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Report of Working Group I (Procurement) on the work of its seventh session

(New York, 4-8 April 2005)

Contents

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I. Introduction

1. At its thirty-seventh session, in 2004, the Commission entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "UNCITRAL Model Procurement Law" or "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004, A/CN.9/568). At that session, it decided to entrust the Secretariat with the preparation of drafting materials and studies reflecting the deliberations of the Working Group for consideration at its future session. It further decided that at its next session it would proceed with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its seventh session in New York from 4 to 8 April 2005. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Canada, Chile, China, Colombia, Czech Republic, France, Germany, Guatemala, Iran (Islamic Republic of), Jordan, Kenya, Madagascar, Mexico, Nigeria, Pakistan, Qatar, Republic of Korea, Russian Federation, Serbia and Montenegro, Singapore, Spain, Sri Lanka, Sweden, Thailand, Tunisia, Turkey, Uganda, United States of America and Venezuela.

3. The session was attended by observers from the following States: Brunei Darussalam, Cuba, Dominican Republic, Finland, Indonesia, Kuwait, Myanmar and the Philippines.

4. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: Food and Agriculture Organization of the United Nations (FAO), International Monetary Fund (IMF), United Nations Secretariat and United Nations Programme;

(b) *Intergovernmental organizations*: African Development Bank, European Commission, European Space Agency, International Development Law Organization (IDLO), Organization for Economic Cooperation and Development (OECD) and World Trade Organization (WTO);

(c) *International non-governmental organizations invited by the Commission*: European Law Students' Association (ELSA), International Bar Association (IBA) and International Studies Institute (ISI).

5. The Working Group elected the following officers:

Chairman: Mr. Stephen R. Karangizi (Uganda)

Rapporteur: Mr. Phua Wee Chuan (Singapore).

6. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.33);

(b) A note by the Secretariat setting out issues arising from the use of electronic communications in public procurement (A/CN.9/WG.I/WP.34 and Add.1 and 2);

(c) A note by the Secretariat presenting a comparative study of practical experience with the use of electronic (reverse) auctions in public procurement (A/CN.9/WG.I/WP.35 and Add.1);

(d) A note by the Secretariat presenting a comparative study of abnormally low tenders in public procurement (A/CN.9/WG.I/WP.36).

7. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

III. Deliberations and decisions

8. At its seventh session, the Working Group continued its work on the elaboration of proposals for the revision of the UNCITRAL Model Procurement Law. The Working Group used the notes by the Secretariat referred to in paragraph 6 above (A/CN.9/WG.I/WP.34 and 35 and their addenda and A/CN.9/WG.I/WP.36) as a basis for its deliberations.

9. The Working Group requested the Secretariat to prepare drafting suggestions for its eighth session, reflecting the deliberations of the Working Group at the current session, on electronic publication and communication of procurement-related information, other aspects arising from the use of electronic means of communication in the procurement process, such as controls over their use, electronic reverse auctions, and abnormally low tenders. The understanding of the Working Group was that the consideration of those topics should be completed at its next session. The Working Group further decided, time permitting, to take up the topic of framework agreements at its next session. In this regard, it recalled its consideration of the subject at its sixth session at which the Secretariat was entrusted with the preparation of a note on this question (A/CN.9/568, para. 78). The Working Group also heard suggestions that the following topics should thereafter be

given priority: suppliers' lists; remedies and enforcement; evaluation and comparison of tenders (including the promotion of industrial, social and environmental policies in procurement); organization of procurement; and the procurement of services.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. Electronic publication and communication of procurement-related information

1. General remarks

10. The Working Group had before it a note by the Secretariat (A/CN.9/WG.I/WP.34 and Add.1 and 2). It was recalled that in adapting the Model Law to recent developments in public procurement, notably in the use of electronic means of communication, the focus should be on those amendments that were necessary to eliminate obstacles to the use of electronic communications. In this regard, support was reiterated for the approach taken by the Working Group at its sixth session that the Model Law should encourage the use of electronic communications and technologies in public procurement (A/CN.9/568, para. 18). The goals of achieving simplification and precision in the text were also emphasized. The Working Group also recalled effects that changes in the provisions of the Model Law would have on those countries that based their procurement legislation on the Model Law.

