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PROCUREMENT

Draft articles 28 to 42 of Model Law on Procurement

Note by the Secretariat

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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 Working Group agreed that the commentary would not be revised until after the text of the Model Law had been settled and requested the Secretariat to revise the first draft of articles 1 through 35 to take account of the discussion and decisions at its eleventh session (A/CN.9/331, para. 222). At the twelfth session, the Working Group had before it the second draft of articles 1 through 35 (A/CN.9/WG.V/WP.28) as well as draft provisions on review of acts and decisions of, and procedures followed by, the procuring entity (draft articles 36 through 42, contained in A/CN.9/WG.V/WP.27). At that session, the Working Group reviewed the second draft of articles 1 through 27. At the thirteenth session, the Working Group reviewed the second draft of articles 28 to 35, and the provisions on review (article 36 to 42). It did not have sufficient time to again review draft articles 1 to 27, which had been revised to take account of the decisions at the twelfth session, and decided to consider those articles at its fourteenth session. It also requested the Secretariat to revise articles 28 to 42, taking into account the discussions and decisions at the thirteenth session (A/CN.9/356, para. 196).
3. At the fourteenth session, the Working Group will have before it the text of articles 1 to 27 as revised following the twelfth session (contained in document A/CN.9/WG.V/WP.30), as well as, in the present document, articles 28 to 42, revised to reflect the decisions taken at the thirteenth session. The present document also contains, in its annex, the text of several new provisions that have been added either as a result of decisions taken at the thirteenth session or at the initiative of the Secretariat. In addition, the annex contains a number of changes to the first portion of the Model Law (articles 1 to 27) that flow from the Working Group's decisions at the twelfth session with regard to articles 28 to 42. The Working Group may wish to consider the contents of that annex at appropriate points in its consideration of articles 1 to 27.

4. In revising articles 28 through 42, the Secretariat implemented all changes, additions and deletions agreed upon by the Working Group at its eleventh session. A limited number of proposals and suggestions with respect to which decisions were not taken at the thirteenth session, and which the Secretariat believes the Working Group may wish to consider further, have been incorporated within square brackets.

5. The draft articles contained in the present document set forth the provisions governing the use of the methods of procurement other than tendering available under the Model Law. Those methods have been included to accommodate the wide variety of circumstances and procurement needs that procuring entities might encounter. In agreeing to include three of those methods, namely, two-stage tendering, request for proposals and competitive negotiation, the Working Group recognized that in certain situations the conditions for use of those methods might present a degree of overlap. In order to deal with such situations of overlap, it was decided to include in article 7(2) an order of preference to be used in selecting a method of procurement when the circumstances fit the conditions for use of more than one of the methods of procurement other than tendering. However, it may be considered that the overlap in the conditions for use of those three methods results not only from the general character of the conditions for use of the three methods, but also from the fact that the exceptional types of procurement situations in question have been dealt with differently from country to country. In view of this diversity in practice, the Working Group may wish to consider further whether the Model Law as presently formulated would give adequate guidance as to the particular method of procurement to be used in procurement circumstances intended to be covered by the three methods in question.

6. The Working Group may also wish to consider whether it is desirable to recommend that each enacting State should incorporate each of the procurement methods in question. It might be considered preferable for the Model Law to provide enacting States that did not wish to incorporate the full array of methods of procurement other than tendering with the option of not incorporating certain of those methods. Such an approach would recognize the distinct character of the three methods, while recognizing that for certain types of procurement situations enacting States might differ as to their choice of procurement methods.

7. Throughout the present document, changes of and additions to wording that appeared in earlier drafts are underlined, except in the case of headings to articles, all of which are underlined as a matter of style. Deletions from earlier drafts are indicated in the notes following each article.

8. At the thirteen session, the Secretariat was requested to prepare a note for the fourteenth session on the subject of suspension of procurement proceedings in response to claims seeking redress against the procuring entity for its conduct of procurement proceedings (A/CN.9/356, para. 190). That note is contained in document A/CN.9/WG.V/WP.34.

DRAFT ARTICLES 28 TO 42 OF MODEL LAW ON PROCUREMENT

CHAPTER II. TENDERING PROCEEDINGS

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

Article 27. Opening of tenders

[For the text of articles 1 to 27, including sections I to VI
of chapter II, see A/CN.9/WG.V/WP.30.]

* * *

Article 28. Examination, evaluation and comparison of tenders

- (1) (a) The procuring entity may ask contractors and suppliers for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. 1/ No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted. 2/

[(b) Notwithstanding subparagraph (a), the procuring entity shall correct purely arithmetical errors apparent on the face of a tender.] 3/
- (2) The procuring entity shall reject a tender: 4/
 - (a) if the contractor or supplier that submitted the tender is not qualified, subject to article 8(3);
 - (b) if the contractor or supplier that 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.
 - (d) [deleted] 5/
- (3) [incorporated in article 10 quater] 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. Any such deviations shall be quantified, to the extent possible. 7/ and appropriately taken account of in the evaluation and comparison of tenders.
- (5) [deleted] 8/
- (6) [deleted] 9/
- (7) (a) The procuring entity shall evaluate and compare the tenders that have not been rejected pursuant to paragraph (2) or to article 10 quater in order to ascertain the successful tender, 10/ as defined in subparagraph (c), 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.

(b) [deleted] 11/

(c) The successful tender shall be: 12/

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

(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of factors specified in the solicitation documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable. 13/

(d) In determining the lowest evaluated tender in accordance with subparagraph (c)(ii), the procuring entity may consider only the following:

(i) the tender price, subject to any margin of preference applied pursuant to subparagraph (e);

(ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods or completion of construction, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods or construction;

(iii) the balance of payments position or foreign exchange reserves of [this State], countertrade arrangements, local content, including manufacture, labor and materials, economic development, encouragement of domestic investment or activity, encouragement of employment equity, reservation of certain production for domestic suppliers, transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand subparagraph (iii) by including additional factors)]; 14/ and

(iv) national defence and security considerations. 14/

(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 calculated in accordance with the procurement regulations. 15/

(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.

(8 bis) Whether or not it has engaged in prequalification proceedings pursuant to article 8 bis, the procuring entity may require the contractor or supplier submitting the tender that has been found to be the successful 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. 16/

(8 ter) If the contractor or supplier submitting the successful tender is requested to reconfirm its qualifications in accordance with paragraph (8 bis), but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (7), from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 29(1), to reject all remaining tenders. 17/

(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 involved officially in the examination, evaluation or comparison of tenders or in the decision of which tender should be accepted, except as provided in article 10 ter.
18/

(10) [deleted] 20/

Notes

1. The formal requirements formerly set forth in the second and third sentences have been incorporated in article 10 bis (see note 1 under that article).

