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UNITED NATIONS
GENERAL
ASSEMBLY



Distr.
LIMITED

A/CN.9/WG.V/WP.28
8 August 1990

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on the New International
Economic Order
Twelfth session
Vienna, 8-19 October 1990

PROCUREMENT

Second draft of articles 1 to 35 of Model Law on Procurement

Report of the Secretary-General

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INTRODUCTION

1. The Commission decided at its nineteenth session in 1986 to undertake work in the area of procurement as a matter of priority and entrusted that work to its Working Group on the New International Economic Order (A/41/17, para. 243). The Working Group commenced its work at its tenth session in October 1988. It devoted that session to deliberations on the basis of a study of procurement prepared by the Secretariat that discussed possible objectives of national procurement policies and that examined national procurement laws and practices and the roles and activities of various international institutions and development funding agencies in connection with procurement (A/CN.9/WG.V/WP.22). After completing its consideration of the study the Working Group requested the Secretariat to prepare a first draft of a Model Law on Procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125).
2. The first draft of articles 1 to 35 of the Model Law on Procurement and the accompanying commentary prepared by the Secretariat (A/CN.9/WG.V/WP.24 and A/CN.9/WG.V/WP.25) were considered by the Working Group at its eleventh session in February 1990. (The draft articles contained in those documents is hereinafter referred to as the "first draft".) Draft provisions on review of acts and decisions of, and procedures followed by, the procuring entity were not included in the first draft and were to be prepared subsequent to the preparation of that draft.
3. After considering the first draft and the accompanying commentary, the Working Group requested the Secretariat to revise the text of the Model Law taking into account the discussion and decisions at that session of the Working Group. It was agreed that the revision need not attempt to perfect the structure or drafting of the text. It was also agreed that the commentary would not be revised until after the text of the Model Law had been settled, and that no revision of the commentary would be prepared for the twelfth session of the Working Group. In addition, the Working Group requested the Secretariat to prepare for the twelfth session draft provisions on the review of acts and decisions of, and procedures followed by, the procuring entity (A/CN.9/331, para. 222). The revision of draft articles 1 to 35 of the Model Law is contained in the present document; draft provisions on review, consisting of articles 36 to 42, are contained in A/CN.9/WG.V/WP.27.
4. In preparing the present draft, the Secretariat has sought to incorporate all deletions, changes and additions agreed upon by the Working Group at its eleventh session. In addition, an attempt has been made to incorporate proposals and suggestions made at that session but in respect of which agreement was not reached. Wording reflecting proposals and suggestions upon which agreement was not reached at the eleventh session are, in most cases, placed within square brackets. However, wording reflecting proposals and suggestions that, it is believed, are not likely to be controversial or to encounter opposition (e.g., improvements in drafting that do not affect the substance of the text) have not been placed within square brackets. Proposals and suggestions have not been reflected in the text where they would conflict with an approach agreed upon by the Working Group or where they would for other reasons be difficult to incorporate. Such proposals and suggestions were few in number.

5. In the present draft, changes of and additions to wording that appeared in the first draft are underlined, except in the case of headings to articles, all of which are underlined as a matter of style. Deletions from the first draft are indicated in the notes following each article.

6. The present draft may serve as a useful compendium of elements that the Working Group considers are, or that may be, important for an efficient, effective and fair procurement system, and thus may facilitate the further work of the Working Group in the area of procurement. It will be observed, however, that the addition to the text of the wording and provisions upon which the Working Group has agreed makes the text longer, more complex and more cumbersome; further additions will make the text even more so. Those characteristics, particularly in a Model Law intended for global application, can impede the usefulness and acceptability of the text. In considering the present draft, the Working Group may wish to re-examine critically each provision of the text with respect to the possibility of rendering the text less complex and cumbersome as well as from the point of view of substance. For example, in the light of the early decision of the Working Group that the Model Law should be a "framework" law, setting forth only the essential elements of procurement procedure, some matters of detail that currently appear in the text might be left to be dealt with in the procurement regulations.

7. Unless otherwise indicated in the notes accompanying the draft articles, the Secretariat will, in preparing the next draft of the Model Law, proceed on the assumption that proposals and suggestions for changes and additions in respect of which the Working Group took no decision at its eleventh session (such proposals, suggestions and provisions being reflected in the present (second) draft within square brackets) are not to be incorporated in the text, except those that the Working Group affirmatively decides to retain or to modify. Additions that are not retained or modified by the Working Group will be deleted from the text; where necessary, the wording of the first draft will be reinstated. With respect to changes to wording that appeared in the first draft that are not retained or modified by the Working Group, the wording used in the first draft will be reinstated.

SECOND DRAFT OF ARTICLES 1 TO 35 OF MODEL LAW ON PROCUREMENT

CHAPTER I. GENERAL PROVISIONS

Article 1. Application of Law *

(1) This Law applies to procurement by procuring entities. 1/

(2) This Law does not apply to procurement for national security or national defence purposes, except where the procuring entity expressly declares that it applies. 2/

*/ Article headings are for reference purposes only and are not to be used for purposes of interpretation.

Notes

1. The remainder of the text of article 1 in the first draft has been deleted and is incorporated in the definition of "procurement" that has been added in new subparagraph (a) of article 2. See note 1 to article 2.
2. See A/CN.9/331, para. 139.

* * *

Article 2. Definitions

For the purposes of this Law:

[(new a) "procurement" means the acquisition, through purchase, rental, lease, hire-purchase or any other means, of goods or of construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves[, and the acquisition of telecommunications, transport or insurance services];] 1/

(a) "procuring entity" means:

(i) any department, agency, organ or other unit, or any subdivision thereof, of the Government or the administration[, except.....;] 2/

(ii) (each State enacting this Model Law inserts in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity").

(b) "goods" includes raw materials, products, equipment and other physical objects of every kind and description[, whether in solid, liquid or gaseous form, and electrical, nuclear and other energy;] 3/

(c) "construction" means such physical work as site preparation, excavation, erection, [demolition,] building, installation of equipment or materials, decoration and finishing, in respect of a new structure or of an existing structure[, as well as drilling, mapping, satellite photography, seismic studies and similar activities in connection with such work]; 4/

(d) "procurement proceedings" [includes] tendering proceedings, competitive negotiation proceedings and single source procurement; 5/

(e) "international tendering proceedings" means [tendering proceedings in which participation by contractors and suppliers whose places of business or habitual residences are located outside (this State) is encouraged and promoted through the use of particular procedures provided for by this Law]; 6/

(f) "tender security" includes such arrangements as guarantees [issued by financial institutions], 7/ letters of credit, cheques on which a bank is primarily liable and cash deposits, provided by a contractor or supplier to secure obligations in respect of its tender;

(g) "currency" includes unit of account;

(g bis) "tendering proceedings" means procedures engaged in, in accordance with articles 11 through 33, with a view towards entering into a procurement contract; 8/

(h) "competitive negotiation proceedings" means [negotiations on a competitive basis between the procuring entity and contractors and suppliers, governed by article 34, with a view towards entering into a procurement contract]; 9/

(i) "single source procurement" means procurement from a particular contractor or supplier without engaging in tendering proceedings or competitive negotiation proceedings;

(i bis) "contractor or supplier" means any party or potential party, according to the context, to a procurement contract with the procuring entity; 8/

(j) a tender is "responsive" if it conforms to the requirements set forth in the solicitation documents, including requirements concerning the characteristics of the goods, construction [or services] to be procured and the terms and conditions of the procurement contract. 10/

Notes

1. The definition of "procurement" has been added pursuant to the suggestion in A/CN.9/331, para. 27. It incorporates the suggestions and proposals in A/CN.9/331, paras. 17, 18 and 23. If this addition is not adopted, article 1(1) will be reformulated along the lines of the first draft. The Working Group may wish to consider whether it is desirable to list the various means of acquisition, or whether it would be preferable to refer simply to acquisition by any means except by gift.

2. See A/CN.9/331, para. 23.
3. See A/CN.9/331, para. 23. The phrase "physical objects" replaces the phrase "tangible objects" that appeared in the first draft.
4. See A/CN.9/331, para. 24.
5. The changes in this subparagraph, consisting of the addition of the word "includes" and the deletion of wording that appeared in the first draft, have been made on the initiative of the Secretariat.
6. See A/CN.9/331, para. 23.
7. See A/CN.9/331, para. 25.
8. Added on the initiative of the Secretariat.
9. See A/CN.9/331, para. 26.
10. The definition of "responsive" tender has been relocated from article 28(4)(a) of the first draft, pursuant to A/CN.9/331, para. 156. The reference to services has been included within square brackets in the light of the possibility of including certain services in new subparagraph (a) of this article.

* * *

Article 3. Underlying [objectives] 1/

[The [objectives] of this Law are, consistent with the efficient operation of the procurement system of (this State)]: 2/

- (a) to maximize economy in procurement;
- (b) to foster and encourage participation in procurement proceedings by competent contractors and suppliers, including, where appropriate, [participation by contractors and suppliers whose places of business or habitual residences are located outside (this State)]: 3/
- (c) to promote competition among contractors and suppliers for the supply of the goods, construction [or services] 4/ to be procured;
- (d) to provide for the fair and equitable treatment of all contractors and suppliers in connection with procurement covered by this Law;
- (e) to promote the integrity of, and fairness and public confidence in, the procurement process; and
- (f) to achieve transparency in the procedures relating to procurement.

Notes

1. Pursuant to the suggestion in A/CN.9/331, para. 30, the word "objectives" replaces the word "policies" that appeared in the first draft. Paragraph (2) of this article, which appeared in the first draft, has been moved to a separate article (article 3 bis) and reworded.

2. The reference to "efficiency", which appeared in subparagraph (a) in the first draft, has been moved to the chapeau of the article, pursuant to the proposal in A/CN.9/331, para. 31. The Working Group may wish to consider whether the objectives in subparagraphs (a) through (f) should be subsidiary to the objective of efficiency, as they are under the present formulation, or whether the objective of efficiency should have the same status as the other objectives, as it did in the first draft.