11. As regards the general legislative principles and policy approaches for dealing with electronic communications and technologies in the procurement process, the Working Group decided to include provisions based on the electronic commerce texts prepared by UNCITRAL where necessary (see also A/CN.9/WG.I/WP.34, para. 13), but should amend them in the revised Model Law so as to take account of the specific circumstances of public procurement. The Working Group also recalled the decision taken at its sixth session that appropriate statements of the governing principles should be found in the Model Law, but that appropriate further guidance might usefully be provided in the Guide to Enactment (A/CN.9/568, para. 24).

12. It was agreed that the Secretariat should include a provision in an early section of the Model Law, as a new article 4 bis, promulgating the general principles of functional equivalence and technological neutrality to be observed in various actions taken in the course of the procurement process, such as publication of opportunities and procurement-related information, communication between, for example, procuring entities and suppliers, opening of tenders and holding pre-tender conferences. Such a general provision, it was observed, should eliminate obstacles to and ambiguities in the use of electronic means of communication in public procurement under the Model Law and encourage such use by amending all phrases implying a solely paper-based environment, such as "writing", "sealed envelope", "signature" or "record-keeping", without being overly prescriptive or rendering the Model Law more complex.

13. The Working Group agreed to continue its deliberations at a future session taking into account the following two variants alternatives for a new article 4 bis in the Model Law:

Variant A

"Article 4 bis. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

Any [provision] [requirement] under this Law for:

(a) a document to be in writing;

(b) a document to be signed;

(c) a document to be in a sealed envelope;

(d) a document to be published or provided or made accessible;

(e) a record to be created or maintained;

(f) meeting of persons to take place; and

(g) the opening of tenders

or any other requirement implying physical presence or a paper-based environment

may be met by the use of electronic, optical or comparable means [, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy], [provided that the enacting State or procuring entity is satisfied that such use:

(a) [does not represent an obstacle to the procurement process] [uses means of communication generally available];

(b) promotes economy and efficiency in the procurement process; and

(c) will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition.]"

Variant B

"Any provision of this Law related to writing, to a record or to a meeting shall be interpreted to include electronic, optical or comparable means, [including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy] [provided that the enacting State or procuring entity is satisfied that such use:

(a) [does not represent an obstacle to the procurement process] [uses means of communication generally available];

(b) promotes economy and efficiency in the procurement process; and

(c) will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition]"

(with the inclusion of the list found in Variant A in the Guide to Enactment).

14. The Working Group requested the Secretariat to make adjustments to both variants so as to ensure that the "accessibility standards" would apply to any means of publication and communication chosen.

2. Notion of "electronic" and other terms (A/CN.9/WG.I/WP.34, paras. 17-22, and A/CN.9/WG.I/WP.34/Add.2, *article 2 Definitions*)

15. With reference to paragraph 22 of A/CN.9/WG.I/WP.34, the Working Group considered possible additions to the definitions section of the Model Law, found in the proposed amendments to article 2 of the Model Law as contained in A/CN.9/WG.I/WP.34/Add.2.

16. The first possible addition considered was a definition of the term "electronic", in the following terms: "'electronic' relates to technology having electronic, optical, magnetic, or similar capabilities that may be used to send, receive or store information, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy", (drawing on the definition of a "data message" in article 2 of the UNCITRAL Model Law on Electronic Commerce, A/51/17, annex I). Some delegations and observers questioned whether the proposed definition was appropriate, considering whether a definition of the term "electronic communications" would be more useful for legislators than one of the adjective "electronic" alone.

17. As to the text of the second proposed definition, it was suggested, in light of continuing technological developments, that the word "comparable" should be substituted for the word "similar" and to explain the reasons therefor in the Guide to Enactment.

18. The second possible addition considered was a definition of a "publicly accessible electronic information system", in the following terms (drawing on the definition of an "information system" in article 2 of the UNCITRAL Model Law on Electronic Commerce, A/51/17, annex I): "'publicly accessible electronic information system' means a system for generating, sending, receiving, storing or otherwise processing electronic communications which is generally accessible to persons making use of electronic devices." Some delegations and observers questioned whether the proposed definition was in fact necessary, particularly if the definition of "electronic" or "electronic communications" were sufficiently wide, with corresponding changes to the proposed amendments to other articles of the Model Law.

19. As to the text of the proposed definition, it was suggested that the words "and data" after the word "communications" and the word "any" before the word "persons" should be added.

20. The Working Group heard suggestions by delegates and observers that other definitions should be included in the revised Model Law including definitions of the terms "writing" and "electronic means", perhaps based on the definitions of these notions in the European Union procurement directives of 31 March 2004 (Directive 2004/17/EC and Directive 2004/18/EC). It was also suggested that the Guide to Enactment should encourage consistency in the use of terminology by enacting States, so as to avoid conflict with other legislative acts.