2. See A/CN.9/356, para. 15.

3. Square brackets around subparagraph (b) have been retained in accordance with the decision in A/CN.9/356, para. 16, to defer a final decision on the subparagraph pending further consideration of other articles of the Model Law.

4. At the thirteenth session, the question was raised whether the use of the words "shall reject a tender" implied a duty on the part of the procuring entity to take some formal action of rejection (see A/CN.9/343, para. 17). It was suggested that if the intent of the provision was not to impose such a duty, words such as "shall not accept a tender" might be more appropriate. It was also recognized that the question of whether to require a formal act of rejection should be considered in the context of the discussion of the draft articles on review, something which the Working Group did not have an opportunity to do at the thirteenth session during its consideration of the articles on review.

5. See A/CN.9/356, para. 18.

6. See note 1 under article 10 quater.

7. See A/CN.9/356, para. 21.

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

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

10. Pursuant to A/CN.9/356, paras. 22 and 27, the term "successful tender" provisionally replaces the term "most economic tender".

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

12. Subparagraphs (c) and (d) have been reformulated pursuant to A/CN.9/356, paras. 25 to 35.

13. See A/CN.9/356, para. 31; see also article 17(2)(e bis), and its accompanying note (set forth in the annex to the present document), with regard to the decision of the Working Group in A/CN.9/356, para. 31, that the solicitation documents should indicate the manner of quantification of non-price factors. The Working Group may wish to consider the use of the term "most favourable tender" in place of the term "lowest evaluated tender".

14. See A/CN.9/356, para. 34.

15. Pursuant to A/CN.9/356, para. 25, the second sentence, which dealt with detailed aspects of the application of a margin of preference, has been deleted and replaced by the reference to the procurement regulations. The Working Group may wish to consider further the desirability of this modification in view of the potential impact of margins of preference on tendering proceedings and in light of the fact that the issuance of procurement regulations is optional under article 4.

16. In accordance with A/CN.9/356, para. 38, paragraph (8 bis) has been reformulated to leave to the discretion of the procuring entity reconfirmation of qualifications when prequalification proceedings have been engaged in.

17. Paragraph (8 ter) has been added to implement the decision of the Working Group in A/CN.9/356, para. 39, that the Model Law should indicate how the procuring entity should proceed when the contractor or supplier submitting the successful tender fails to reconfirm its qualifications.

18. At the thirteenth session it was suggested that there was an apparent inconsistency between paragraph (9), which restricted the disclosure of information concerning examination, clarification, evaluation and comparison of tenders, and article 33(2), concerning public disclosure of the record of the procurement proceedings, as the latter provision was formulated in A/CN.9/WG.V/WP.30 (see A/CN.9/356, para. 41). It was decided to defer a final decision on paragraph (9) until consideration by the Working Group of article 33(2). In view of the decision of the Working Group in A/CN.9/356, para. 80, to limit disclosure of such information as contained in the record, it would appear that the apparent inconsistency between paragraph (9) and article 33(2) has been alleviated. (The substance of article 33(2) has been moved to article 10 ter, a consolidated provision on records requirements for all procurement proceedings in accordance with A/CN.9/356, para. 77.)

* * *

Article 29. Rejection of all tenders

(1) (Subject to approval by . . . (each State designates an organ to issue the approval), and) if so specified in the solicitation documents, the procuring entity may reject all tenders at any time prior to the acceptance of a tender, or after a contractor or supplier submitting a successful tender fails to reconfirm its qualifications when requested to do so in accordance with article 28(8 bis)). 1/ 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 is not required to justify those grounds. 2/

(1 bis) [deleted] 3/

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1), towards contractors and suppliers that have submitted tenders.

(3) Notice of the rejection of all tenders shall be given promptly to all contractors and suppliers that submitted tenders. 4/

Notes

1. See A/CN.9/356, para. 42. The reference to impermissible grounds for rejection of all tenders has been deleted pursuant to A/CN.9/356, para. 46.

2. The preceding sentence, which formerly appeared in paragraph (2), has been moved to paragraph (1) for the purposes of clarity.

3. See A/CN.9/356, para. 46.

4. The formal requirements for the notice, formerly set forth in paragraph (3), to have been incorporated in article 10 bis (for the text of the article, see the annex to the present document).

* * *

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. 1/

Note

1. The references to articles 29(1 bis) and 31(4) have been deleted in accordance with A/CN.9/356, para. 52.

* * *

SECTION VIII. [moved to chapter III, section I] 1/

Article 31. [moved to articles new 33 bis and 33 bis] 1/

Note

1. In accordance with A/CN.9/343, para. 80, the provisions on two-stage-tendering proceedings have been moved to section I of chapter III.

* * *

SECTION IX. ACCEPTANCE OF TENDER AND ENTRY INTO FORCE OF
PROCUREMENT CONTRACT 1/

Note

1. The reference in the title of Section IX to the record of the tendering proceedings has been deleted consequent to the addition to Chapter I of article 10 ter, containing a consolidated provision on record requirements for all procurement proceedings available under the Model Law (for the text of the article, see the annex to the present document).

* * *

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

(1) Subject to articles 28(8 ter) and 29, 1/ the tender that has been ascertained to be the successful tender pursuant to article 28(7)(c) shall be accepted. Notice of acceptance of the tender shall be given promptly to the contractor or supplier submitting the tender. 2/

(2) (Except as provided in paragraphs (3)(b) and (3 bis),) 3/ 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.

[(3) (a) (Notwithstanding the provisions of paragraph (2), the solicitation documents may require the contractor or supplier whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases,) 4/ the procuring entity 5/ and the contractor or supplier shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) is dispatched to the contractor or supplier. 6/

(b) (Where a written procurement contract is required to be signed pursuant to paragraph (3)(a),) 4/ subject to paragraph (3 bis), 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, neither the procuring entity nor the contractor or supplier shall take any action which interferes with the entry into force of the procurement contract or with its performance. 7/

(3 bis) Where the procurement contract is required to be approved by a higher authority or the Government, the decision on whether to grant the approval shall be made within a reasonable time after the notice referred to in paragraph (1) is dispatched to the contractor or supplier. The procurement contract shall not enter into force or, as the case may be, be executed before the approval is given. 8/

(3 ter) (Where an approval referred to in Paragraph (3 bis) is required, the) solicitation documents shall specify the amount of time following the dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to article 25(1) or the period of effectiveness of tender securities that may be required pursuant to article 26(1). 9/

(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 procuring entity shall select a successful tender, in accordance with article 28(7), from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 29(1), to reject all remaining tenders. The notice provided for in paragraph (1) shall be given to the contractor or supplier that submitted that tender. 10/

(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) [incorporated in article 10 bis] 11/

(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).

