applicable, the extent of participation by nationals among key staff in the performance of the services.

36. These evaluation criteria may be in addition to a minimum requirement for skills and experience expressed as qualification criteria under article 9 [\[\\*\\*hyperlink\\*\\*\]](#) and paragraph (2) (e) of this article. Whereas by virtue of article 9 the procuring entity has the authority not to evaluate or pursue the proposals of unqualified suppliers or contractors, including the same types of skills and experience in the evaluation criteria, the procuring entity will be able to weigh, for example, the required experience of one service provider against experience of others. On the basis of such a comparison, it may be more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the proposal.

37. While the primary focus of dialogue typically may be on technical aspects or legal or other supporting issues, the subject matter of the procurement and market conditions may allow and even encourage the procuring entity to use price as an aspect of dialogue. In addition, in some cases, it is not possible to separate price and non-price criteria. Thus a preliminary price may be required to be provided in the initial proposals. The price is always included in the BAFOs.

38. Paragraph (5) (g) is applicable in situations when the procuring entity, in the light of the circumstances of the given procurement, decides that a minimum and/or maximum number of suppliers or contractors with whom to engage in dialogue should be established. Those limits should aim at reaching the optimum number of participants, taking into account that in practice holding concurrent negotiations with many suppliers has proved to be very cumbersome and unworkable, and may

discourage participation. The provisions refer to a desirable minimum of three participants. They are supplemented by provisions of paragraphs (6) (b) and (7).

39. Paragraph (5) (h) refers to the criteria and procedures for evaluating the proposals in accordance with article 11 [\[\\*\\*hyperlink\\*\\*\]](#) that in particular sets out exceptions to default requirements as regards assigning the relative weights to all evaluation criteria, to accommodate the specific features of this procurement method. These features may make it impossible for the procuring entity to determine from the outset of the procurement the relative weights of all evaluation criteria. It is therefore permitted under article 11 to list the relevant criteria in the descending order of importance. Where sub-criteria are also known in advance, they should be specified as well and assigned relative weight if possible; if not, they should also be listed in the descending order of importance. It is recognized that different procurements might require different levels of flexibility as regards specification of evaluation criteria and procedures in this procurement method. However, providing a true picture of the evaluation criteria and procedure from the outset of the procurement proceedings is a fundamental requirement of article 11.

40. In the context of paragraph (5) (m) requiring the procuring entity to specify in the request for proposals any other requirements relating to the proceedings, it may be beneficial to include the timetable envisaged for the procedure. The proceedings by means of this procurement method are usually time- and resource-consuming on both sides — the procuring entity and suppliers or contractors. An estimated timetable of the proceedings in the request for proposals encourages better procurement planning and makes the process more predictable, in particular as regards the maximum period of time during which suppliers or contractors should be expected to commit their time and resources. It also gives both sides a better idea as regards the timing of various stages and which resources (personnel, experts, documents, designs, etc.) would be relevant, and should be made available, at which stage.

41. After the provision of the request for proposals to the relevant suppliers or contractors, sufficient time should be allowed for suppliers or contractors to prepare and submit their proposals. The relevant timeframe is to be specified in the request for proposals and may be adjusted if need be, in accordance with the requirements of article 14 [\[\\*\\*hyperlink\\*\\*\]](#).

42. Paragraph (6) regulates the examination (assessment of responsiveness) of proposals. All proposals are to be assessed against the established minimum examination criteria notified to suppliers or contractors in the invitation to the procurement and/or request for proposals. The number of suppliers or contractors to be admitted to the next stage of the procurement proceedings — dialogue — may fall as a result of the rejection of non-responsive proposals, i.e. those that do not meet the established minimum criteria. As in the case with pre-qualification proceedings (see paragraph [25] above), examination procedures cannot be used for the purpose of limiting the number of suppliers or contractor to be admitted to the next stage of the procurement proceedings. If all suppliers or contractors presenting proposals turn out to be responsive, they all must be admitted to the dialogue unless the procuring entity reserved the right to invite only a limited number. As stated in the context of paragraph (5) (g) (see paragraph [33] above), such a right can be reserved in the request for proposals. In this case, if the number of responsive proposals exceeds the established maximum, the procuring entity will select the

maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals. The Model Law itself does not regulate this procedure and criteria, which may vary from procurement to procurement. A certain level of subjectivity in the selection cannot be excluded in this procurement method. The risk of abusive practices should be mitigated by the requirement to specify the applicable selection procedure and criteria in the request for proposals, and to provide prompt notification of the results of the examination procedure, including reasons for rejection when applicable. These requirements should allow the aggrieved suppliers effectively to challenge the procuring entity's decisions. Managerial techniques to oversee the procedure can also support these regulatory tools.