21. The view was also expressed that provisions of the Model Law aimed at ensuring the publication and accessibility of relevant information should be formulated in technologically neutral terms and any provisions specific to electronic means of communication should be avoided. At the same time, it was stated that such specific provisions could be useful in certain cases and for certain countries. It was suggested that in the revision of the Model Law, the Working Group should strive to achieve a balance between formulating provisions in technologically neutral terms and ensuring the functional equivalence among various means of communication, on the one hand, and the promotion of electronic means of communication, highlighting possible problems arising from their use and suggesting ways of dealing with such problems, on the other.

22. The Working Group held informal consultations on drafting suggestions with respect to proposed definitions for inclusion in article 2 of the Model Law, and agreed that further deliberations regarding the proposed definitions should be held at a future session, taking the following alternative proposals into account:

Variant A

"'Electronic means' of communicating, publishing, exchanging or storing information or documents means the generation, exchange, sending, receipt or storage of information or documents by electronic, optical or comparable means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

'Electronic means' of assembly of persons for any purpose under this Law means any method of assembly whereby those assembled can follow and participate in the proceedings by electronic means of communication."

Variant B

"'Electronic means' of communicating, publishing, exchanging or storing information or documents, and of holding meetings, means the generation, exchange, sending, receipt or storage of information or documents by electronic, optical or comparable means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy."

Variant C

Not to include any definitions of "electronic means" on the basis that they would be superfluous in the light of the proposed article 4 bis (see paras. 10-14 above).

23. The Secretariat was requested to take these proposals into consideration when preparing documentation for continuation of the Working Group's discussion at a future session.

3. Electronic publication of legal texts and other information (A/CN.9/WG.I/WP.34, paras. 24-30, and 42-47, A/CN.9/WG.I/WP.34/Add.1, paras. 8-17, and A/CN.9/WG.I/WP.34/Add.2, *article 5 Public accessibility of legal texts, article 14 Public notice of procurement contract awards, article 24 Procedures for soliciting tenders or applications to prequalify, article 37 Notice of solicitation of proposals, article 47 Restricted tendering, and article 48 Request for proposals*)

24. It was agreed that the scope of article 5 should be expanded to cover the public accessibility of all procurement-related information subject to mandatory publication, including legal texts. The Working Group noted that the Secretariat was currently reviewing the relevant practice under domestic procurement regimes to identify additional information relevant to potential suppliers that the Model Law did not currently require to be published and that could be brought within the scope of article 5 (A/CN.9/WG.I/WP.34, paras. 29-30). The Working Group agreed to revert to this matter once the results of the study were made available to it.

25. It was agreed that the Model Law should include a provision promulgating the general principle that a procuring entity should have the right to choose the means of publication under article 5. That is, the procuring entity could choose either paper or electronic publication, or both, without being required to justify the choice made, provided that the means of publication chosen complied with certain "accessibility standards". The Working Group requested the Secretariat to provide draft accessibility standards for its consideration at a future session, which standards could be based on proposed paragraph 3 of article 24 contained in document A/CN.9/WG.I/WP.34/Add.2. The principles of that paragraph would provide that the method of publication chosen:

(a) Should not represent an obstacle to access to the procurement process;

(b) Would be justified to promote economy and efficiency in the procurement process;

(c) Would not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition.

26. It was agreed that general principles to be included in the revised article 5 would apply to the publication of other information currently dealt with in other articles of the Model Law, such as invitations to participate in specific procurement (articles 24, 37, 46, 47 and 48 of the Model Law, as discussed in paragraphs 42-45 of A/CN.9/WG.I/WP.34 and paragraphs 8-17 of A/CN.9/WG.I/WP.34/Add.1) and contract awards (article 14 of the Model Law, as discussed in paragraphs 46-47 of A/CN.9/WG.I/WP.34), or other information, the publication of which may be envisaged in the revised Model Law, such as publication of forthcoming contract opportunities (see below, section 4).

27. The Working Group requested the Secretariat to provide drafting suggestions for its consideration reflecting the above matters and to report to the Working Group on the outcome of the study it was requested to undertake as noted in paragraph 24 above.

28. The Working Group agreed that, in the continuation of its deliberations regarding draft article 5 at a future session, the following text would be considered:

"Article 5. Public accessibility of procurement-related information

"(1) The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereto, as well as any other documents and information required to be published [or being published under this Law] shall be promptly made accessible to the public and systematically maintained.