Notes

1. See A/CN.9/356, para. 60.

2. In accordance with A/CN.9/356, para. 61, and by way of the reference to articles 28(8 ter) and 29, reference is made to the obligation of the procuring entity to select a successful tender in accordance with article 28(7)(c) from among the tenders remaining when the contractor or supplier submitting the first selected tender fails to meet a request to reconfirm its qualifications, subject to the right of the procuring entity under article 29(1) to reject all the remaining tenders.

3. The reference to paragraph (3 bis) has been added as a result of the inclusion, pursuant to A/CN.9/356, paras. 68 and 69, of the additional exception contained in that paragraph to the entry-into-force rule set forth in paragraph (2) (see note 9). The present formulation of paragraphs (2) and (3) reflects the decision at the thirteenth session as to the manner in which the Model Law should accommodate the two basic ways in which procurement contracts enter into force, i.e., upon dispatch of the notice of acceptance and upon signature of a procurement contract (see A/CN.9/356, paras. 62 to 65). However, the opening words of paragraph (2) have been placed within parentheses in order to invite the Working Group to consider whether the Model Law should further indicate that those words, as well as the entirety of paragraph 3 would not have to be incorporated by those enacting States that wished to provide for entry into force of the procurement contract solely upon dispatch of the notice of acceptance. Such an approach would be in line with the decision that the Model Law should provide for both methods of entry into force, without suggesting that each enacting State had to incorporate both methods.

4. The preceding text has been placed within parentheses in order to invite the Working Group to consider whether the Model Law should indicate that that text, as well as the entirety of paragraph 2, would not be incorporated by those enacting States that wished to provide for entry into force of the procurement contract solely upon the signature of a contract (see also note 4).

5. The Working Group may wish to consider whether the present reference to the procuring entity as the signatory of the procurement contract should be accompanied by an alternative formulation to be used by enacting States in which the procurement contract is typically not signed by the governmental entity, such as a central tendering board, that conducts the procurement proceedings for all government ministries, but is signed by the particular governmental ministry in whose behalf those proceedings are conducted. Under such an approach, the words "[requesting ministry]" might be added at this and other relevant parts of article 32, following, and as an alternative to, the words "procuring entity".

6. In accordance with A/CN.9/356, para. 65, subparagraph (a) refers to the solicitation documents, rather than to the notice of acceptance of the tender, as the source of the requirement of a signed procurement contract, and the reference to the applicable law has been deleted.

7. In accordance with A/CN.9/356, para. 72, the statement of the rule governing the conduct of the procuring entity and of the contractor and supplier has been modified to revert to the earlier version, contained in A/CN.9/WG.V/WP.24. The reference to paragraph (3 bis) has been added pursuant to A/CN.9/356, para. 72.

8. Paragraph (3 bis) has been added pursuant to the decision in A/CN.9/356, para. 68, to accommodate the practice in some States which requires the procuring entity, after notifying acceptance of a tender, to obtain a final approval of the procurement contract as a condition for entry into force of that contract. The new provision has not been added to paragraph (3), as suggested in A/CN.9/356, para. 68, since such final approval requirements may be applicable to entry-into-force procedures covered both by paragraphs (2) and (3). It is suggested that the Model Law indicate that the incorporation of paragraph (3 bis), as well as of the reference to paragraph (3 bis) found in paragraph (3)(b), would be optional, in order to accommodate those enacting States in which it was not the practice to require such final approvals. As the second sentence in the form agreed upon by the Working Group envisages both methods of entry into force provided for under article 32, that sentence would have to be adjusted in those enacting States that uniformly required the signature of a procurement contract as well as in those that uniformly did not. It may be noted that the text agreed upon by the Working Group does not provide for final approval requirements after the signature of a procurement contract.

9. Paragraph (3 ter) has been added pursuant to A/CN.9/356, para. 69. The portion of the text within parentheses at the beginning of the paragraph would not have to be incorporated by States that applied a final approval requirement uniformly. Similarly, it could be indicated that the entirety of the paragraph would not be incorporated by States that uniformly did not apply such a requirement.

10. See A/CN.9/356, para. 73.

11. See note 1 under article 10 bis (see annex to present document).

* * *

Article 33. Record of tendering proceedings

[incorporated in article 10 ter] 1/

Note

1. See A/CN.9/356, para. 77, as well as article 10 ter, and its accompanying note, in the annex to the present document.

* * *

CHAPTER III. PROCUREMENT OTHER THAN BY MEANS OF
TENDERING PROCEEDINGS

SECTION I. TWO-STAGE-TENDERING PROCEEDINGS

New Article 33 bis. Conditions for use of two-stage tendering 1/

(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may employ the procedures provided for in this article where:

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

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

2/

Notes

1. Pursuant to A/CN.9/356, para. 59, the conditions for use of two-stage tendering (formerly scheduled to appear in article 33 bis(1)), and the provisions dealing with procedures, have been set forth in separate articles. The title of article 33 bis has been modified accordingly.

2. The Working Group may wish to consider deletion of the foregoing provision as it would appear to be adequately covered by subparagraph (a).

* * *

Article 33 bis. Procedures for two-stage-tendering proceedings 1/

(1) [moved to new article 33 bis] 1/

(2) The provisions of chapter II of this Law shall apply to two-stage-tendering proceedings except to the extent those provisions are derogated from in the present section.

(3) The solicitation documents 2/ shall call upon contractors and suppliers to submit, in the first stage of the two-stage-tendering proceedings, 3/ 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 or construction as well as to contractual terms and conditions of their supply.

(4) The procuring entity may engage in negotiations with any contractor or supplier whose tender has not been rejected pursuant to articles 10 quater, 28(2), or 29 concerning any aspect of its tender.

(5) In the second stage of the two-stage-tendering proceedings, 3/ 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 or construction to be procured, and any criterion set forth in those documents for evaluating and comparing tenders and for ascertaining the successful 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. A contractor or supplier not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the contractor or supplier may have been required to provide. 4/ The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 28(7)(c).

(6) [deleted] 5/

Notes

1. See note 1 under new article 33 bis.
2. The reference to articles 17 and 20 in regard to the preparation of the solicitation documents has been deleted as the point appeared to be adequately covered by paragraph (2).
3. Added at the initiative of the Secretariat for the purposes of clarity.
4. See A/CN.9/356, para. 55.
5. Paragraph 6, which referred to the requirement in article 7(5) that the record of the procurement proceedings should contain a statement of the circumstances on which the procuring entity relied in invoking new article 33 bis, has been deleted in view of the mention in article 10 ter (1)(g) of the article 7(5) requirement.