3. The wording of the first draft has been modified to align with the modification made to the definition of "international tendering proceedings" in article 2(e).

4. See note 8 to article 2.

* * *

Article 3 bis. International agreements or other international obligations of (this State) relating to procurement

To the extent that this Law conflicts with an obligation of (this State) under any treaty or other form of agreement to which it is a party with one or more other States or under any agreement with an international financing institution, that has already been or is subsequently entered into by (this State), the requirements of such obligation shall be applied; but in all other respects, the procurement shall be governed by this Law. 1/

Note

1. The substance of this article originally appeared as paragraph (2) of article 3. It has been reworded in accordance with A/CN.9/331, para. 33, and placed in a separate article.

* * *

Article 4. Procurement regulations

The . . . (each State enacting this Model Law specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to elaborate upon or supplement this Law.

Article 5. Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement

This Law and the procurement regulations, all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments of this Law and those regulations and administrative rulings and directives, shall be promptly made accessible to the public.

[Article 6. Control and supervision of procurement 1/

(1) The approval function referred to in articles 7(2), 7(3), 12(2), 28(3), 29(1) and 31(1) shall be performed by ... (each State enacting this Model Law specifies the organ or authority authorized to perform the approval function).

(2) (Each State enacting this Model Law specifies in this paragraph and, if necessary, in subsequent paragraphs, any additional functions in connection with the control and supervision of procurement and the organ(s) or authority(ies) to perform those functions.)]

Note

1. This article has been placed within square brackets because of a possible inconsistency in decisions of the Working Group at its eleventh session with respect to the approval function. The approval function was discussed initially in A/CN.9/331, paras. 36 to 38. In A/CN.9/331, paras. 176 and 194, the Working Group agreed that the approval function should be dealt with in the implementing regulations and not in the Model Law. That decision would seem to call for the deletion of article 6 and of all references in the Model Law to the necessity of the procuring entity to obtain approval of an act or decision. However, in connection with article 28(3), the prevailing view of the Working Group was that the requirement that the procuring entity had to obtain approval of a decision to reject a tender under that provision should be retained (A/CN.9/331, para. 152). The Working Group may wish to remedy the apparent inconsistency.

* * *

Article 7. Methods of procurement and conditions for their use

(1) Except as otherwise provided by this Law, a procuring entity engaging in procurement shall do so by means of tendering proceedings.

(2) [Subject to approval,] 1/ the procuring entity may engage in procurement by means of competitive negotiation proceedings:

(a) when the [estimated value] 2/ of the procurement contract is less than the amount set forth in the procurement regulations; or

(b) when tendering proceedings have been engaged in but [no tenders were submitted, or] 3/ all tenders were rejected by the procuring entity pursuant to article 28(2) or (3) or article 29, [and when engaging in new tendering proceedings would be unlikely to result in a procurement contract]. 4/

(3) [Subject to approval,] 1/ the procuring entity may engage in single source procurement when:

(a) the [estimated value] 2/ of the procurement contract is less than the amount set forth in the procurement regulations;

(b) the goods, construction [or services] is available only from a particular contractor or supplier, [or a particular contractor or supplier has exclusive rights in respect of the goods, construction [or services], and] no reasonable alternative or substitute exists; 5/

(c) there is an urgent need for the goods, construction [or services] making it impossible or imprudent to use tendering proceedings or competitive negotiation proceedings, as the case may be, because of the amount of time involved in using those proceedings;

(d) for reasons of standardization, or the need for compatibility with existing [goods,] equipment or technology, [additional supplies] must be procured from [the] contractor or supplier [that supplied the existing goods, equipment or technology]; 3/

(e) the procuring entity seeks to enter into a contract with the contractor or supplier for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs;

(f) for [the protection] of national security [or for reasons of national defense] there is a need for secrecy in respect of the procuring entity's procurement needs; 6/

(g) [procurement from a particular contractor or supplier is necessary in order to promote socio-economic policies specified in the procurement regulations;] 3/, 7/

(h) [procurement from a particular contractor or supplier is necessary in order to develop a particular source of supply for reasons of national security or national defense;] 3/

(i) [the scope or volume of the goods, construction [or services] required by the procuring entity exceeds the normal capacity of the relevant industry and a particular contractor or supplier is willing to build or acquire special facilities or capacity in order to supply the goods, construction [or services]]. 3/

(4) The procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (2)(a) or (3)(a). 8/

(5) A procuring entity that invokes the provisions of paragraph (2) or (3) shall include in the record required under article 34(4) or article 35, as the case may be, 9/ a statement of the circumstances on which it relied and, except in respect of paragraph (3)(f), shall specify the relevant facts.

Notes

1. See note 1 to article 6.

2. See A/CN.9/331, para. 40.

3. See A/CN.9/331, para. 42.

4. See A/CN.9/331, para. 214. Subparagraph (b)(ii), which appeared in the first draft, has been deleted.

5. See A/CN.9/331, para. 42. With respect to the references to services in paragraph (3)(b) and elsewhere in this article, see note 8 to article 2.

6. See A/CN.9/331, para. 44.

7. The Working Group may wish to consider whether, even with its scope limited to the promotion of specified socio-economic policies, subparagraph (g) would provide too much scope to a procuring entity to defeat the objectives of the Model Law.

8. The words "of the goods or construction" that appeared in the first draft after the word "procurement" have been deleted.

9. Pursuant to A/CN.9/331, para. 207, the word "record" replaces the word "minutes" that appeared in the first draft. The words "as the case may be" have been added to improve the clarity of the provision.

* * *

Article 8. Qualifications of contractors and suppliers 1/

(new 1) This article applies to the ascertainment by the procuring entity of the qualifications of contractors and suppliers at any stage of the procurement proceedings. 2/

(1) Subject to the right of contractors and suppliers to protect their intellectual property or trade secrets, the procuring entity may: 3/

(a) require contractors and suppliers participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers: 4/

(i) have legal capacity [according to the law of the State of which a contractor or supplier is a national] to enter into the procurement contract; 5/, 6/

(ii) are not insolvent, [in receivership,] 5/ bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iii) have fulfilled their obligations to pay taxes and social security contributions in (this State);

[(iv) have not been convicted of any criminal offense concerning their professional conduct [or based on the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract], 7/ [and have not been held liable in civil proceedings for loss arising from the performance or failure to perform a procurement contract,] within a period of [5] years preceding the commencement of the procurement proceedings;] 8/

(v) [deleted] 9/

(vi) possess sufficient technical competence, financial resources, equipment and other physical facilities, [managerial capability, reliability, experience, and reputation], and sufficient personnel, to perform the procurement contract; 10/

(b) investigate by any other appropriate means[, including by inspection of the books of the contractor or supplier,] the qualifications of the contractor or supplier pursuant to criteria set forth in subparagraph (a). 11/

(2) Any requirement established pursuant to paragraph (1)(a) and any criterion established by the procuring entity for the evaluation of the qualifications of contractors and suppliers under paragraph (1)(a)(vi) shall be set forth in the prequalification documents, if any, and in the solicitation documents and shall apply equally to all contractors and suppliers. A procuring entity shall impose no requirement or qualification criterion other than those provided for in paragraph (1)(a). 12/

(2 bis) The procuring entity shall evaluate the qualifications of contractors and suppliers in accordance with the qualification criteria and procedures set forth in the prequalification documents and the solicitation documents. 13/

(2 ter) [In the case of international tendering proceedings, the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of contractors and suppliers [that discriminates against foreign contractors and suppliers or against categories thereof]. 14/

(3) [Subject to the efficient operation of the procurement system,] a contractor or supplier shall not be precluded from participating in procurement proceedings for the reason that it has not demonstrated that it is qualified pursuant to paragraph (1) if the contractor or supplier undertakes to demonstrate that it is qualified during the course of the procurement proceedings and if it is reasonable to expect that the contractor or supplier will be able to do so. 15/

Notes

1. Pursuant to A/CN.9/331, para. 45, the substance of article 9 that appeared in the first draft has been merged with the present article; the article refers only to the "qualifications" of contractors and suppliers, and not to their "eligibility".

2. See A/CN.9/331, para. 70. The words "at any stage of the procurement proceedings" are intended to include the postqualification proceedings provided for in article 28(8 bis). Although the agreement of the Working Group called for an express reference to postqualification proceedings, the more generalized formulation contained in this paragraph is presented for the consideration of the Working Group. It clarifies that not only postqualification proceedings, but also the evaluation of the qualifications of contractors and suppliers at any other stage of the procurement proceedings, are subject to the criteria, requirements and procedures provided for in article 8 (see A/CN.9/331, para. 78).

3. See A/CN.9/331, para. 46; paragraph (1) has been restructured.

4. Pursuant to the proposal in A/CN.9/331, para. 47, the reference to "written statements" has been deleted.

5. See A/CN.9/331, para. 48.

6. The Working Group may wish to note that in many legal systems the applicable law for determining the capacity of a party to enter into a contract would not necessarily be the law of the country of which the party is a national.

7. See A/CN.9/331, para. 53.

8. Pursuant to A/CN.9/331, para. 49, the entire sub-subparagraph has been placed within square brackets in the light of the differing opinions as to whether it should be retained. It will be deleted if not affirmatively acted upon by the Working Group. The reference to civil liability has been added but placed within square brackets pending a decision by the Working Group as to whether or not it should be included. The Working Group may wish to note that, under that ground, a contractor or supplier would be disqualified for [5] years even where it acted generally in good faith in connection with the prior contract and its improper or non-performance of that contract was relatively minor. If the ground for exclusion is to be retained at all, it should perhaps be narrowed considerably.

9. See A/CN.9/331, para. 50.

10. The foregoing provision has been moved to the present article from article 9 as it appeared in the first draft, pursuant to A/CN.9/331, para. 45. The references to managerial capability, reliability, experience and reputation have been added pursuant to proposals in A/CN.9/331, para. 53.