"[(2) Any further information, such as regarding forthcoming opportunities, internal controls or guidance, that an enacting State or procuring entity chooses to publish shall be promptly made accessible to the public and systematically maintained.]"

4. Publication of forthcoming procurement opportunities (A/CN.9/WG.I/WP.34, paras. 31-41, and A/CN.9/WG.I/WP.34/Add.2, *article 5 bis Notice of procurement opportunities*)

29. Although some doubt was raised as to whether publication of information on forthcoming opportunities constituted the best practice that the Model Law should promote, the prevailing view in the Working Group was that the publication of forthcoming procurement opportunities contributed to the transparency of procurement processes, efficiency in procurement planning and opening up procurement markets, especially in international bidding and, therefore, should be encouraged. However, it was also agreed that such publication should be optional, not mandatory. The Working Group noted concerns expressed with respect to the possible negative impact that mandatory publication could have, for instance pre-empting flexibility in the State budgeting process, traditionally a prerogative of legislators. The Working Group therefore expressed a preference for Variant B of the proposed article 5 bis Notice of procurement opportunities, as contained in A/CN.9/WG.I/WP.34/Add.2, which provided as follows:

"Within [the enacting State specifies a time-limit] after the begin of a fiscal year, procuring entities may publish notice of their expected procurement requirements for the following [the enacting State specifies a period]."

30. The views differed, however, as to the necessity of having a provision on the optional publication of forthcoming procurement opportunities in the Model Law at all, as opposed to elaborating advantages of such publications in the Guide to Enactment. In support of including the provision in the Model Law, it was stated that this subject, new in the Model Law, could be overlooked if put only in the Guide, which would be unfortunate in light of its importance and positive effects on the procurement process.

31. It was suggested that proposed amendments should make it clearer that information on forthcoming opportunities was not binding on procuring entities. The Working Group agreed to revert to this matter once the results of the study referred to in paragraph 12 above were made available to it.

5. Form of communication (A/CN.9/WG.I/WP.34/Add.1, paras. 18-43, and A/CN.9/WG.I/WP.34/Add.2, *article 7 Prequalification proceedings, article 9 Form of communications, article 10 Rules concerning documentary evidence provided by suppliers or contractors, article 25 Contents of invitation to tender and invitation to prequalify, article 26 Provision of solicitation documents, article 28 Clarification and modification of solicitation documents, article 30 Submission of tenders, article 37 Notice of solicitation of proposals, and article 40 Clarification and modification of requests for proposals*)

32. The Working Group agreed to revise the Model Law so that article 9 would incorporate a general principle as to the form of communication applicable to all types of communications dealt with in the Model Law, including provision, clarification and modification of solicitation documents, and submission of tenders. It was agreed that the principle should be drafted in a manner similar to that proposed as regards article 5 (see section 3 above), giving the option to the procuring entity to choose any form of communication, without being required to justify its choice, provided that the chosen form met the accessibility standards, as described in paragraph 25 above.

33. The Working Group agreed that suppliers should not be given the right to choose a form of communication with the procuring entity and therefore amendments should be made as necessary to the provisions of the Model Law and the Guide to Enactment that provided for or could be construed to imply such a right, specifically with regard to articles 9.3 and 30.5 (b). It was also agreed that, in so doing, the Secretariat should exercise caution so as not inadvertently to remove the safeguards contained in those provisions against discriminatory or otherwise exclusionary practices by the procuring entities. It was suggested that in defining the accessibility standards referred to in paragraphs 25 and 32 above and revising the Guide to Enactment, such concerns should be duly borne in mind. Also as regards the accessibility standards, the Working Group agreed to consider where in the Model Law the definition(s) of those standards should be placed at a future session.

B. Other aspects arising from the use of electronic means of communication in procurement

1. Conditions for functional equivalence between electronic and written tenders (A/CN.9/WG.I/WP.34/Add.1, para. 33, and A/CN.9/WG.I/WP.34/Add.2, *article 30 Submission of tenders*)

(a) Security measures in communications and in the treatment of tenders

34. The Working Group considered the issue of security measures in communications and in the treatment of tenders, and the text of the proposed article 30 bis of the UNCITRAL Model Procurement Law as contained in document A/CN.9/WG.I/WP.34/Add.2. The Working Group noted that the proposed text addressed (inter alia) issues of authenticity of communications, integrity of data, date and time of electronic communications and confidentiality of such communications. In accordance with its earlier decision that such matters fall to be addressed in the law of electronic commerce and not procurement law per se, the Working Group decided that such text should not be introduced into the revised Model Law. Nonetheless, the Working Group noted that appropriate guidance

(including the desirability of such regulation in an enacting State) should be provided in the Guide to Enactment.