* * *

SECTION II. REQUEST-FOR-PROPOSALS PROCEEDINGS

Article 33 ter. Conditions for use of request for proposals 1/

(1) (Subject to approval by . . . (each State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of requests for proposals, which shall be addressed to as many contractors or suppliers as practicable, but to at least three, if possible, provided that the following conditions are satisfied: 2/

(a) the procuring entity has been unable to fully decide upon the particular nature or specifications of the goods or construction to be procured and seeks proposals as to various possible means of meeting its needs; 3/

(b) the selection of the successful contractor or supplier is to be based on both the effectiveness of the proposal and on the price of the proposal; 4/ and

(c) the procuring entity has established the factors for evaluating the proposals and has determined the relative weight to be accorded to each such factor and the manner in which they are to be applied in the evaluation of the proposals. 4/

(2) The procuring entity shall publish in a widely circulated trade journal a notice seeking expression of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the publication of the notice shall not confer any rights on contractors or suppliers, including any right to have a proposal evaluated. 5/

Notes

1. At the thirteenth session, the Working Group agreed to replace the provisions on request-for-proposals proceedings set forth in articles 33 ter to 33 sexies in A/CN.9/WG.V/WP.30 by the proposed text set forth in A/CN.9/356, para. 82, as modified in A/CN.9/356, paras. 85 to 105. In line with A/CN.9/356, para. 59, the procedures for request-for-proposals proceedings, contained in paragraphs (2) to (7) of the text agreed upon by the Working Group, have been set forth in paragraphs (1) to (6) of a separate provision, article 33 quater. The titles of articles 33 ter and 33 quater have been modified accordingly.

2. See A/CN.9/356, para. 85. The Working Group may wish to consider, for the purposes of achieving a clear distinction between the provisions on conditions for use of request-for-proposals proceedings and the provisions setting forth the procedures to be followed in such proceedings, to move to article 33 quater the reference in the chapeau to the circulation of the request for proposals, as well as subparagraphs (b) and (c), and paragraph (2), since all of those provisions deal with procedures to be followed when the procuring entity engages in request-for-proposals proceedings.

3. See A/CN.9/356, para. 89.

4. See A/CN.9/356, para. 90, as well as note 2, concerning the appropriateness of retaining subparagraphs (b) and (c) in their current position.

5. See A/CN.9/356, paras. 87 and 88.

* * *

Article 33 quater. Procedures for request-for-proposals proceedings 1/

(1) The factors referred to in article 33 ter (1)(c) shall concern: 2/

(a) the relative managerial and technical competence of the contractor or supplier; 3/

(b) the effectiveness of the proposal submitted by the contractor or supplier; and

(c) the price submitted by the contractor or supplier for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(2) A request for proposals issued by a procuring entity shall include at least the following information:

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

(b) a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as the location of any construction to be effected;

(c) the factors for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such factor, and the manner in which they will be applied in the evaluation of the proposal; and

(d) the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal.

(3) Any modification or clarification of the request for proposals shall be communicated to all contractors and suppliers participating in the request-for-proposals proceedings. 4/

(4) The procuring entity shall open all proposals in such a manner as to avoid the disclosure of their contents to competing contractors and suppliers. 5/

(5) The procuring entity may engage in negotiations with contractors or suppliers with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) any negotiations between the procuring entity and a contractor or supplier shall be confidential;

(b) subject to article 10 ter, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) the opportunity to participate in negotiations is extended to all contractors and suppliers that have submitted proposals and whose proposals have not been rejected; and

(d) any modification of the evaluation criteria set forth in the request for proposals following the commencement of negotiations is carried out in a way that preserves the confidentiality of the negotiations. 6/

(6) Following completion of negotiations, the procuring entity shall request all contractors or suppliers remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. 7/

(7) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) only the factors referred to in paragraph (1) and set forth in the request for proposals and in any modification thereof shall be considered; 8/

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price; 9/

(c) the price of a proposal shall only be considered by the procuring entity after completion of the technical evaluation; 9/

(d) the procuring entity may refuse to evaluate proposals submitted by contractors or suppliers it considers unreliable or incompetent. 10/

Notes

1. See note 1 under article 33 ter.

2. See A/CN.9/356, para. 93.

3. See A/CN.9/356, para. 94.

4. In its discussion of paragraph (5), the Working Group agreed that the procuring entity should be permitted to modify the evaluation criteria set forth in the request for proposals, provided that any such modification would be communicated to all participating contractors and suppliers (see A/CN.9/356, para. 102), and that a provision to that effect should be included in paragraph (5). Paragraph (3) has been added in order to reflect that decision, but it does so in a general manner, so as to cover not only modifications of the evaluation criteria, but also modifications of any of the information set forth in the request for proposals.

5. The Working Group may wish to consider limiting paragraph (4) to prohibiting the disclosure of the contents of proposals to competing contractors and suppliers. In its present form, the provision might suggest that proposals are to be opened publicly, a procedure which there may not be any particular reason to follow in request-for-proposals proceedings.

6. Subparagraph (d) has been added to reflect the decision in A/CN.9/356, para. 102, that modifications of evaluation criteria carried out after commencement of negotiations should not compromise the confidentiality of negotiations. The Working Group may wish to consider the desirability of retaining such a provision, which may be difficult to interpret and apply. It might be considered that the concern addressed in subparagraph (d) is sufficiently met in subparagraphs (a) and (b).

7. See A/CN.9/356, para. 104.

8. See A/CN.9/356, para. 105.

9. The Working Group may wish to consider whether it is unnecessarily restrictive for the Model Law to require that the evaluation of proposals should be carried out using the procedures set forth in subparagraphs (b) and (c) since alternative methods appear to exist in practice. Accordingly, the issues raised in these subparagraphs might be more appropriately left to the procurement regulations.

10. Subparagraph (d) has been added to reflect the decision in A/CN.9/356, para. 94, that the Model Law should authorize the procuring entity to exclude contractors or suppliers deemed unreliable or incompetent.

* * *

Articles 33 quinquies and sexies. [deleted] 1/

Note

1. See note 1 under article 33 ter.

* * *

SECTION III. COMPETITIVE-NEGOTIATION PROCEEDINGS

New Article 34. Conditions for use of competitive negotiation 1/

(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation in the following circumstances:

(a) when, due to the special nature or particularly complex technical character, or scope or volume of goods or construction to be procured, it is necessary to negotiate with contractors or suppliers in order to enable the procuring entity to obtain the solution which represents the best value; 2/

(b) when there is an urgent need for the goods or construction and engaging in tendering proceedings would therefore be impossible or imprudent, provided that the circumstances giving rise to the urgency were not foreseeable by, or a result of dilatory conduct on the part of, the procuring entity; 3/

(c) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(d) when the procuring entity applies this Law, pursuant to article 1(2), to procurement involving national defence or national security and determines that competitive negotiation is the most appropriate method of procurement; 4/ or

(e) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to articles 10 quater, 28(2) or 29, and when engaging in new tendering proceedings would be unlikely to result in a procurement contract; 5/

(f) [deleted] 6/

Notes

1. Pursuant to the request in A/CN.9/356, para. 59, the conditions for use of competitive negotiation and the provisions dealing with procedures have been set forth in separate articles.