11. Pursuant to A/CN.9/331, para. 45, the word "eligibility" that appeared in this subparagraph and elsewhere in the article the first draft has been changed to "qualifications". The reference to inspection of the books of a contractor or supplier has been added pursuant to the proposal in A/CN.9/331, para. 51.

12. The indicated wording in the first sentence of paragraph (2) is a re-formulation of the wording that originally appeared in the paragraph, as a consequence of the merger of article 15 with the present article (see A/CN.9/331, para. 66).

13. The substance of this provision originally appeared as paragraph (1) of article 15, which has been merged with the present article pursuant to A/CN.9/331, para. 66. In the first sentence, the word "evaluate" replaces the word "assess", pursuant to A/CN.9/331, para. 67; the word "requirements" has been added; and the reference to "solicitation" documents replaces the reference to "procurement" documents pursuant to A/CN.9/331, para. 28.

14. The substance of the foregoing paragraph originally appeared as paragraph (3) of article 15, which has been merged with the present article pursuant to A/CN.9/331, para. 66. The reference to discrimination against foreign contractors and suppliers or categories thereof replaces the original formulation in paragraph (3) of article 15, pursuant to A/CN.9/331, paras. 67 and 69.

15. The square brackets surrounding this paragraph as it appeared in the first draft have been removed, pursuant to the decision of the Working Group to retain a provision along the lines of the paragraph (A/CN.9/331, para. 52). The opening words of the paragraph have been added pursuant to a proposal in A/CN.9/331, para. 52. The Working Group may wish to consider whether those words give too much scope for arbitrary exclusion of a contractor or supplier from participation in the procurement proceedings. The other indicated wording is a reformulation of wording that appeared in the original version of the paragraph.

Article 9. [Merged with article 8] 1/

Note

1. See A/CN.9/331, para. 45.

* * *

[Article 10. Rules concerning documentary evidence provided by contractors and suppliers 1/

(1) This article applies to documentary evidence provided by contractors and suppliers to demonstrate their qualifications in procurement proceedings, when the procuring entity requires that the documentary evidence be legalized. 2/

(2) Documentary evidence other than that emanating from a governmental, judicial or administrative authority, shall be signed and sworn to or otherwise solemnized by the maker of the document before a notary or other authority competent under the law of the place where the authority serves to attest to the authenticity of the document and to its signature and solemnization, and the attestation of the notary or other competent authority shall be affixed or joined to the document. The attestation by a foreign notary or other competent authority shall be acceptable if it is legalized in accordance with the law applicable in (this State) relating to the legalization of foreign public documents.

(3)(a) Documentary evidence emanating from a governmental, judicial or administrative authority outside (this State) shall be acceptable if it is legalized in accordance with the law applicable in (this State) relating to the legalization of foreign public documents.

(b) Documentary evidence emanating from a governmental, judicial or administrative authority in (this State) shall conform to the law applicable in (this State) concerning the signature, solemnization and legalization of such documents.]

Notes

1. This article has been placed within square brackets pursuant to A/CN.9/331, para. 56, where it is questioned whether or not the article should be retained at all. The article will be deleted if not affirmatively acted upon by the Working Group. References in the title and text of the article to "written statements" have been deleted pursuant to the proposal in A/CN.9/331, para. 47.

2. Pursuant to A/CN.9/331, para. 45, the words "eligibility and" that appeared before the word "qualifications" in the first draft have been deleted. The final words of the paragraph have been added pursuant to A/CN.9/331, para. 56.

* * *

CHAPTER II. TENDERING PROCEEDINGS

SECTION I. INTERNATIONAL TENDERING PROCEEDINGS

Article 11. International tendering proceedings

A procuring entity that is required under article 7 to engage in tendering proceedings may decide to engage in international tendering proceedings, taking into account the objectives of economy and efficiency in the procurement. 1/

Note

1. Paragraph (2) that appeared in the first draft of this article, and the reference to paragraph (2) that appeared in paragraph (1), have been deleted pursuant to A/CN.9/331, para. 58, which reflects the decision of the Working Group that international tendering proceedings should not be mandatory. The reference in A/CN.9/331, para. 58, to examples of cases where international tendering proceedings would be desirable has not been included, since it might be more appropriate for such examples to be given in the commentary, rather than in the article itself.

* * *

SECTION II. SOLICITATION OF TENDERS AND APPLICATIONS TO PREQUALIFY

Article 12. Solicitation of tenders and applications to prequalify

(1) A procuring entity shall solicit tenders, and, where applicable, applications to prequalify, from all interested contractors and suppliers by causing a notice of proposed procurement to be published in . . . (each State enacting this Model Law specifies the official gazette or other official publication in which the notice of proposed procurement is to be published). In international tendering proceedings, the notice of proposed procurement shall also be published, in a language customarily used in international trade, in a newspaper or relevant trade publication or technical journal of wide international circulation. [The foregoing provisions do not preclude the use of additional means of bringing the notice of proposed procurement to the attention of contractors and suppliers.] 1/

(2)(a) [Notwithstanding the provisions of paragraph (1),] 2/

[alternative 1] where restricted participation in the tendering proceedings is more conducive to economy and efficiency,]

[alternative 2] where the time and costs involved in soliciting, examining, evaluating and comparing tenders from all interested contractors and suppliers is disproportionate to the estimated value of the procurement contract, where the goods or construction to be procured are available only from a small number of contractors and suppliers known to the procuring entity and it is more conducive to economy and efficiency in procurement to solicit

tenders only from those contractors and suppliers, or where soliciting tenders from all interested contractors and suppliers could impede effective competition by deterring the submission of tenders by qualified contractors and suppliers,] 3/

the procuring entity may[, subject to approval,] 4/ solicit tenders by communicating 5/ the notice of proposed procurement only to particular contractors and suppliers selected by it. The procuring entity shall select a sufficient number of contractors and suppliers to ensure effective competition, consistent with the efficient conduct of the tendering proceedings.

[(b) The notice of proposed procurement may be communicated to contractors and suppliers in writing or by any other means that provides a record of the contents of the notice. However, where there is an urgent need for the goods, construction [or services] 6/ to be procured or where the estimated value of the procurement contract is less than the amount set forth in the procurement regulations, tenders may be solicited from the selected contractors and suppliers by informing them of the contents of the notice of proposed procurement by telephone and communicating the notice of proposed procurement to them immediately thereafter in writing or by any other means that provides a record of the contents of the notice.] 7/

Notes

1. The second sentence has been restructured to make it clear that the language requirement applies only where international tendering proceedings are used. The final sentence has been added pursuant to the proposal in A/CN.9/331, para. 60. The wording is intended to encompass any means of bringing the notice of proposed procurement to the attention of contractors and suppliers, including by electronically transmitted message or telephone.
2. See A/CN.9/331, para. 61. Paragraph (2) has been restructured into two subparagraphs as a consequence of the addition of the provision set forth in paragraph (2)(b).
3. The two alternative versions of paragraph (2)(a) are presented pursuant to the suggestion in A/CN.9/331, para. 61. The Working Group may wish to consider the possibility of retaining alternative 1 with the expectation that a more detailed rule, such as the one contained in alternative 2, could be included in the procurement regulations.
4. See note 1 to article 6.
5. The word "communicating" replaces the word "sending" that appeared in the first draft, so as to avoid an implication that the notice must be in the form of a written document.
6. See note 8 to article 2.
7. See A/CN.9/331, paras. 60 and 117.

* * *

Article 13. [Deleted] 1/

Note

1. See A/CN.9/331, para. 62.

* * *

Article 14. Contents of notice of proposed procurement

(1) The notice of proposed procurement shall contain at least 1/ the following information:

- (a) the name and address of the procuring entity;
- (b) the nature and quantity of the goods [or services] 2/ to be supplied or the nature and location of the construction to be effected;
- (c) the desired or required time for the supply of the goods [or services] 2/ or for the completion of the construction;
- (d) the criteria to be used for evaluating the qualifications of contractors and suppliers, in conformity with article 8(1)(a); 3/
- (e) the means of obtaining the solicitation documents and the place from which they may be obtained; 4/
- (f) the price, if any, charged by the procuring entity for the solicitation documents and, in the case of international tendering proceedings, the currency and means of payment for those documents;
- (g) in the case of international tendering proceedings, the language or languages in which the solicitation documents are available;
- (h) the place and deadline for the submission of tenders;
- (i) if a tender security is required, the nature and amount of the security; 5/
- (j) the right under article 36 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings. 5/

(2) If prequalification proceedings are to be engaged in, the notice of proposed procurement shall so state. In such a case, the notice of proposed procurement need not contain the information referred to in paragraph (1)(e) or (g), but shall contain the following additional information:

- (a) the means of obtaining the prequalification documents and the place from which they may be obtained;
- (b) the price, if any, charged by the procuring entity for the prequalification documents and, in the case of international tendering proceedings, the currency and terms of payment for those documents;
- (c) in the case of international tendering proceedings, the language or languages in which the prequalification documents are available; and

(d) the place and deadline for the submission of applications to prequalify.

Notes

1. See A/CN.9/331, para. 64.
2. See note 8 to article 2.
3. See in A/CN.9/331, para. 45.
4. Pursuant to the proposal in A/CN.9/331, para. 28, references to "procurement documents" in this subparagraph and elsewhere in the article have been changed to "solicitation documents".
5. Subparagraphs (i) and (j) have been added pursuant to A/CN.9/331, para. 64. The Working Group may wish to consider whether it is necessary to require notice of proposed procurement to contain the information called for by those subparagraphs, particularly information concerning the right to review, especially if that information must be provided in the solicitation documents (see note 18 to article 18). Draft article 36 and other draft provisions concerning the right of review are contained in A/CN.9/WG.V/WP.27.