(b) The opening of tenders

35. The Working Group then considered the issue of opening of tenders. Recalling its earlier decision that a procuring entity should be given the option to stipulate that tenders must be submitted electronically under article 30 of the UNCITRAL Model Procurement Law (see section 5 above), the Working Group addressed the provisions regarding the opening of tenders under article 33 of the Model Law. It was recalled that article 33 (1) of the Model Law provided that tenders "shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders […], at the place and in accordance with the procedures specified in the solicitation documents", and that article 33 (2) provided that "all suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders".

36. The Working Group noted that while article 33 (1) seemed to be sufficiently broad to accommodate any system for opening tenders, article 33 (2) suggested the physical presence of suppliers and contractors at a given place and time. The Working Group noted that some countries had introduced enabling provisions that permitted opening of tenders through an electronic information system that automatically released and opened the tenders at the date and time provided in the solicitation documents, and automatically transmitted the information that would usually be publicly announced at the opening of tenders. The Working Group considered whether the Model Law should make provision for such electronic bid-opening.

37. In this regard, the Working Group considered the following proposed addition to article 33 of the Model Law, as contained in document A/CN.9/WG.I/WP.34/Add.2, aimed at enabling procuring entities to use electronic communications as a substitute for tender opening in the presence of suppliers and contractors:

> "(4) Where the procurement proceedings were conducted solely electronically in accordance with articles 9 (1) ter, 25 (1)(k), 25 (2)(f) or [insert provisions dealing with reverse auctions and other fully automated procedures, if any], suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are allowed to follow the opening of the tenders through electronic means of communication [, such as on-line exchange of electronic messages, videoconferencing or similar technology,] used by the procuring entity provided that all suppliers or contractors that have submitted tenders have access to the required technical and other means of communication used by the procuring entity and that those means do not present an unreasonable barrier to participation in the session."

38. It was noted that this provision addressed only a situation in which procurement proceedings were conducted electronically and not one in which a combination of paper and electronic tenders were submitted. Accordingly, the Working Group decided that the word "solely" should be deleted from the proposed text.

39. Further, and in the light of the general accessibility standards that the Working Group had decided should be included in the Model Law, and the general provisions that the Working Group had requested the Secretariat to draft in this regard (see

paras. 25 and 32 above), the Working Group decided that the proviso contained at the end of the proposed text ("provided that all suppliers or contractors that have submitted tenders have access to the required technical and other means of communication used by the procuring entity and that those means do not present an unreasonable barrier to participation in the session") was redundant and should not be included.

40. The Working Group also decided that the text in square brackets (["such as on-line exchange of electronic messages, videoconferencing or similar technology"]) might be redundant once its consideration of the definitions section of the Model Law was complete. Accordingly, the Working Group did not wish to include that text in the draft provision at this stage.

41. Finally, it was observed that the draft provision should expressly state that the provision would be deemed to satisfy the requirements of article 33 (2) (the physical presence of suppliers).

42. The Working Group requested the Secretariat to provide drafting suggestions to reflect the above issues for its consideration at a future session.

2. Legal value of electronic documents used in or resulting from procurement proceedings (A/CN.9/WG.I/WP.34, paras. 44-58, and A/CN.9/WG.I/WP.34/Add.2, *articles 11 Record of procurement proceedings and 36 Acceptance of tender and entry into force of procurement contract*)

(a) Record of procurement proceedings

43. The Working Group recalled that article 11 of the UNCITRAL Model Procurement Law required the procuring entity to maintain a record of the procurement proceedings containing certain minimum information, and provided for that information to be made accessible. However, it was also noted that the Model Law itself did not prescribe the form of the record, and consequently did not prevent a procuring entity from maintaining the record in electronic form.

44. The Working Group then considered whether article 11 should be amended so as to address the form in which the record should be maintained, and whether provision regarding procedures for maintaining and accessing electronic records, including measures to ensure the integrity, accessibility and confidentiality of information should be made.