2. See A/CN.9/356, para. 110.

3. See A/CN.9/356, para. 111. The Working Group may wish to consider further the desirability of including such a limitation on the availability of urgency as a condition for use of competitive negotiation. It might be considered that the limitation, while effective in restricting resort to competitive negotiation through negligence or intentional circumvention of tendering requirements on the part of the procuring entity, could itself result in serious detriment to the public interest by delaying urgently needed procurement. A review of a similar restriction with respect to urgency as a condition for use of single source procurement might also be considered (see article 35 (new 1)(c)).

4. See A/CN.9/356, para. 114.

5. The reference to article 10 quater replaces the reference to article 28(3) in view of the incorporation of the latter provision in article 10 quater. As to whether any changes to subparagraph (e) are necessary to reflect the right of the procuring entity to reject all tenders when a selected contractor or supplier fails to reconfirm its qualifications, it would appear that the point is adequately covered by the reference to article 29, particularly in view of the reformulation of paragraph (1) of article 29.

6. See A/CN.9/356, paras. 116 and 117.

* * *

Article 34. Procedures for competitive negotiation 1/

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

(2) Any requirements, guidelines, documents, clarifications 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 article 10 ter, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party. 3/

(3 bis) Following completion of negotiations, the procuring entity may request all contractors or suppliers remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. 4/

(4) [incorporated in article 10 ter]. 5/

Notes

1. The title of article 34 has been modified to reflect the presentation of the conditions for use and procedures for competitive negotiation in separate articles (see note 1 under new article 34).

2. See A/CN.9/356, para. 119.

3. The reference to paragraph (4) has been replaced by the reference to article 10 ter, which contains a consolidated provision on record requirements for procurement proceedings. Concerning the other modifications, see A/CN.9/356, paras. 120 to 122.

4. Paragraph (3 bis) has been added pursuant to A/CN.9/356, para. 118. The Working Group may wish to consider further the desirability or necessity of including paragraph (3 bis) in view of its discretionary nature and of the aim of this method of procurement to give the procuring entity a generally unrestricted power to negotiate. Reference to such a procedure might be left to the procurement regulations.

5. Paragraph (4) has been incorporated in article 10 ter (see note 1 under that article).

* * *

SECTION IV. REQUEST-FOR-QUOTATIONS PROCEEDINGS

New Article 34 bis. Conditions for use of request for quotations 1/

(1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of a request for quotations for the procurement of standardized goods that are readily available and for which there is an established market, provided that the estimated value of the procurement contract is less than the amount set forth in the procurement regulations. 2/

(2) The procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1).

Notes

1. Pursuant to A/CN.9/356, para. 59, the conditions for use of request for quotations (formerly appearing in article 34 bis (1) and (2)), and the provisions dealing with procedures, have been set forth in separate articles. The title of article 34 bis has been modified accordingly.

2. See A/CN.9/356, para. 124.

* * *

Article 34 bis. Procedures for request for quotations

(1) [moved to new article 34 bis] 1/

(2) [moved to new article 34 bis] 1/

(3) The procuring entity shall request quotations from as many contractors or suppliers as practicable, but from at least three, if possible. 2/ Each contractor or supplier from whom a quotation is requested shall be informed whether any elements other than the cost of the goods themselves, such as transportation and insurance, are to be included in the price. 3/

(3 bis) Each contractor or supplier is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a contractor or supplier with respect to a quotation submitted by the contractor or supplier. 4/

(4) The procurement contract shall be awarded to the contractor or supplier that gave the lowest priced responsive quotation and is considered reliable by the procuring entity. 5/

(5) [incorporated in article 10 ter] 6/

Notes

1. See note 1 under under new article 34 bis.

2. See A/CN.9/356, para. 128.

3. At the thirteenth session the question was raised whether the reference to price included elements other than the cost of the goods themselves, such as transportation and insurance charges (see A/CN.9/356, para. 132). It was also suggested that, if the composition of the price was also an issue relevant to other methods of procurement, consideration might be given to including a definition of "price" in article 2. It would appear that the inclusion of such a definition would be of limited value since the components of the price would vary from case to case. However, it would seem that the objectives of the Model Law would be furthered by requiring the procuring entity, at least in procurement proceedings that do not involve negotiation, to inform participating contractors and suppliers beforehand of the elements to be covered by the price that they quote. Such a requirement has therefore

been added to paragraph (3). In this vein, the Working Group may wish to consider whether the composition of the price should be expressly mentioned in article 17(2)(i) (see the annex to the present document, under article 17(2)(i)).

4. The contents of paragraph (3 bis), which were formerly a part of paragraph (3), have been moved to a separate paragraph for the purposes of clarity.

5. See A/CN.9/356, paras. 130 and 131.

6. Paragraph (5) has been incorporated into article 10 ter, which contains a consolidated provision on record requirements for all procurement proceedings under the Model Law (for the text of the article, see the annex to the present document).

* * *

SECTION V. SINGLE SOURCE PROCUREMENT

Article 35. Single source procurement 1/

(new 1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may procure the goods or construction by soliciting a proposal or price quotation from a single contractor or supplier when:

(a) [deleted] 2/;

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

(c) due to a catastrophic event, there is an urgent need for the goods or construction, making it impossible or imprudent to use other methods of procurement because of the amount of time involved in using those methods, provided that the condition resulting in the urgency was unforeseeable and unavoidable and was not due to the dilatory conduct of the procuring entity; 3/

(d) for reasons of standardization, or the need for compatibility with existing goods, equipment or technology, the procuring entity, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the suitability of alternatives to the goods in question, determines that additional supplies must be procured from the contractor or supplier that supplied the existing goods, equipment or technology; 4/

(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; 5/

(f) the procuring entity applies this law, pursuant to article 1(2), to procurement involving national defence or national security and determines that single source procurement is the most appropriate method of procurement; 6/

(g) procurement from a particular contractor or supplier is necessary in order to promote a policy specified in article 28(7)(d)(iii) and approval is obtained following public notice and adequate opportunity to comment, provided that procurement from no other contractor or supplier is capable of promoting that policy; 7/

(h) [deleted] 8/;

(i) [deleted] 9/.