* * *

Article 15. [Merged with article 8] 1/

Note

1. Pursuant to the suggestion in A/CN.9/331, para. 66, the substance of this article has been merged with article 8 in the following manner: paragraphs (1) and (3) of article 15 have been slightly reformulated and have become, respectively, paragraphs (3) and (4) of article 8; paragraph (2) of article 15 has been deleted. The heading preceeding article 15 ("Section III. Qualifications of contractors and suppliers") has been changed and relocated to appear immediately preceeding article 16.

* * *

SECTION III. PREQUALIFICATION OF CONTRACTORS AND SUPPLIERS 1/

Note

1. This heading has been changed and relocated as a consequence of the merger of article 15 with article 8.

* * *

Article 16. Prequalification proceedings

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, contractors and suppliers that are qualified. [However, prequalification proceedings shall not be engaged in where participation in tendering proceedings is restricted pursuant to article 12(2).] [The provisions of article 8 shall apply to prequalification proceedings.] 1/

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each contractor and supplier that requests them in accordance with the procedures specified in the notice of proposed procurement and that pays the price, if any, charged for those documents.

(3) The prequalification documents shall contain all information necessary to enable contractors and suppliers to prepare and submit applications to prequalify, including, but not limited to, the information required to be included in the notice of proposed procurement pursuant to article 14(1), except subparagraph (e) thereof, plus the following information:

(a) instructions for preparing and submitting prequalification applications;

[(b) any additional information concerning the goods [or services] to be supplied or the construction to be effected that would be useful to contractors or suppliers in preparing their prequalification applications;] 2/

(c) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the tendering proceedings;

(d) any documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their qualifications; 3/

(e) the criteria and procedures to be used for evaluating the qualifications of contractors and suppliers; 4/

(f) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for contractors and suppliers to prepare and submit their applications, paying particular regard, in the case of international tendering proceedings, to the time reasonably needed by foreign contractors and suppliers and taking into account the reasonable needs of the procuring entity; 5/

(g) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings;

(h) [deleted] 6/

(3 bis) The procuring entity shall respond promptly to any request by a contractor or supplier for clarification of the prequalification documents that is received by the procuring entity prior to the deadline for the submission of applications to prequalify. The response by the procuring entity, which shall not identify the source of the request, shall be communicated to all contractors and suppliers to which the procuring entity provides the prequalification documents. 7/

(4) The procuring entity shall promptly notify all contractors and suppliers submitting applications to prequalify whether or not they have been prequalified and[, after a tender has been accepted,] 8/ shall make available to the general public the names of all contractors and suppliers that have been prequalified. [Only] 9/ contractors and suppliers that have been prequalified shall be entitled to submit tenders.

(5) The procuring entity shall upon request communicate to contractors and suppliers that have not been prequalified the grounds therefore, but the procuring entity shall not be required to give reasons to substantiate those grounds.

(6) A procuring entity that has engaged in prequalification proceedings is not precluded from re-evaluating at a later stage of the tendering proceedings the qualifications of contractors and suppliers that have been prequalified. 10/

Notes

1. Pursuant to the proposal in A/CN.9/331, para. 45, the words "eligible and" that appeared in the first draft have been deleted. The opening words of the paragraph as it appeared in the first draft have been reformulated in accordance with the suggestion in A/CN.9/331, para. 73, and moved to the second sentence. The word "qualified" at the end of the first sentence and the entire third sentence replace the words "qualified to perform the procurement contract" that appeared in the first draft, in order to clarify the intention that the prequalification proceedings be directed to evaluating the qualifications of contractors and suppliers pursuant to the criteria, requirements and procedures provided for in article 8.

2. This subparagraph has been placed within square brackets pursuant to the proposal in A/CN.9/331, para. 74, that the subparagraph be deleted. With respect to the reference to services, see note 8 to article 2.

3. Pursuant to the proposal in A/CN.9/331, para. 45, the words "eligibility and" that appeared in the first draft have been deleted. The reference to "written statements" that appeared in the first draft has been deleted pursuant to the proposal in A/CN.9/331, para. 47.

4. The word "evaluating" replaces the word "assessing" that appeared in the first draft, pursuant to the view reflected in A/CN.9/331, para. 67.

5. The indicated words have been added in order to be consistent with the changes made to article 24(1) pursuant to A/CN.9/331, para. 120.

6. This subparagraph has been reformulated pursuant to A/CN.9/331, para. 76, and relocated to paragraph (3 bis).

7. This paragraph has been added pursuant to A/CN.9/331, para. 76. It is patterned after article 22(1). The paragraph includes requests for clarification of information contained in the prequalification documents relative to the prequalification practices and procedures.

8. See A/CN.9/331, para. 77.

9. The word "only" replaces the word "all" that appeared in the first draft, pursuant to the suggestion in A/CN.9/331, para. 72.

10. Pursuant to the proposal in A/CN.9/331, para. 45, the words "eligibility and" that appeared in the first draft have been deleted. The word "re-evaluating" replaces the word "re-assessing" that appeared in the first draft, pursuant to the view reflected in A/CN.9/331, para. 67.

* * *

SECTION IV. SOLICITATION DOCUMENTS 1/

Note

1. Pursuant to A/CN.9/331, para. 28, references to "procurement documents" in this heading and throughout the text have been changed to "solicitation documents".

* * *

Article 17. Provision of solicitation documents to contractors and suppliers

The procuring entity shall provide a set of the solicitation documents to contractors and suppliers in accordance with the procedures and requirements specified in the notice of proposed procurement. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of the solicitation documents to each contractor and supplier that has been prequalified and that pays the price, if any, charged for those documents.

Article 18. Contents of solicitation documents

The solicitation documents shall contain [all] 1/ information necessary to enable contractors and suppliers to prepare and submit responsive tenders, [and information concerning the procedures for the opening, examination, comparison and evaluation of tenders,] 2/ including, but not limited to, the following information:

(a) instructions for preparing tenders;

(b) the criteria and procedures [, conforming with the provisions of article 8,] relative to the evaluation of the qualifications of contractors and suppliers or relative to the re-confirmation of qualifications [pursuant to article 28(8 bis)]; 3/

(c) [this subparagraph has been combined with subparagraph (b), above]

(d) any documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their qualifications[, and any requirement imposed pursuant to article 10 that documentary evidence be legalized]; 4/

(e) the nature and required technical and quality characteristics of the goods, construction [or services] 5/ to be procured, [in conformity with article 20,] 6/ including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected [or the services are to be rendered]; 7/

(f) the required terms and conditions of the procurement contract to be entered into as a result of the tendering proceedings[, including, but not limited to, any required terms and conditions concerning the method of pricing to be used in the contract; the extent to which, if at all, taxes, customs duties and similar charges and levies are to be included in the contract price; the allocation between the parties of the risk of higher costs of performing the contract resulting from changes in laws relating to taxes, customs duties and similar charges and levies and from changes in other laws affecting the performance of the contract; the law applicable to the contract; and the means of settling disputes under the contract]; 8/

(g) if alternatives to the characteristics of the goods, construction [or services] contractual terms and conditions or other requirements set forth in the solicitation 9/ documents are solicited, a statement to that effect;

(h) if contractors and suppliers are permitted to submit tenders for only a portion of the goods, construction [or services] to be procured, a designation of the portion or portions for which tenders may be submitted;

(i) the manner and, in international tendering proceedings, the currency or currencies in which the tender price is to be formulated and expressed;

(j) [deleted] 10/

(k) in international tendering proceedings, the language or languages in which tenders are to be prepared[, in conformity with article 23]; 6/

(l) any requirements of the procuring entity with respect to the nature, amount and other principal terms and conditions of any tender security to be provided by contractors and suppliers submitting tenders and of any security for the performance of the procurement contract to be provided by the contractor or supplier that enters into the procurement contract, and with respect to the type of institutions or entities from which such securities will be acceptable, or any choice offered by the procuring entity with respect to the nature, amount or other terms and conditions of the tender security or with respect to the type of institutions or entities, 11/ [in conformity with article 26]; 6/

(m) the manner, place and deadline for the submission of tenders[, in conformity with article 24]; 6/

(n) the means by which, pursuant to article 22, 12/ contractors and suppliers may seek clarifications of the solicitation documents and the place and time of any meeting of contractors and suppliers [that may be] 13/ convened by the procuring entity;

(n bis) if the procuring entity reserves the right to modify the solicitation documents pursuant to article 22, a statement to that effect; 14/

(o) the period of time during which tenders shall be in effect[, in conformity with article 25]; 6/

(p) the place, date and time for the opening of tenders[, in conformity with article 27]; the procedures to be followed for opening and examining tenders and the procedures and criteria for evaluating and comparing tenders and for ascertaining the most economic tender [as defined in article 28(7)(c)], including, but not limited to, such factors as how the criteria will be quantified or otherwise applied, the relative weight or other indication of the degree of importance that each criterion will have, the manner in which the criteria will be combined and in which the tenders will be compared in order to ascertain the most economic tender, and any margin of preference that will be applied, its amount and the manner of its application; 15/

(q) in international tendering proceedings, the currency that will be used for the purpose of evaluating and comparing tenders [pursuant to article 28(8)] 6/ and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate issued by a specified financial institution prevailing on a specified date will be used;

(r) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to the tendering proceedings;

(s) [references to:

(i) this Law, the procurement regulations and all other laws and regulations of (this State) directly pertinent to the tendering proceedings; and

(ii) the principal tax, social security, safety, environmental protection, health and labour laws and regulations of (this State) pertinent to the performance of the procurement contract, provided, however, that the omission of any such reference shall not of itself constitute grounds for review under article 36 or give rise to liability on the part of the procuring entity]; 16/

(t) the name(s) and address(es) of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from contractors and suppliers in connection with the tendering proceedings, without the intervention of an intermediary; 17/

(u) any countertrade commitment to be made by the contractor or supplier; 18/

[(v) the acts and decisions of the procuring entity that are subject to approval and the organ or organs that are to give such approval;] 19/

(w) the right under article 36 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings; 18/

[(x) if the procuring entity reserves the right to reject all tenders pursuant to article 29, a statement to that effect;] 20/

(y) any formalities that will be required in order for a tender that has been accepted to enter into force, including, where applicable, the signature of a written procurement contract pursuant to article 32. 21/

Notes

1. The word "all" has been placed within square brackets pursuant to the proposal in A/CN.9/331, para. 82 that the word be deleted.