43. In accordance with paragraph (7), the number of suppliers or contractors invited to the dialogue in any event must be sufficient to ensure effective competition. The desirable minimum of three suppliers or contractors mentioned in paragraph (5) (g) is reiterated in this paragraph. The procuring entity will not however be precluded from continuing with the procurement proceedings if only one or two responsive proposals are presented. The reason for allowing the procuring entity to continue with the procurement in such case is that, even if there is a sufficient number of responsive proposals, the procuring entity has no means of ensuring that the competitive base remains until the end of the dialogue phase: suppliers or contractors are not prevented from withdrawing at any time from the dialogue.

44. Paragraph (8) sets out two requirements for the format of dialogue: that it should be held on a concurrent basis and that the same representatives of the procuring entity should be involved to ensure consistent results. The reference to "representatives" of the procuring entity is in plural in these provisions since the use of committees comprising several people is considered to be good practice, especially in the fight against corruption. This requirement does not prevent the procuring entity from holding dialogue with only one supplier or contractor, as explained above. Dialogue may involve several rounds or phases. By the end of each round or phase, the needs of the procuring entity are refined and participating suppliers or contractors are given a chance to modify their proposals in the light of those refined needs and the questions and comments put forward by the negotiating committee during dialogue.

45. The reference in subsequent paragraphs of this article to "suppliers or contractors remaining in the procurement proceedings" indicates that the group of suppliers or contractors entering the dialogue at the first phase may decline throughout the dialogue process. Some suppliers or contractors may decide not to participate further in dialogue, or they may be excluded from further negotiations by the procuring entity on the grounds permitted under the Model Law or other provisions of applicable law of the enacting State. Unlike some systems with similar procurement methods, the Model Law does not give an unconditional right to the procuring entity to terminate competitive dialogue with a supplier or contractor, for example, only because in the view of the procuring entity that supplier or contractor would not have a realistic chance of being awarded the contract. The dialogue phase involves constant modification of solutions and it would be unfair to eliminate any supplier only because at some stage of dialogue a solution appeared not acceptable to the procuring entity. Although terminating the dialogue with such a supplier

might allow both sides to avoid wasting time and resources (which could turn out to be significant in this type of procurement), and might consequently reduce the risk of reduced competition in future procurements, UNCITRAL has proceeded on the basis that the risks to objectivity, transparency and equal treatment significantly outweigh the benefits.

46. On the other hand, the procuring entity should not be prohibited from terminating dialogue with suppliers or contractors on the grounds specified in the Model Law or through other provisions of applicable law of the enacting State. Some provisions in the Model Law would require the procuring entity to exclude suppliers or contractors from the procurement proceedings. For example, they must be excluded on the basis of article 21 [\[\\*\\*hyperlink\\*\\*\]](#) (inducement, unfair competitive advantage or conflicts of interest), or if they are no longer qualified (for example in the case of bankruptcy), or if they materially deviate during the dialogue phase from the minimum responsive requirements or other key elements that were identified as non-negotiable at the outset of the procurement. In such cases, the possibility of a meaningful challenge under chapter VIII by aggrieved suppliers or contractors is ensured since the procuring entity will be obligated to notify promptly suppliers or contractors of the procuring entity's decision to terminate the dialogue and to provide grounds for that decision. It may be useful to provide suppliers or contractors at the outset of the procurement proceedings with information about the grounds on which the procuring entity will be required under law to exclude them from the procurement.

47. Paragraph (9) imposes limits on the extent of modification of the terms and conditions of the procurement as set out at the outset of the procurement proceedings. Unlike article 15 [\[\\*\\*hyperlink\\*\\*\]](#) that regulates modification of the solicitation documents before the submissions/proposals are presented, paragraph (9) deals with restriction on modification of any aspect of the request for proposals after the initial proposals have been presented. The possibility of making such modifications is inherent in this procurement method; not allowing sufficient flexibility to the procuring entity in this respect will defeat the purpose of the procedure. The need for modifications may be justified in the light of dialogue but also in the light of circumstances not related to dialogue (such as administrative measures).