(new 1 bis) [deleted] 10/

(1) [deleted] 11/

(2) [deleted] 11/

Notes

1. See A/CN.9/356, para. 134.

2. Subparagraph (a), which authorized resort to single source procurement for low-value procurement, has been deleted pursuant to A/CN.9/356, para. 136.

3. See A/CN.9/356, para. 138. See also note 3 under new article 34.

4. See A/CN.9/356, para. 139.

5. The Working Group may wish to note that the analogous provision in subparagraph (c) of new article 34 makes reference to development of prototypes, while the present provision does not.

6. See A/CN.9/356, para. 141.

7. See A/CN.9/356, paras. 142 and 143.

8. See A/CN.9/356, para. 144.

9. See A/CN.9/356, para. 145.

10. See A/CN.9/356, para. 146.

11. Paragraphs (1) and (2) have been incorporated in article 10 ter, which contains a consolidated provision concerning record requirements for procurement proceedings under the Model Law (for the text of the article, see the annex to the present document).

CHAPTER IV. REVIEW

Article 36. Right to review

Any contractor or supplier 1/ that has an interest in obtaining a procurement contract resulting or anticipated to result from procurement proceedings covered by this Law and that claims to suffer, to risk suffering or to have suffered loss 2/ due to an act or decision of, or procedure followed by, the procuring entity, that is in breach of a duty imposed by

[Variant 1] 3/

this law

[Variant 2]

article 8(2), (2 bis), (3), article 8 bis (2), (3), (3 bis), (3 ter), (4) and (5), article 10, article 10 bis, article 10 ter (1) and (2), article 10 quater, article 11(1), article 12 (1), (1 bis), and (2)(a), article 14, article 17, article 19, article 20, article 22, article 24, article 25(2)(a), article 27, article 28, article 29 (2) and (3), article 30, article 32 (1), (3), (3 ter), and (4), article 33 bis (5), 33 ter (1) and (2), 33 quater (2), (3), (4), (5), (6) and (7), article 34 (1), (2), and (3), and article 34 bis (3) and (4) 4/

may seek review of the act, decision or procedure in accordance with articles 37 through [42] at any stage of the procurement proceedings or after the procurement proceedings have terminated.

Notes

1. See A/CN.9/356, para. 151.

2. See A/CN.9/356, para. 156.

3. Pursuant to A/CN.9/356, paras. 154 and 158, article 36 has been reformulated to reflect the decision of the Working Group that the Model Law should present two alternatives for indicating in the Model Law the provisions that imposed duties the breach of which would give rise to a cause of action. Variant I, based on the approach used in some States, contains a simple reference to the breach by the procuring entity of duties imposed by the Model Law. Variant II, based on the approach used in some other States, sets forth a list of the articles which impose duties the violation of which would give rise to a cause of action. As indicated in A/CN.9/356, para. 154, in place of listing the relevant articles within the text of the Model Law as is presently done in variant II, article 36 could be left with only the simple rule stated in variant I, and the relevant articles listed in the commentary, with an indication that enacting States that wished to do so could incorporate the list of articles into article 36. It would appear that the reformulation of article 36, irrespective of which variant an enacting State would select, meets the concern expressed in A/CN.9/356, para. 157, that it should be made clear that article 36 was intended to refer only to aspects of procurement proceedings addressed in the Model Law.

4. The list of articles in variant II has been drawn up in accordance with the decision of the Working Group in A/CN.9/356, para. 153, that articles that imposed a duty on the procuring entity relating to the qualification and selection of contractors and suppliers should give rise to remedies under the Model Law and that certain articles providing for the exercise of discretion by the procuring entity should give rise to remedies only if the procuring entity failed to exercise the discretion at all or exercised it in an arbitrary fashion. According to that decision, articles imposing duties, or providing for exercise of discretion, aimed at the general public interest should not be regarded as establishing any private rights. Provisions not appearing on the list would be considered as not giving rise to remedies.

* * *

Article 37. Review by procuring entity or by approving authority

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to [this Law], the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure. A reference in [this Law] to the head of the procuring entity or the head of the approving authority includes any person designated by the head of the procuring entity or by head of the approving authority, as the case may be.

(2) The head of the procuring entity or of the approving authority shall not entertain a complaint, unless it was submitted within 10 days after the earlier of the time when the person submitting it became aware of the circumstances giving rise to the complaint or the time when that person should have become aware of those circumstances. [The foregoing time limit does not apply to complaints seeking only compensation for costs incurred in preparing a tender or proposal.] 1/

(3) The head of the procuring entity or of the approving authority shall not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the person that submitted it and the procuring entity, the head of the procuring entity or of the approving authority shall, within 20 working days 2/ after the submission of the complaint, issue a written decision. The decision shall:

(a) state the reasons for the decision; and

(b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken. 3/

(5) If the head of the procuring entity or of the approving authority does not issue a decision by the time specified in paragraph (4), the person submitting the complaint or the procuring entity is entitled immediately thereafter to institute proceedings under article [38 or 40]. Upon the institution of such proceedings the competence of the head of the procuring entity or of the approving authority to entertain the complaint ceases.

(6) The decision of the head of the procuring entity or of the approving authority shall be final unless proceedings are instituted under article [38 or 40]. 4/

Notes

1. The text within square brackets has been added pursuant to a proposal in A/CN.9/356, para. 162. The Working Group may wish to consider whether determining the time limitation for entertainment of complaints on the basis of the relief being sought would unnecessarily complicate the Model Law. On another point, it will be recalled that the Working Group agreed in A/CN.9/356, para. 78, that consideration should be given to providing an exception to time limitations for seeking review to the extent that an aggrieved contractor or supplier was prevented from exercising its right to seek review as a result of a breach by the procuring entity of record requirements set forth in article 10 ter. In this regard, consideration might be given to the fact that the time limitation in article 37 runs from the time of discovery of the alleged misconduct, rather than from the actual date of the misconduct. This permits, for example, a complainant that would have discovered the procuring entity's misconduct through an accurate record of the procurement proceedings to seek review upon discovery of the misconduct, despite any delay in discovery caused by the inaccurate record, as long as the petition for review was filed within the ten day period following discovery of the misconduct.

2. See A/CN.9/356, para. 164.

3. The reference to payment of compensation has been deleted pursuant to A/CN.9/356, para. 167.

4. The Working Group may wish to consider adding a reference to the time limitations for instituting proceedings under article 38 or 40.