2. See A/CN.9/331, para. 83.

3. This subparagraph has been reformulated and incorporates subparagraph (c) which appeared in the first draft; the references to article 8 and article 28(8 bis) have been added pursuant to A/CN.9/331, para. 81.

4. Pursuant to the proposal in A/CN.9/331, para. 45, the words "eligibility and" that appeared in the first draft have been deleted. The reference to "written statements" that appeared in the first draft has been deleted pursuant to the proposal in A/CN.9/331, para. 47. The reference to requirements that documentary evidence be legalized has been added to take account of the change made to article 10, whereby that article would apply only if a requirement of legalization were imposed by the procuring entity, and pursuant to A/CN.9/331, para. 81. It should be deleted if article 10 is not retained.

5. With respect to the references to services in this subparagraph and elsewhere in the article, see note 8 to article 2.

6. The reference has been added pursuant to A/CN.9/331, para. 81.

7. The indicated wording at the end of the subparagraph changes wording used in the first draft in order to be consistent with similar wording in article 28(7)(d).

8. See A/CN.9/331, paras. 86 and 88. The Working Group may wish to consider whether the added wording is necessary, or whether the reference to required contractual terms and conditions at the beginning of the subparagraph is sufficient.

9. See note 1 to heading of Section IV. This paragraph has been slightly reworded on the initiative of the Secretariat.

10. See A/CN.9/331, para. 89.

11. See A/CN.9/331, para. 128. The Working Group may wish to consider whether the point addressed by the added wording is already covered by the subparagraph without that wording, and, therefore, whether the added wording is necessary.
12. The reference to article 22 corrects a typographical error.
13. See A/CN.9/331, para. 91.
14. See A/CN.9/331, para. 115, and note 3 to article 22.
15. Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft. The references to articles 27 and 28(7)(c) have been added pursuant to A/CN.9/331, para. 81. The words "and examining tenders and the procedures and criteria for" change wording in the first draft to achieve greater clarity.
16. This subparagraph is a reformulation, pursuant to A/CN.9/331, para. 97, of the subparagraph that appeared in the first draft. It combines two proposals made in A/CN.9/331, para. 96, by requiring references only to the "principal" laws and regulations pertinent to the performance of the contract, instead of requiring exhaustive references, and by negating the possibility of a contractor or supplier claiming review of or compensation for an omission of such a law or regulation. The Working Group might wish to recall the approach agreed upon with respect to article 16(3)(h), the original version of which required the prequalification documents to set forth references to laws and regulations directly pertinent to the prequalification proceedings. In that case, the Working Group decided to delete the requirement and instead to require the procuring entity to be prepared on request to explain the relevant practices and procedures to contractors and suppliers (see A/CN.9/331, para. 76, and the reformulation of the provision in question in article 16(3 bis) of the present draft). The Working Group may wish to consider whether to adopt a similar approach with respect to the present subparagraph.
17. See A/CN.9/331, para. 98.
18. See A/CN.9/331, para. 99. The Working Group may wish to consider whether the point addressed by subparagraph (u) is already covered by subparagraph (f), and whether the requirement in subparagraph (w) is useful or desirable.
19. See A/CN.9/331, paras. 99 and 176. The Working Group may wish to consider whether this requirement is useful or desirable. With respect to the requirement of approval, see note 1 to article 6.
20. See A/CN.9/331, para. 177.
21. See A/CN.9/331, para. 201.

* * *

Article 19. Charge for solicitation documents

The procuring entity may charge contractors and suppliers a sum for solicitation 1/ documents provided to them. The sum shall reflect only the cost of printing the solicitation documents and providing them to contractors and suppliers.

Note

1. See note 1 to heading of Section IV.

* * *

Article 20. [Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents] 1/

(1) Specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction [or services] 2/ to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, shall not be included or used in the prequalification documents or in the solicitation 3/ documents with a view to creating [unnecessary] 4/ obstacles to participation by contractors or suppliers in tendering proceedings including, in the case of international procurement proceedings, foreign contractors and suppliers, nor shall such specifications, plans, drawings, designs, requirements, symbols or terminology be included or used which have the effect of creating unnecessary obstacles to such participation.

(2) To the extent possible, specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods, construction [or services] to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction [or services] to be procured shall be used, where available, in formulating the specifications, plans, drawings and designs to be included in the prequalification documents and in the solicitation documents.

(b) Standardized trade terms shall be used, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents and of the solicitation documents.

(c) [deleted] 5/

(4) In the case of international procurement proceedings, the prequalification documents and the solicitation documents shall be formulated in . . . (each State enacting this Model Law specifies its official language or languages) (and in a language customarily used in international trade). (In the event of a variation or conflict between language versions, the version in the language customarily used in international trade shall prevail.) 6/

Notes

1. See A/CN.9/331, para. 103.
2. With respect to the references to services in this paragraph and elsewhere in the article, see note 8 to article 2.
3. See note 1 to heading of Section IV.
4. See A/CN.9/331, para. 105.
5. See A/CN.9/331, para. 108.
6. As explained in paragraph 2 of the commentary to article 20 in the first draft, the reference to a language customarily used in international trade and the final sentence have been placed within round brackets because they need not be adopted by an implementing State whose official language is one customarily used in international trade. Pursuant to the suggestions in A/CN.9/331, para. 109, the formulation of this provision could be altered so as to call upon the implementing State to designate a particular language or languages customarily used in international trade by stating, "each State enacting this Model Law specifies its official language or languages and one or more additional languages customarily used in international trade".

* * *

Article 21. [deleted] 1/

Note

1. See A/CN.9/331, para. 114.

* * *

Article 22. Clarifications and modifications of solicitation 1/ documents

(1) A contractor or supplier requiring a clarification of the solicitation documents shall communicate a request for such clarification to the procuring entity. The procuring entity shall respond promptly to any request for clarification that is received by it prior to the deadline for submission of tenders. The response by the procuring entity, which shall not identify the source of the request, shall be communicated to all contractors and suppliers to which the procuring entity provides the solicitation documents. 2/

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether at its own initiative or in response to a clarification requested by a contractor or supplier, modify the solicitation documents by issuing an addendum thereto, provided that the right to do so has been specified in the solicitation documents. 3/ The addendum shall be communicated promptly to all contractors and suppliers to which the procuring entity sends the solicitation documents and shall be binding on them.

(3) Any request for clarification and any response thereto by the procuring entity and any addendum to the solicitation documents shall be made in writing or in any other form that preserves a record of the request, response or addendum. [However, a request for clarification or a response to such a

request may be communicated by telephone provided that, immediately thereafter, confirmation of the request or response, as the case may be, is communicated to the recipient of the request or response in writing or by any other means that provides a record of the confirmation.] 4/

(4) If the procuring entity convenes a meeting of contractors and suppliers, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, without identifying the sources of the requests, and its responses to those requests. The minutes shall be prepared in writing or in any other form that provides a record of the information contained therein and shall be provided 5/ to all contractors and suppliers to which the procuring entity provides the solicitation documents.

Notes

1. With respect to the reference to solicitation documents in this paragraph and elsewhere in the article, see note 1 to heading of Section IV.
2. The words "copies of", which appeared at the beginning of this sentence in the first draft, have been deleted so as to avoid an implication that the response must be in writing (see paragraph (3)).
3. See A/CN.9/331, para. 115. The Working Group may wish to consider whether this condition is useful or desirable.
4. See A/CN.9/331, para. 117.
5. The word "provided" replaces the word "communicated" that appeared in the first draft.

* * *

SECTION V. TENDERS

Article 23. Language of tenders

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued. 1/

Note

1. See A/CN.9/331, para. 119. The effect of this wording is that the procuring entity may not preclude a contractor or supplier from submitting its tender in any language in which the solicitation documents have been issued; but the procuring entity may permit tenders to be submitted in languages other than those in which the solicitation documents have been issued.

* * *

Article 24. Submission of tenders

(1) The procuring entity shall fix a specific date and time as the deadline for the submission of tenders. The deadline shall allow sufficient time for contractors and suppliers to prepare and submit their tenders, paying

particular regard, in the case of international tendering proceedings, to the time reasonably needed by foreign contractors and suppliers, and shall take into account the reasonable needs of the procuring entity. 1/

(2) If the procuring entity issues a clarification or modification of the solicitation documents pursuant to article 22, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford contractors and suppliers reasonable time to take the clarification or modification into account in their tenders. 2/

(2 bis) The procuring entity may, prior to the deadline for the submission of tenders, extend the deadline if, due to unforeseen circumstances, it is not possible for contractors or suppliers to submit their tenders by the deadline. 3/

(2 ter) Notice of any extension of the deadline shall be given promptly in writing or by any other means that provides a record of the information contained therein to each contractor and supplier to which the procuring entity provides the solicitation documents. 4/ [However, notice of an extension of the deadline may be communicated by telephone provided that, immediately thereafter, confirmation of the notice is communicated to the contractors and suppliers in writing or by any other means that provides a record of the confirmation.] 5/

(3) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened or considered and shall be returned to the contractor or supplier that submitted it. 6/

(4) Tenders shall be submitted in writing and in sealed envelopes. [However, the procuring entity may give contractors and suppliers the option to submit tenders by any other means that provides a record of the information contained in the tender.] 7/ The procuring entity shall provide to the contractor or supplier a receipt showing the date and time when the tender was received.

Notes

1. The word "reasonably" has been added at the initiative of the Secretariat in order to create parallelism between the obligation of the contractors and suppliers and that of the procuring entity. The wording at the end of the sentence has been added pursuant to A/CN.9/331, para. 120.