45. In accordance with its earlier decisions that information might be communicated or, in this case, stored, electronically (A/CN.9/568, paras. 23 and 37), the Working Group considered whether a paragraph addressing the conditions to be in place for a record to be maintained electronically should be included in the Model Law. In this regard, the Working Group considered the proposed additional article 11 (5), as contained in document A/CN.9/WG.I/WP.34/Add.2. The Working Group concluded that general provisions regarding electronic communications and dissemination of information should address such issues, and that including the form of the record in this article might be counterproductive and might dilute the force of the regulation of the content of the record. Nonetheless, the Working Group recognized that article 11 addressed the storage but not the dissemination of information, and therefore requested the Secretariat to consider how to include this broader concept

in the accessibility standards that it had requested the Secretariat to draft (see paras. 25 and 32 above).

46. In addition, it was observed that measures to ensure the integrity, accessibility and confidentiality of information would apply to any method of maintaining the procurement record, and therefore the proposed paragraph 6 contained in document A/CN.9/WG.I/WP.34/Add.2, should be added to the text of article 11, amended so as to refer to any method of storage of information. The proposed text for paragraph 6 was as follows:

> "The procurement regulations may establish procedures for maintaining and accessing electronic records, including measures to ensure the integrity, accessibility and, where appropriate, confidentiality of information."

47. The Working Group therefore requested the Secretariat to redraft the provision in terms that would apply to all storage methods.

(b) Acceptance of tender and entry into force of procurement contract

48. As regards the acceptance of tenders and entry into force of a procurement contract, the Working Group noted that article 36 (2)(a) and (b) of the UNCITRAL Model Procurement Law provided that the solicitation documents could require the supplier or contractor whose tender had been accepted to "sign a written procurement contract" conforming to the tender. The Working Group therefore considered whether:

(a) The UNCITRAL Model Procurement Law should expressly allow for the execution of a procurement contract by electronic means and, if so, whether it should also refer to the possibility for the enacting State to prescribe procedures for signing or authenticating a procurement contract concluded electronically; or

(b) The matter should be left for other legislation of the enacting States, in which case the Guide to Enactment might briefly set out the relevant issues.

49. In this regard, the Working Group considered proposed additions to the current article 36, as contained in document A/CN.9/WG.I/WP.34/Add.2, to be a new paragraph 7 to that article:

> "(7) Where a written procurement contract is required to be signed pursuant to this article, that requirement is met by the use of electronic communications or documents that are signed with an electronic signature that complies with any requirements established by the procuring entity."

50. The Working Group observed that this proposed provision might duplicate or even contradict laws governing electronic commerce, and it might not be necessary in any event given the accessibility standards that it had requested the Secretariat to draft (see paras. 25 and 32 above). In this regard, it was also observed that the Working Group had decided not to make further provisions regarding electronic communications that might be regulated in other laws unless the procurement context strictly required such provision. Accordingly, the Working Group decided that there was no need to include the proposed text, though it noted that the Guide to Enactment might usefully address the issues raised, as set out in para. 34 above.

C. Electronic (reverse) auctions (A/CN.9/WG.I/WP.35 and Add.1)

51. The Working Group based its consideration of the subject on a note by the Secretariat (A/CN.9/WG.I/WP.35 and Add.1). The Working Group was informed that an electronic reverse auction (ERA) could be defined as an online, real-time dynamic auction between a buying organization and a number of suppliers who competed against each other to win the contract by submitting successively lower priced bids during a scheduled time period.

52. The Working Group acknowledged that ERAs were increasingly used as a method of procurement in those countries where e-commerce had become a norm, but it also noted that the extent of regulation of ERAs as well as their use varied widely from jurisdiction to jurisdiction. The Working Group also heard that other international organizations, including the World Trade Organization and multilateral development banks, were considering possible measures bearing on ERAs, and that the recent European Union procurement directives made provision for ERAs. The need for harmonization between the regulations of these various organizations was highlighted.

53. The Working Group heard the recent experience of several delegations and observers in the practice of ERAs, and that improved value for money, efficient allocation of resources, and transparency in the process of awarding contracts through the use of ERAs had been observed. One observer also elucidated costs savings that had been achieved, such as transactional costs to the procuring entity and to suppliers, and costs internal to procuring entities (for example, personnel costs).