* * *

Article 38. Administrative review *

(1) A contractor or supplier entitled under article 36 to seek review 1/
may submit a complaint, which shall be in writing, to [insert name of
administrative body]:

(a) if the complaint cannot be submitted or entertained under article 37 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 10 days after the earlier of the time when the contractor or supplier submitting it became aware of the circumstances giving rise to the complaint or the time when that contractor or supplier should have become aware of those circumstances; 2/

(b) pursuant to paragraph (5) of article 37, provided that the complaint is submitted within 10 days after the expiry of the period referred to in article 37(4); 3/ or

(c) if the person claims to be adversely affected by a decision of the head of the procuring entity or of the approving authority under article 37, provided that the complaint is submitted within 10 days after the issuance of the decision; 4/.

(1 bis) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity or to the approving authority. 5/

(2) The [insert name of administrative body] may [grant] [recommend] 6/ one or more of the following remedies, unless it dismisses the complaint: 7/

(a) declare the legal rules or principles that govern the subject matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision;

(f) [deleted] 8/;

(g) require the payment of compensation [for any reasonable costs incurred by the person submitting the complaint in connection with the procurement proceedings] [for loss suffered by the person submitting the complaint] 9/ as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

(h) order that the procurement proceedings be terminated;

(3) The [insert name of administrative body] shall issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(4) The decision shall be final unless an action is commenced under article 40. 10/

* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 38 and provide only for judicial review (article 40). [The foregoing note has been added pursuant to A/CN.9/356, para. 170.]

Notes

1. See A/CN.9/356, para. 171.
2. The time limit for filing for administrative review under subparagraph (a) has been added pursuant to A/CN.9/356, para. 172. This time limit is aligned with the one in article 37(2), so as to ensure that contractors and suppliers that intend to file complaints do so promptly after discovery of the circumstances giving rise to the complaint, either pursuant to article 37 or, if the procurement contract has entered into force, pursuant to article 38(1)(a). Concerning the question of whether the effect on the time limit of a violation by the procuring entity of record requirements should be addressed, see note 1 under article 37.
3. The time limit for filing for administrative review under subparagraph (b) has been added pursuant to A/CN.9/356, para. 172.
4. The time limit for filing for administrative review under subparagraph (c) has been added pursuant to A/CN.9/356, para. 172.
5. Paragraph (1 bis) has been added pursuant to A/CN.9/356, para. 172.
6. Pursuant to A/CN.9/356, para. 173, the words "may grant" have been supplemented by the indicated language in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but could make recommendations.
7. See A/CN.9/356, para. 174.
8. The reference to annulment of the procurement contract has been deleted pursuant to A/CN.9/356, para. 174. The Working Group may wish to consider further the question of annulment in conjunction with its consideration of article 41.
9. No decision was reached at the thirteenth session regarding the types of losses to be compensated (see paragraph 7 of the commentary on article 38, and paragraph 3 of the commentary on article 37, in A/CN.9/WG.V/WP.27).
10. The Working Group may wish to consider whether it would be appropriate to add a reference to the time limits applicable for commencing an action under article 40.

* * *

Article 39. Certain rules applicable to review proceedings under article 37 [and article 38]

(1) Promptly after the submission of a complaint under article 37 [or article 38], the head of the procuring entity or of the approving authority [, or the [insert name of administrative body], as the case may be,] shall notify all contractors and suppliers participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such contractor or supplier whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. 1/

(3) A copy of the decision of the head of the procuring entity or of the approving authority [, or of the [insert name of administrative body], as the case may be,] shall be furnished within [5] days to the person submitting the complaint, to the procuring entity and to any other person that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

Note

1. The Working Group decided in A/CN.9/356, para. 180, to retain only the second sentence of variant B, with the indicated modifications.

* * *

Article 40. Judicial review

The [insert name(s) of court(s)] has jurisdiction over an action commenced by a contractor or supplier 1/ referred to in article 36 to review an act or decision of, or a procedure followed by, the procuring entity. 2/

Notes

1. See A/CN.9/356, para. 182.

2. The second sentence, including subparagraphs (a) through (d), which specified circumstances in which the commencement of judicial review would be permitted, has been deleted pursuant to A/CN.9/356, para. 187.

* * *

Article 41. Suspension of procurement proceedings [and of performance of procurement contract] 1/

[[Variant A] The timely submission of a complaint under article 37 [or article 38] or the timely commencement of an action under article 40 shall suspend the procurement proceedings [, or the performance of the procurement contract, if it has entered into force,] pending the disposition of the review proceedings unless the head of the procuring entity or of the approving authority, [the [insert name of administrative body]] or the court, as the case may be, determines that the suspension would not be in the public interest.

[Variant B] After the timely submission of a complaint under article 37 [or article 38], or the timely commencement of an action under article 40, the head of the procuring entity or of the approving authority, [the [insert name of administrative body]] or the court, as the case may be, may suspend the procurement proceedings [, or the performance of the procurement contract, if it has entered into force,] in order to preserve the rights of the person submitting the complaint or commencing the action pending the disposition of the review proceedings.]]

Note

1. Article 41 has been placed within square brackets in view of the Working Group's decision in A/CN.9/356, para. 190, to defer a decision on the article pending further consideration (see paragraph 8 in the introduction to the present document, as well as A/CN.9/WG.V/WP.34).

* * *

Article 42. [deleted] 1/

Note

1. Article 42, which referred to disciplinary, administrative or criminal responsibility of the procuring entity, has been deleted pursuant to A/CN.9/356, para. 192.

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ANNEX

Additional provisions and changes to other draft articles
of Model Law on Procurement

Add the following provision:

Article 10 bis. Communications between procuring entity and contractors
and suppliers 1/

Communications between contractors and suppliers and the procuring entity referred to in articles 8 bis(3 bis), 22(3), 25(2)(a), 28(1), 29(3) and 32(1) shall be made in a form which provides a record of the communication. However, those communications may be made by telephone provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.

Note

1. Article 10 bis has been added in line with a request by the Working Group at the thirteenth session (see A/CN.9/356, paras. 14, 50 and 76) that the Secretariat consider the replacement by a consolidated provision of a number of similar provisions on telephone communications between the procuring entity and contractors and suppliers found in articles 8 bis, 22(3), 25(2)(a), 28(1), 29(3) and 32(6)(a). Further consolidation has been achieved by also encompassing in article 10 bis the writing requirement found in those provisions, thereby making it possible to avoid in their entirety the repeated references to identical formal requirements contained in those provisions. The formulation used to describe the permissible means of communication, which is based on article 1(e) of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, encompasses, but avoids express mention of, writing.