48. At the same time, the negative consequences of unfettered discretion may significantly outweigh the benefits in terms of flexibility. The provisions of paragraph (9) seek to achieve the required balance by preventing the procuring entity from making changes to 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. They are the subject matter of the procurement, qualification and evaluation criteria, the minimum requirements established pursuant to paragraph (2) (f) of this article and any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that the procuring entity explicitly excludes from the dialogue at the outset of the procurement (i.e. non-negotiable requirements). The provisions would not prevent suppliers or contractors from making changes in their proposals as a result of the dialogue; however, deviation from the essential requirements of the procurement (such as the subject matter of the procurement, the minimum or non-negotiable requirements) may become a

ground for the exclusion from the procurement of the supplier or contractor proposing such unacceptable deviations.

49. Paragraph (10) provides an essential measure to achieve equal treatment of suppliers and contractors in the communication of information from the procuring entity to suppliers or contractors during the dialogue phase. It subjects any such communication to the provisions of article 23 on confidentiality, some of which are specifically designed for chapter V procurement methods. Concerns over confidentiality are particularly relevant in this procurement method in the light of the format and comprehensive scope of the dialogue. The general rule is that no information pertinent to any particular supplier or its proposal should be disclosed to any other participating supplier without consent of the former. Further exceptions are listed in article 24 (3) [\[\\*\\*hyperlink\\*\\*\]](#) (disclosure is required by law, or ordered by competent authorities, or permitted in the solicitation documents). (For the guidance to article 24, see the commentary to that article in Section [\\*\\* above \[\\*\\*hyperlink\\*\\*\]](#).)

50. Achieving equal treatment of all participants during the dialogue requires implementing a number of practical measures. The Model Law refers only to the most essential ones, such as those in paragraph (10), and the requirement that negotiations be held on a concurrent basis by the same representatives of the procuring entity (paragraph (8) as explained in paragraph [\[39\]](#) above). Other measures, such as ensuring that the same topic is considered with the participants concurrently for the same amount of time, should be thought through by committees when preparing for the dialogue phase. Enacting States may wish to provide for other practical measures in the procurement regulations.

51. Upon completion of the dialogue stage, all the remaining participants must be given an equal chance to present BAFOs, which are defined as best and final with respect to each supplier's proposal. This definition highlights one of the main distinct features of this procurement method — the absence of any complete single set of terms and conditions of the procurement beyond the minimum technical requirements against which final submissions are evaluated.

52. Paragraphs (11) and (12) regulate the BAFOs stage. The safeguards contained in these paragraphs are intended to maximize competition and transparency. The request for BAFOs must specify the manner, place and deadline for presenting them. No negotiation with suppliers or contractors is possible after BAFOs have been presented and no subsequent call for further BAFOs can be made. Thus the BAFO stage puts an end to the dialogue stage and freezes all the specifications and contract terms offered by suppliers and contractors so as to restrict an undesirable situation in which the procuring entity uses the offer made by one supplier or contractor to pressure another supplier or contractor, in particular as regards the price offered. Otherwise, in anticipation of such pressure, suppliers or contractors may be led to raise the prices offered, and there is a risk to the integrity of the marketplace.

53. Paragraph (12) prohibits negotiations on the terms of the BAFOs. It should be read in conjunction with the provisions of article 16 [\[\\*\\*hyperlink\\*\\*\]](#), which allow the procuring entity to seek clarification of BAFOs as for other submissions, but do not allow price or other significant information to be altered as part of the clarification process, as the commentary to that article explains. The dialogue phase means that the article 16 [\[\\*\\*hyperlink\\*\\*\]](#) procedure is unnecessary as regards the

initial proposals, unless there are queries as to whether or not they meet the minimum criteria set out in the request for proposals itself.

54. Paragraph (13) deals with the award of the procurement contract under this procurement method. It is to be awarded to the successful offer, which is determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals. The reference to the criteria and procedure for evaluating the proposals as set out in the request for proposals in this provision reiterates the prohibition of modification of those criteria and procedures during the dialogue stage, found in paragraph (9) of the article as explained in paragraphs [\*\*42 and 43\*\*] above.

55. The procuring entity will be required to maintain a comprehensive written record of the procurement proceedings, including a record of the dialogue with each supplier or contractor, and to give access to the relevant parts of the record to the suppliers or contractors concerned, in accordance with article 25 [\*\*hyperlink\*\*]. This is an essential measure in this procurement method to ensure effective oversight, including audit, and possible challenges by aggrieved suppliers or contractors.

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