54. However, it was noted that the use of ERAs had also raised a number of concerns, in particular that such use: (a) did not guarantee the lowest responsible and responsive price and continued savings in subsequent ERAs; (b) could have hidden costs that might negate any savings realized from the auction process itself, notably opportunity costs from potential suppliers not competing in the market and additional running costs in the case of construction and services; (c) might encourage imprudent bidding and thus create a higher risk of abnormally low bids; (d) might not adequately handle non-price factors, such as quality of performance and buyer-supplier relationships; (e) might create conflicts of interest in market players, such as software firms and “market makers” or “e-market operators”, and fee-charging centralized purchasing agencies; (f) were more vulnerable than traditional bidding processes to collusive behaviour, often undetectable by procuring entities, especially in projects characterized by a small number of bidders, or in repeated bidding in which the same group of bidders participated; and (g) might have negative effects on the market, including an anti-competitive impact and a negative impact on technical innovations and innovative practices.

55. It was also noted that some commentators had observed that the cost savings identified did not persist in the medium to long term. Additionally, the Working Group was informed that the use of ERAs might operate so as to discourage or exclude the participation of small- and medium-sized enterprises in the procurement process, and therefore might come into conflict with other government economic policy objectives and further undermine long-term efficiency gains and costs savings through the negative effects on competition in the marketplace.

56. In addition, it was observed that certain general procurement principles set out in the Model Law, including those forbidding the disclosure of information on other bids, pre-closing negotiations or bid-shopping, may be contradictory with some inherent features of ERAs, and the Working Group was consequently invited to formulate its general position in this regard.

57. It was acknowledged that some of the above concerns, even where they were inherent features of ERAs, could be addressed through regulation aimed at promoting transparency, such as by applying conditions to the use of ERAs. It was stressed that the risks of collusive behaviour should be a focus of the Working Group in its deliberations, taking into account current considerations of other international organizations in this area.

58. It was observed that there were two systems of ERAs in current use: those that treated ERAs as a procurement method itself, and those that treated ERAs as an optional phase in other procurement methods. Further, there were two main types of ERAs: those based on the lowest price alone and those that permitted additional criteria to be auctioned. In some systems, the additional criteria were quantified using a mathematical formula that allowed each bidder to be ranked before and throughout the conduct of the ERA itself. It was commented that although the use of such formulas was beneficial and removed the risks of subjective assessments during the conduct of an ERA, over-reliance could be placed on such quantification methods.

59. The Working Group noted that many commentators had observed that ERAs were most successful for goods and services that could clearly be specified and whose non-price criteria could be quantified, and there was a general tendency in international practice to confine the use of ERAs to standardized goods and some simple types of services. Commodities, such as fuel, standard information technology equipment, office supplies and primary building products were quoted as examples of items appropriately procured by ERAs. Although it was noted that the procurement of works was usually excluded from ERAs, the Working Group did not consider that that such types of procurement should be excluded per se, in that the main issues were whether or not the specifications could be drafted with precision and the criteria to be subject to auction easily and objectively quantified.

60. The Working Group recalled its previous consideration that, with appropriate safeguards in place, ERAs could be used without compromising the principles of the Model Law and be beneficial to both procuring entities and suppliers (A/CN.9/568, para. 54). Views differed, however, as to whether provisions governing the use of ERAs should be included in the Model Law. Some delegations considered that it would be premature to take a decision on that issue in light of the noted limited experience with and regulation of ERAs. The prevailing view, however, taking account of the increasing use of ERAs and twin aims of harmonization and promotion of best practice, was that the revised Model Law should indeed contain provisions on ERAs.

61. It was suggested that, while the Model Law could contain a general enabling provision setting up key principles for the use of ERAs, the Guide to Enactment should address the use of ERAs in detail, in particular advantages and disadvantages, problems commonly arising and ways of dealing with them. Some delegates and observers noted the importance of guidelines from UNCITRAL to

ensure consistency in regulations of that subject in various jurisdictions. Concern was expressed that practices could otherwise be developed that would be divergent and inconsistent with the principles of the Model Law.

62. As to the contents of the general enabling provisions, it was noted that a key principle would be the conditions for use (and limitations to the use) of ERAs, such as those described in para. 59 above and as more fully set out in A/CN.9/WG.I/WP.35, paras. 20-25. As regards some such conditions, the Working Group agreed to confine ERAs under the Model Law to the procurement of clearly specified goods, works and services whose non-price criteria could be quantified. It was noted that paragraphs 8 and 20 of A/CN.9/WG.I/WP.35 could serve as a basis for defining the scope of application of ERAs.

63. Some delegations were of the view that, in conformity with the principle of technological neutrality aimed at ensuring the equality of suppliers (see para. 12 above), the Working Group should not limit itself to regulating ERAs but also should make provision for reverse auctions in their conventional, non-electronic form. It was observed that such auctions (as well as ERAs) could provide a platform for a dynamic procurement method. The Working Group acknowledged that reverse auctions in this form were used in public procurement in certain countries in one region. However, strong reservations were expressed as to whether the use of conventional reverse auctions constituted best practice that the Model Law should promote.