* * *

Add the following provision:

Article 10 ter. Record of procurement proceedings 1/

(1) The procuring entity shall prepare a record of the procurement proceedings containing the following information:

(a) a brief description of the goods or construction to be procured, or of the procurement need for which the procuring entity requested proposals;

(b) the names and addresses of contractors and suppliers that submitted tenders, proposals or quotations;

(c) information relative to the qualifications, or lack thereof, of contractors and suppliers that submitted tenders, proposals or quotations;

(d) the price and a summary of the other principal terms and conditions of each tender, proposal or quotation and of the procurement contract;

(e) a summary of the evaluation and comparison of tenders, proposals or quotations;

(f) the information required by article 10 quater, if a tender, proposal or quotation was rejected pursuant to that provision; if all tenders were rejected pursuant to article 29, a statement to that effect [and the grounds therefore, in accordance with article 29(2)]; if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and the grounds therefor; 2/

(g) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 7(5) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used.

(2) The portion of the record referred to in subparagraphs (1)(a) and (b) shall be made available for inspection by any person 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, proposal or quotation, as the case may be, has been accepted] or after procurement proceedings have been terminated without resulting in a procurement contract. 3/

(2 bis) The portion of the record referred to in subparagraphs (1)(c) to (f) shall be made available for inspection by contractors or suppliers that submitted tenders, proposals or quotations, or applied for prequalification, 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, proposal or quotation has been accepted] or after procurement proceedings have been terminated without resulting in a procurement contract. 4/ However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) information 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;

(b) information relating to the examination, evaluation and comparison of tenders, proposals or quotations, and tender, proposal or quotation prices. 5/

(3) The portion of the record referred to in subparagraph (1)(g) shall be made available to governmental bodies exercising an audit or control function over the procuring entity in accordance with the laws of [this State]. 6/

(4) The procuring entity shall not be liable to contractors and suppliers solely as a result of a failure to prepare a record of the procurement proceedings in accordance with the present article. 7/

Notes

1. Article 10 ter has been added to implement the decision of the Working Group in A/CN.9/356, para. 77, to replace the provisions in articles 33, 33 sexies, 34(4), 34 bis(4) and 35(1) and (2) with a consolidated provision concerning the record requirements for all procurement methods available under the Model Law. Article 10 ter is based on article 33, with additions and changes indicated by underscoring.

2. In line with the expansion of the rule on improper inducements to all methods of procurement (see article 10 quater in the present annex), subparagraph (f) requires that the record of proceedings involving any type of procurement method note the rejection of a contractor or supplier offering a gratuity or other type of improper inducement. It is suggested that the procuring entity also be required to record the grounds for rejection of all tenders. This would align record requirements for tendering proceedings with the requirement that, when procurement proceedings involving other methods of procurement do not result in a procurement contract, the record should state the reasons therefor. Under article 29(2), the procuring entity is required to provide information concerning the grounds for rejection of all tenders, upon request, to contractors and suppliers that submitted tenders.

3. Subparagraphs (a) and (b) of paragraph (2) have been placed in a separate paragraph, paragraph (2 bis).

4. In accordance with A/CN.9/356, paras. 79 and 80, paragraphs (2), (2 bis) and (3) provide that the extent of disclosure of the record obligatory under the Model Law varies according to the type of information and user in question. The Working Group may wish to consider whether disclosure of any additional portions of the record to the general public would be desirable or whether paragraph (2), as presently formulated, leaves sufficient scope for such additional disclosure to be governed by general laws of the enacting State concerning access to information. As to the point of time when the record should be made available to the various categories of users, the present text reflects the decision of the Working Group in A/CN.9/356, para. 81, to retain both alternatives contained in square brackets that had appeared in article 33(2), pending further revision of the provision. The second of those alternatives has been modified to reflect its incorporation into a provision applicable to all methods of procurement.

5. Pursuant to A/CN.9/356, para. 80, the restrictions on disclosure set forth in subparagraphs (a) and (b) have been retained, along with the provision allowing court-ordered disclosure of restricted information.

6. See A/CN.9/356, para. 80.

7. See A/CN.9/356, para. 78.

* * *

Add the following provision:

[Article 10 quater. Inducements from contractors and suppliers 1/

(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity shall 6/ reject a tender, proposal or quotation 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 procurement proceedings. The rejection of the tender, proposal or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings.]

Note

1. Article 10 quater has been added in order to invite the Working Group to consider whether the Model Law should contain a general provision requiring the rejection of tenders, as well as the rejection of proposals and quotations in procurement proceedings involving other methods of procurement, when a contractor or supplier offers a gratuity or some other such inducement to the procuring entity in order to influence the outcome of the procurement proceedings. Previously, the Model Law contained such a provision only with regard to tendering proceedings, in article 28(3). It would appear, however, that the objectives of the Model Law would be better served if a provision of that type were to apply to all of the competitive methods of procurement available under the Model Law. Article 10 quater is based on article 28(3), with changes to encompass other methods of procurement indicated by underscoring. The provision reflects the decision in A/CN.9/356, para. 19, that rejection in such cases should be mandatory rather than discretionary.

* * *

Article 8 bis (6)

At the thirteenth session, the Working Group agreed that the use of the word "re-evaluating" in paragraph (6) needed to be reviewed (see A/CN.9/356, para. 37). In that connection, the Working Group might wish to consider replacing the words "re-evaluating at a later stage of the procurement proceedings the qualifications of contractors and suppliers that have been prequalified" by the words "requesting, at a later stage of the procurement proceedings, contractors and suppliers that have been prequalified to re-confirm their qualifications".

* * *

Article 17(2)(e bis)

It is suggested to add the text below, as subparagraph (e bis), to reflect the requirement in article 28(7)(a) and (c)(ii) that the solicitation documents specify the factors, including non-price factors, that are to be used by the procuring entity in determining the successful tender, as well as to implement the decision of the Working Group in A/CN.9/356, para. 31, that the method of quantification of non-price factors should be indicated in the solicitation documents:

"(e bis) the factors to be used by the procuring entity in determining the successful tender, including any non-price factors to be used pursuant to article 28(7)(c) and (d) and the manner in which any such non-price factors are to be quantified".

* * *

Article 17(2)(i)

As discussed in A/CN.9/356, para. 132, as well as in note 3 under article 34 bis, the Working Group may wish to consider whether further specificity is desirable in the Model Law as to the composition of the price of tenders. One possibility would be to make a more specific reference in article 17(2)(i) to the elements that are to make up the price by adding the following language:

" ... including whether the price is to cover elements other than the cost of the goods or construction themselves, such as transportation and insurance charges".

* * *

Article 17(2)(y)

It was decided in A/CN.9/356, para. 69, that reference should be made in solicitation documents to any final approval requirement and to the amount of time expected to be needed to obtain any such final approval. This might be done by adding the following language at the end of subparagraph (y):

"and approval by a higher authority or the Government and the amount of time following the dispatch of the notice of acceptance that will be required to obtain the approval".