2. See A/CN.9/331, paras. 115 and 121. The Working Group may wish to consider whether making an extension of the deadline mandatory in circumstances that are defined only generally ("if necessary to afford contractors and suppliers a reasonable time") would lead to disputes and litigation, and whether it is preferable to leave it to the judgement of the procuring entity as to whether to extend the deadline, as in the first draft. With respect to the reference to the solicitation documents in this paragraph and elsewhere in the article, see note 1 to heading of Section IV.

3. This sentence originally appeared as paragraph (2)(a)(ii) of the first draft. It has been placed in a separate paragraph as a consequence of the change made to paragraph (2)(a)(i) of the original draft (currently paragraph (2)).

4. This sentence appeared as paragraph (2)(b) in the first draft. It has been slightly reworded and placed in a separate paragraph in consequence of the change made to paragraph (2)(a)(i) in the first draft (paragraph (2) in the present draft).

5. See A/CN.9/331, para. 117.

6. Pursuant to A/CN.9/331, para. 123, the sentence whereby a tender submitted after the deadline for submission of tenders could be considered if the contractor or supplier was not able to submit its tender on time has been deleted.

7. As explained in paragraph 4 of the commentary to article 24 in the first draft this sentence has been placed within square brackets in order to invite the Working Group to consider whether or not it should be included. The sentence will be deleted if not affirmatively acted upon by the Working Group. If the sentence is retained it may be desirable to specify that the availability of the option referred to must be set forth in the solicitation documents.

* * *

Article 25. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents. 1/ The period of time shall commence at the deadline for submission of tenders.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may, in exceptional circumstances, 2/ request contractors or suppliers to extend the period for an additional specified period of time. A contractor or supplier may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness. 3/ The request and the responses thereto shall be made in writing or by any other means that provides a record of the information contained therein. [However, a request or a response may be communicated by telephone provided that, immediately thereafter, confirmation of the request or response is communicated to the recipient in writing or by any other means that provides a record of the confirmation.] 4/

(b) The procuring entity shall 5/ require contractors and suppliers that agree to the extension to extend or to procure an extension of the period of effectiveness of tender securities provided by them or, if it is not possible to do so, to provide new tender securities, to cover the extended period of effectiveness of their tenders.

(3) [A contractor or supplier may modify or withdraw its tender prior to the deadline for the submission of tenders by communicating the modification or a notice of withdrawal to the procuring entity in writing or by any other means that provides a record of the information contained therein. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for submission of tenders.] 6/

Notes

1. See note 1 to heading of Section IV.
2. See A/CN.9/331, para. 124. The Working Group may wish to consider whether the potential for disputes and litigation arising from the inclusion of this condition outweighs its usefulness.
3. See A/CN.9/331, para. 124.
4. See A/CN.9/331, para. 117.
5. The word "shall" replaces the word "may" that appeared in the first draft, pursuant to A/CN.9/331, para. 125. The Working Group may wish to consider whether it is preferable to leave to the judgement of the procuring entity the question of whether or not tender securities are to be extended.
6. This paragraph has been slightly re-worded on the initiative of the Secretariat, and placed within square brackets in view of the differing views set forth in A/CN.9/331, para. 126. The paragraph will be retained in its present form unless the Working Group decides otherwise.

* * *

SECTION VI. TENDER SECURITIES

Article 26. Tender securities

(1) If the procuring entity requires contractors and suppliers submitting tenders to provide a tender security:

- (a) the requirement shall apply to all such contractors and suppliers;
- (b) in international tendering proceedings, a contractor or supplier shall not be precluded from providing a tender security issued by a foreign institution or entity, if the tender security and the institution or entity otherwise conform to lawful requirements set forth in the solicitation documents, unless the issuance of the security by the institution or entity would be in violation of a law of (this State) relating to the issuance of securities of the type in question or relating to the transaction of business in (this State) by the institution or entity; 1/
- (c) the solicitation documents may stipulate that the institution or entity issuing the tender security must be acceptable to the procuring entity. 2/
- [(d) the procuring entity shall require, in the solicitation documents, that the tender security include provisions entitling the procuring entity to claim the amount of the security if the contractor or supplier that supplied it;
- (i) withdraws or modifies its tender contrary to the provisions of article 25;

(ii) does not accept a correction of an arithmetical error in its tender and its tender is rejected pursuant to article 28(2)(b); or

(iii) fails to sign a procurement contract if required by the procuring entity to do so or fails to provide a required security for the performance of the contract, if its tender has been accepted.] 3/

- (2) The procuring entity shall make no claim to the amount of the tender security, and shall, without delay, return or procure the return of the tender security to the contractor or supplier that supplied it, after the earliest to occur of:
- (a) the expiry of the tender security,
 - (b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required,
 - (c) the termination of the tendering proceedings without the entry into force of a procurement contract, or 4/
 - (d) the permitted withdrawal of the tender in connection with which the tender security was supplied. 5/

Notes

1. See A/CN.9/331, paras. 129 and 131. Some changes in wording have been made in order to achieve greater clarity.

2. See A/CN.9/331, para. 129. Although the Working Group stated that the substance of this provision should be incorporated into a reformulated subparagraph (b), it has been added as a separate subparagraph in order to enable the procuring entity in all cases (i.e., even in cases of wholly domestic procurement) to impose the condition that the issuer of the tender security must be acceptable to the procuring entity.

3. See A/CN.9/331, para. 135. The Working Group may wish to consider whether it is preferable to leave to the judgement of the procuring entity what terms the tender security should contain with respect to the circumstances in which the security can be claimed.

4. This provision replaces the provision that appeared in the first draft, which read, "the rejection by the procuring entity of all tenders pursuant to article 28(2) or (3) or article 29". The present formulation encompasses the formulation in the first draft, and also takes into account the proposal in A/CN.9/331, para. 133, that reference be made to the time when the tendering proceedings terminated.

5. See A/CN.9/331, para. 133.

* * *

SECTION VII. OPENING, EXAMINATION, EVALUATION
AND COMPARISON OF TENDERS

Article 27. Opening of tenders

- (1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents. 1/
- (2) All contractors and suppliers that have submitted tenders or their representatives shall be permitted to be present at the opening of tenders.
- (3) The name and address of each contractor or supplier whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders[, communicated to all contractors and suppliers that have submitted tenders but that are not present or represented at the opening of tenders,] [and recorded immediately in the record of the tendering proceedings required by article 33]. 2/

Notes

1. See A/CN.9/331, para. 137, and note 1 to the heading of Section IV.
2. These additions have been made pursuant to the suggestion and proposal in A/CN.9/331, para. 142. The Working Group may wish to consider whether the requirement that the information be communicated to absent contractors and suppliers is useful or desirable.

* * *

Article 28. Examination, evaluation and comparison of tenders

- (1) (a) To assist in the examination, evaluation and comparison of tenders, the procuring entity may ask contractors and suppliers for clarifications of their tenders. Any request for clarification and any response to such a request shall be in writing or in any other form that provides a record of the information contained therein. [However, a request or response may be communicated by telephone provided that, immediately thereafter, confirmation of the request or response is communicated to the recipient in writing or by any other means that provides a record of the request or response.] 1/ No change in the tender price or other matter of substance in the tender shall be sought, offered or permitted, except as provided in subparagraph (b).
- [(b) The procuring entity shall correct purely arithmetical errors apparent on the face of a tender.] 2/
- (2) The procuring entity shall reject a tender:
- (a) if the contractor or supplier that submitted the tender is not qualified, subject to article 8(3); 3/
 - (b) if the contractor or supplier submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1)(b);

(c) if the tender is not responsive; 4/

[(d) if the tender is received by the procuring entity after the deadline for the submission of tenders]. 5/

(3) [Subject to approval,] the procuring entity may reject a tender if the contractor or supplier that submitted it offers, gives or agrees to give to any officer or employee or former officer or employee of the procuring entity a gratuity, whether or not in the form of money, an offer of employment or any other thing or service of value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the tendering proceedings. The rejection of the tender and the reasons therefor shall be recorded in the record of the tendering proceedings. 6/

(4) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents. Those permitted deviations shall be quantified and appropriately taken account of in the evaluation and comparison of tenders. 7/

(5) [deleted] 8/

(6) [deleted] 9/

(7) (a) The procuring entity shall evaluate and compare tenders that have not been rejected pursuant to paragraph (2) or (3) in order to ascertain the most economic tender, as defined in subparagraph (c), 10/ in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents. 11/

(b) [deleted] 12/

(c) The most economic tender shall be either:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, or

(ii) the lowest evaluated tender, 13/ which shall be ascertained on the basis of objective and quantifiable criteria, to the extent possible, including, in addition to the tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, such criteria as: the costs of operating, maintaining and repairing the goods or construction over its expected useful life; the functional characteristics of the goods, construction [or services]; the efficiency and productivity of the goods, construction [or services]; the time for delivery of the goods, completion of the construction [or rendering of the services]; the terms of payment; and the terms and conditions of the quality guarantee in respect of the goods, construction [or services]. 14/

[(d) In addition to criteria of the nature referred to in subparagraph (c)(ii) of this paragraph, the procuring entity may apply criteria concerning the effect of the tender on the balance of payments or the foreign exchange reserves of (this State); the extent to which

enterprises, personnel, industries, regions or economic sectors in (this State) would benefit economically as a result of the tender; or the extent to which technological, production, operational, managerial or similar information or skills would be acquired by enterprises or personnel in (this State). To the extent possible, such criteria shall be expressed in the solicitation documents in objective and quantifiable terms.] 15/

(e) In evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors and suppliers or for the benefit of tenders for domestically produced goods. The margin of preference shall be applied by deducting from the tender prices of all tenders, other than those that are to benefit from the margin of preference, import duties and taxes and sales and similar taxes levied in connection with the supply of the goods [or services] or with the construction, and adding to the resulting tender prices the amount of the margin of preference provided for in the procurement regulations or the actual import duty, whichever is less. 16/

(8) When tender prices are expressed in two or more currencies, the tender prices [of all tenders] shall be converted to [the same] currency for the purpose of evaluating and comparing tenders. 17/

(8 bis) Where the procuring entity has engaged in prequalification proceedings pursuant to article 16 it shall, and when it has not engaged in prequalification proceedings it may, require the contractor or supplier submitting the tender that has been found to be the most economic tender pursuant to article 28(7)(c) to reconfirm its qualifications in accordance with criteria and procedures conforming to the provisions of article 8. The criteria and procedures to be used for such reconfirmation shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings. 18/

(9) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to contractors or suppliers or to any other person not officially involved in the examination, evaluation or comparison of tenders or involved 19/ in the decision of which tender should be accepted, except as provided in article 33(2).

(10) [deleted] 20/

Notes

1. See A/CN.9/331, para. 117.

2. See A/CN.9/331, para. 145. This subparagraph has been placed within square brackets in view of the discussion in A/CN.9/331, para. 146. The subparagraph will be retained in its present form unless the Working Group decides otherwise. The sentence in the first draft which read: "Any such correction shall be binding on the contractor or supplier that submitted the tender if accepted by that contractor or supplier" has been deleted on the initiative of the Secretariat as the point seemed to be covered by paragraph (2)(b).

3. Pursuant to the proposal in A/CN.9/331, para. 45, the reference to eligibility that appeared in the first draft has been deleted. The reference to article 8(3) corrects a typographical error. The square brackets surrounding that reference in the first draft have been removed in view of the decision to retain article 8(3) (see note 14 to article 8).

4. The reference to paragraph (6) that appeared in the first draft has been deleted in view of the deletion of paragraph (6). The reference to article 29(1)(a) that appeared in the first draft was a typographical error and the reference should have been article 30(1)(a). The reference has been deleted in view of the deletion of article 30(1)(a).

5. This subparagraph has been added pursuant to A/CN.9/331, para. 150. The Working Group may wish to consider whether it is preferable to require the procuring entity to return a late tender unopened, as currently provided in article 24(3), rather than to retain the tender and reject it under article 28(2). If so, the present subparagraph should be deleted.

6. See A/CN.9/331, para. 152. With respect to the requirement of approval, see note 1 to article 6.

7. Pursuant to A/CN.9/331, para. 156, the first sentence of this subparagraph has been relocated to article 2(j), the remainder of the subparagraph has been slightly reworded, and subparagraph (b) has been deleted.

8. See A/CN.9/331, para. 159.

9. See A/CN.9/331, para. 164.

10. Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to subparagraph (c) has been added.

11. See A/CN.9/331, para. 169.

12. See A/CN.9/331, para. 167.

13. The term "lowest evaluated tender" replaces the term "most economically advantageous tender" that appeared in the first draft, as a consequence of the change of the term "most advantageous tender" to "most economic tender".

14. The last clause of this subparagraph as it appeared in the first draft has been deleted pursuant to A/CN.9/331, para. 168. With respect to the references to services in this subparagraph and elsewhere in the article, see note 8 to article 2.

15. See A/CN.9/331, para. 172.

16. See A/CN.9/331, para. 173. The approach reflected in the indicated wording conforms with that followed by several international financing institutions. The Working Group may wish to consider whether the matters addressed by the wording would be better dealt with in the procurement regulations.

17. See A/CN.9/331, para. 174.

18. See A/CN.9/331, paras. 70, 73 and 78. With reference to the statement in A/CN.9/331, para. 78, that the provision should indicate what was to occur if the qualifications of the contractor or supplier were not reconfirmed, it seems clear that the tender would have to be rejected under article 28(2)(a), and that the provisions of article 7(2)(b) would apply. The Working Group may wish to consider whether it is necessary for that information to be added to the provision.

19. Added on the initiative of the Secretariat to achieve greater clarity.

20. See A/CN.9/331, para. 176.

* * *

Article 29. Rejection of all tenders

(1) [Subject to approval,] [and if so specified in the solicitation documents,] the procuring entity may, at any time prior to the acceptance of a tender, reject all tenders for any reason other than for the sole purpose of engaging in competitive negotiation proceedings and other than any fraudulent purpose. 1/

(1 bis) If the procuring entity rejects all tenders for the reason that the tender prices of all tenders substantially exceed an estimated price established by the procuring entity prior to the commencement of the tendering proceedings, it may either engage in new tendering proceedings on the basis of modified specifications concerning the technical or quality characteristics of the goods, construction [or services] to be procured, or [, subject to approval,] engage in competitive negotiation proceedings with the qualified contractor or supplier that submitted the most economic tender as defined in article 28(7)(c). 2/

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1), towards contractors and suppliers that have submitted tenders. The procuring entity shall upon request communicate to any contractor or supplier that submitted a tender the grounds for its rejection of all tenders, but shall not be required to justify those grounds. 3/

(3) Notice of the rejection of all tenders pursuant to this article shall be given promptly, in writing or by any other means that provides a record of the information contained therein, to all contractors and suppliers that submitted tenders. [However, the notice may be communicated by telephone provided that, immediately thereafter, confirmation of the notice is communicated in writing or by any other means that provides a record of the confirmation.] 4/

Notes

1. See A/CN.9/331, paras. 177, 180, and 182. With respect to the requirement of approval in this paragraph and elsewhere in the article, see note 1 to article 6. The intent of the word "sole" is to recognize that, pursuant to paragraph (1 bis) (added pursuant to A/CN.9/331, para. 182), the procuring entity may reject all tenders for the reason that they all exceed an estimated price, and that in such a case it may engage in competitive negotiation proceedings. The Working Group may wish to consider whether it is useful or desirable to require the right to reject all tenders to be reserved in the solicitation documents. Minor changes in drafting have been made on the initiative of the Secretariat in order to improve the clarity of the paragraph.

2. See A/CN.9/331, para. 182. The Working Group may wish to note that the case where all tenders are rejected because they exceed an estimated price is the only case that is subject to the special provisions set forth in this paragraph. In all other cases where all tenders are rejected, the manner in which the procuring entity may proceed is governed by article 7; namely, it may commence new tendering proceedings (without necessarily having to modify the specifications) or, in the cases mentioned in article 7(2), it may engage in competitive negotiation proceedings. The Working Group may wish to consider whether the situation envisaged by this paragraph should also be left to be governed by the provisions of article 7. In addition, in connection with the issue of estimated prices, the Working Group may wish to recall its disapproval of maximum prices, minimum prices and a range of prices (A/CN.9/331, paras. 89 and 182), and consider whether reference in the Model Law to estimated prices is desirable.

3. See A/CN.9/331, para. 181.

4. See A/CN.9/331, para. 117.

* * *

Article 30. Negotiations with contractors and suppliers

No negotiations shall take place between the procuring entity and a contractor or supplier with respect to a tender submitted by the contractor or supplier, except as provided in article 29(1 bis) and article 31(4). 1/

Note

1. Paragraphs (1)(a) and (b) and paragraph (2) have been deleted pursuant to A/CN.9/331, paras. 182 and 183. The prevailing view of the Working Group, expressed in A/CN.9/331, para. 184, was that the chapeau of paragraph (1) should be retained but placed elsewhere in the Model Law. The chapeau has been retained in article 30 in the present draft as no other location was found to be appropriate. The final words have been added in view of the addition of paragraph (1 bis) in article 29 and of the reference in article 31(4) to negotiations.

* * *

SECTION VIII. TWO-STAGE TENDERING PROCEEDINGS 1/

Note

1. See A/CN.9/331, para. 186.

* * *

Article 31. Two-stage tendering proceedings

(1) [Subject to approval,] 1/ the procuring entity may employ the procedures provided for in this article where:

(a) instead of formulating detailed specifications for the goods, construction [or services], the procuring entity seeks proposals from contractors and suppliers in order to obtain the most advanced or the most appropriate technology or otherwise to obtain the most satisfactory solution to its procurement needs; 2/ or

(b) due to the nature of the goods, construction [or services], the procuring entity is unable to formulate detailed technical specifications. 2/

(2) The provisions of chapter II of this Law shall apply to tendering proceedings in which the procedures provided for in the present article are employed except to the extent those provisions are derogated from in the present article.

(3) The solicitation documents, which shall be prepared in conformity with articles 18 and 20 of this Law, shall call upon contractors and suppliers to submit initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods, construction [or services] as well as to contractual terms and conditions of their supply. 3/

(4) The procuring entity may engage in negotiations 4/ with any contractor or supplier whose tender has not been rejected pursuant to article 28(2) or (3) or article 29 concerning any aspect of its tender.

(5) The procuring entity shall invite contractors and suppliers whose tenders have not been rejected to submit final tenders with prices. The procuring entity may delete or modify any aspect, set forth in the solicitation documents, of the technical or quality characteristics of the goods, construction [or services] to be procured, [and any criterion set forth in those documents for evaluating and comparing tenders and for ascertaining the most economic tender,] and may add new characteristics [or criteria] that conform with this Law. Any such deletion, modification or addition shall be communicated to contractors and suppliers in the invitation to submit final tenders. 5/ A contractor or supplier not wishing to submit a final tender may withdraw from the tendering proceedings [without forfeiting its tender security]. 6/ The final tenders shall be evaluated and compared in order to ascertain the most economic tender as defined in article 28(7)(c). 7/

(6) The procuring entity shall include in the record 8/ required under article 33 a statement of the circumstances on which it relied in invoking

paragraph (1) of this article, specifying the relevant facts.

Notes

1. See note 1 to article 6.
2. See A/CN.9/331, paras. 185 and 188. With respect to the references to services in this paragraph and elsewhere in the article, see note 8 to article 2.
3. The reference to articles 18 and 20 has been included pursuant to A/CN.9/331, para. 189. The second sentence of the paragraph has been added pursuant to A/CN.9/331, para. 188. With respect to the reference to solicitation documents, see note 1 to heading of Section IV.
4. See A/CN.9/331, para. 191. The word "article" has been added to achieve greater clarity.
5. See A/CN.9/331, paras. 190 and 192.
6. The reference to the tender security has been placed within square brackets pursuant to the proposal in A/CN.9/331, para. 192.
7. Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to article 28(7)(c) has been added pursuant to A/CN.9/331, para. 189.
8. Pursuant to A/CN.9/331, para. 207, the word "record" replaces the word "minutes" that appeared in the first draft.

* * *

SECTION IX. ACCEPTANCE OF TENDER AND ENTRY INTO FORCE OF PROCUREMENT CONTRACT; RECORD OF TENDERING PROCEEDINGS 1/

Article 32. Acceptance of tender and entry into force of procurement contract

(1) The tender that has been ascertained to be the most economic tender pursuant to article 28(7)(c) shall be accepted. 2/ However, if the contractor or supplier submitting that tender is required to reconfirm its qualifications pursuant to article 28(8 bis), its tender shall not be accepted unless its qualifications are reconfirmed. 3/ Notice of acceptance of the tender shall be given promptly to the contractor or supplier submitting the tender.

[(2) Except as provided in paragraph (3)(b), 4/ a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) is dispatched to the contractor or supplier that submitted the tender, provided that it is dispatched while the tender is in force and effect.] 5/

[(3) (a) Notwithstanding the provisions of paragraph (2), the notice referred to in paragraph (1) may require the contractor or supplier whose tender has been accepted to sign a written procurement contract conforming to the tender. [When the notice, or the applicable law relative to the

formation of contracts, requires the signature of a written contract.] 4/ the procuring entity and 6/ the contractor or supplier shall sign the procurement contract within a reasonable period of time after the notice is dispatched to the contractor or supplier.

(b) Where a written procurement contract is required to be signed pursuant to paragraph (3)(a), 4/ the procurement contract enters into force when the contract is signed by the contractor or supplier and by the procuring entity. Between the time when the notice referred to in paragraph (1) is dispatched to the contractor or supplier and the entry into force of the procurement contract:

(i) neither the procuring entity nor the contractor or supplier shall take any action that would defeat the object or purpose of the contract or that would interfere 6/ with the entry into force of the procurement contract or with its performance;

(ii) the procuring entity and the contractor or supplier shall inform each other of any circumstance of which they are aware that could interfere with the entry into force of the procurement contract or its performance; 6/

(iii) the procuring entity and the contractor or supplier shall cooperate with each other as necessary in order for the procurement contract to enter into force.] 5/

[(4) If the contractor or supplier whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the tender that is ascertained to be the next most economic tender pursuant to article 28(7)(c) 7/ and that is in force may be accepted. 8/ The notice provided for in paragraph (1) shall be given to the contractor or supplier that submitted that tender.] 9/

(5) Upon the entry into force of the procurement contract and the provision by the contractor or supplier of a security for the performance of the contract, if required, notice of the procurement contract shall be given to other contractors and suppliers, specifying the name and address of the contractor or supplier that has entered into the contract and the price of the contract.

(6) (a) The notices referred to in this article may be given in writing or by any other means that provides a record of the information contained therein. [However, the notices may be communicated by telephone provided that, immediately thereafter, confirmation of the notice is communicated in writing or by any other means that provides a record of the confirmation.] 10/

(b) The notice under paragraph (1) is "dispatched" when it is properly addressed or otherwise directed and transmitted to the contractor or supplier, or conveyed to an appropriate authority for transmission to the contractor or supplier, by a mode authorized by paragraph (6)(a). 11/

Notes

1. Pursuant to A/CN.9/331, para. 207, the term "minutes of tendering

proceedings" has been changed to "record of tendering proceedings".

2. Pursuant to A/CN.9/331, para. 194, the words "subject to approval" have been deleted from this paragraph and from paragraph (4) (see, also, note 1 to article 6). Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to article 28(7)(c) has been added.

3. See A/CN.9/331, paras. 70 and 78.

4. See A/CN.9/331, para. 196.

5. Paragraphs (2) and (3) have been placed within square brackets in view of the differing views reflected in A/CN.9/331, paras. 197 to 200. They will be retained in their present form unless the Working Group decides otherwise. Pursuant to A/CN.9/331, para. 195, the references to receipt of the notice of acceptance of the tender have been deleted. It will be noted that the "dispatch" approach differs from the approach in the United Nations Convention on Contracts for the International Sale of Goods, art. 24. See the discussion of this point in the Working Group note following paragraph 1 of the commentary to article 32 in the first draft.

6. See A/CN.9/331, paras. 202, 203 and 206.

7. Pursuant to A/CN.9/331, paras. 92 and 166, the term "most economic tender" replaces the term "most advantageous tender" that appeared in the first draft, and the reference to article 28(7)(c) has been added.

8. Pursuant to A/CN.9/331, para. 194, the words "subject to approval" have been deleted (see, also, note 1 to article 6.). The phrase "in force and effect" that appeared in the first draft has been changed to "in force".

9. Paragraph (4) has been placed within square brackets in the light of the differing views reflected in A/CN.9/331, para. 205. The paragraph will be retained in its present form unless the Working Group decides otherwise.

10. See A/CN.9/331, para. 117.

11. Pursuant to A/CN.9/331, para. 195, alternative 2 of paragraph 6(b) has been deleted.

* * *

Article 33. Record of tendering proceedings 1/

(1) The procuring entity shall prepare a record of the tendering proceedings, including the opening, examination, evaluation and comparison of tenders. The record shall contain a brief description of the goods or construction to be procured, the names and addresses of contractors and suppliers that submitted tenders; information relative to the qualifications, or lack thereof, of those contractors and suppliers; 2/ the price and a summary of the other principal terms and conditions of each tender and of the procurement contract; a summary of the evaluation and comparison of tenders; the information required by article 28(3), if a tender was rejected pursuant to that provision; 3/ if all tenders were rejected pursuant to article 29, a statement to that effect; and, where applicable, the statement required by article 31(6).

(2) The record of the tendering proceedings shall be made available for inspection by any person 4/ after [a procurement contract has entered into force and the contractor or supplier has supplied a security for the performance of the contract, if required,] [a tender has been accepted] 5/ or after tendering proceedings have been terminated without resulting in a procurement contract. However:

(a) information shall not be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition; 6/

(b) information relating to the examination, evaluation and comparison of tenders[, and tender prices,] shall not be disclosed. 7/

Notes

1. Pursuant to A/CN.9/331, para. 207, the term "minutes of tendering proceedings" that appeared in the first draft has been changed to "record of tendering proceedings" in the title and text of article 33.
2. Pursuant to A/CN.9/331, para. 45, the words "eligibility and" that appeared in the first draft have been deleted.
3. See A/CN.9/331, para. 152.
4. Pursuant to A/CN.9/331, para. 209, the words "any person" replace the words "the general public" that appeared in the first draft.
5. Pursuant to the proposal in A/CN.9/331, para. 212, two alternatives are presented within square brackets for the consideration of the Working Group. The first alternative, which appeared in the first draft, is that the record of the tendering proceedings is to be disclosed after the procurement contract has entered into force and the contractor or supplier supplies a performance security. The second alternative is that disclosure must take place when a tender has been accepted. The time when a tender is accepted would seem to be the earliest time when disclosure of the record could be required, since prior to that time the tendering proceedings would still be in progress and the record would not necessarily have been prepared or completed. It will also be noted that, pursuant to article 32, the acceptance of the tender and the entry into force of the procurement contract will occur simultaneously, except where the signature of a written contract is required. Unless the Working Group decides otherwise, the first alternative will be retained.
6. See A/CN.9/331, para. 210.
7. See A/CN.9/331, para. 211. The Working Group may wish to consider whether disclosure of this information, and in particular the tender prices (reference to which has been set forth within square brackets), is important in order to assure participants in the tendering proceedings, and the public in general, that the procurement law and the procurement regulations have been complied with, and in order to enable an aggrieved contractor or supplier to seek review of acts or decisions of, or procedures followed by, the procuring entity. Articles 33, 34(4) and 35 deal with analogous matters. Once the text of those provisions is settled, they might be consolidated into a single article.

CHAPTER III. PROCUREMENT OTHER THAN BY MEANS OF
TENDERING PROCEEDINGS

Article 34. Competitive negotiation proceedings

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of contractors and suppliers to ensure effective competition. 1/

(2) Any requirements, guidelines, documents or other information relative to the negotiations that are communicated by the procuring entity to a contractor or supplier shall be communicated on an equal basis to all other contractors and suppliers engaging in negotiations with the procuring entity relative to the procurement. 2/

(3) Negotiations between the procuring entity and a contractor or supplier shall be confidential, and, except as provided in paragraph (4), one party to those negotiations shall not reveal or disclose to any third person any documentation or information relating to those negotiations without the consent of the other party.

(4) (a) The procuring entity shall prepare a record of the competitive negotiation proceedings. The record shall contain the names and addresses of contractors and suppliers with which the procuring entity has engaged in negotiations; the price and a summary of the other principal terms and conditions of the procurement contract; if the proceedings did not result in a procurement contract, a statement of the reasons therefor; and the statement and facts required by article 7(5). 3/

(b) The record of the competitive negotiation proceedings shall be made available for inspection by any person after a procurement contract has entered into force, except that information shall not be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition. 3/

Notes

1. The final phrase of this paragraph, which appeared in the first draft, has been deleted pursuant to A/CN.9/331, para. 216.

2. The final phrase of this paragraph, which appeared in the first draft, has been deleted pursuant to A/CN.9/331, para. 217.

3. See A/CN.9/331, para. 218.

Article 35. Record of single source procurement

(1) The procuring entity shall prepare a record of the single source procurement. The record shall contain the name and address of the contractor or supplier from which the procuring entity procured the goods or construction, the price and a summary of the other principal terms and conditions of the procurement contract and the statement and facts required by article 7(5).

(2) The record shall be made available for inspection by any person after the procurement contract has entered into force; provided, however, that information shall not be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition. 1/

Note

1. See A/CN.9/331. para. 220.