64. It was further observed that the aim of technological neutrality was subordinate to the main principles of the Model Law and, in this regard, that reverse auctions in their conventional form raised the risk of a number of improprieties in the procurement process, such as collusion between bidders, price-signalling and corruption, and that bids might not be prepared independently because reverse auctions in their conventional form did not preserve the anonymity of bidders. Furthermore, it was observed that the requirement of physical presence of bidders found in conventional reverse auctions effectively favoured bidders located in the vicinity of the place where the auctions were held and heightened the risks of collusion. Although it was acknowledged that the preservation of anonymity was only part of ensuring the integrity of the procurement process and was not a guarantee against collusion, it was generally considered that the risk of such collusion was likely to be lower in ERAs than other forms of reverse auctions.

65. It was recalled that at its sixth session, the Working Group had taken note of both the context in which the question of electronic reverse auctions had arisen (that is, the technological developments that had given rise to this procurement method) and the general policy objections that had led to the original decision by UNCITRAL not to address reverse auctions in the Model Law. At that session, the Working Group had therefore decided that only electronic reverse auctions should be acknowledged in a revised version of the Model Law (A/CN.9/568, para. 48). Although reluctance was expressed as regards the inclusion of any provisions on reverse auctions other than in electronic format in the Model Law, the Working Group agreed to take a final decision on the matter once it had before it draft provisions governing the use of ERAs.

66. As regards the ways of using ERAs in procurement proceedings (A/CN.9/WG.I/WP.35, paras. 26-27), that is, treating ERAs as a procurement method

itself or treating ERAs as an optional phase in other procurement methods, the general agreement was that it would be preferable to base the draft provisions on the use of ERAs as a procurement method itself.

67. The Working Group deferred its consideration of paragraphs 28-34 of A/CN.9/WG.I/WP.35 and A/CN.9/WG.I/WP.35/Add.1, and entrusted the Secretariat with drafting a general provision for inclusion in the Model Law enabling the use of ERAs as an optional procurement method. The point was made that the Working Group would need to consider the more detailed aspects of ERAs, such as conditions for their use and their modalities, so as to permit it to complete its consideration of the enabling provision and general principles for the use of ERAs. The view was also expressed that the approach to drafting of any provisions in the Model Law regulating ERAs should take account of the approach on the same subject taken by the parties currently revising the plurilateral Government Procurement Agreement of the World Trade Organization (GPA) as regards the use of ERAs.

D. Abnormally low tenders (A/CN.9/WG.I/WP.36)

68. The Working Group based its consideration of the subject on a note by the Secretariat (A/CN.9/WG.I/WP.36). The Working Group recalled that in 1989, the then Procurement Working Group had been informed that an "abnormally low tender" ("ALT") involved a risk that "the tenderer would be unlikely to be able to perform the contract at [the tender price] … or could do so using only substandard workmanship or materials by suffering a loss … it could also indicate collusion between the tenderers" (A/CN.9/WG.V/WP.22). The Working Group at the current session underscored that the root of the issue was this performance risk and in addition noted that ALTs might compromise the aims of the Model Law, including economy and efficiency in procurement, the promotion of competition among suppliers and contractors, and the fair and equitable treatment of all suppliers and contractors.

69. In this regard, the Working Group noted that the Model Law operated on the basis of a price-based and not a cost-based system, and it was noted that the price-based system was in any event the only practicable one. Accordingly, a procuring entity would be required to assess a potential performance risk using prices as a guide to costs, and the resultant analysis would of necessity be an estimate. It was also recalled that a low price per se would not necessarily indicate a performance risk.

70. The Working Group noted that there was a variety of reasons why ALTs might be submitted, including imprecise or ambiguous specifications, errors in evaluating tender documentation, inadequate time given to suppliers to prepare tenders, suppliers' errors in assessing their own costs and inadvertent below-cost pricing during the auction process, and that these reasons might lead to the unintentional submission of ALTs. On the other hand, it was also acknowledged that anti-competitive behaviour in the marketplace, such as predatory pricing as described in paragraph 12 of A/CN.9/WG.1/WP.36, might also lead to the intentional submission of an ALT (though such anti-competitive behaviour was normally controlled and regulated in competition or criminal law). The Working Group was also advised that the General Assembly of the United Nations had adopted a "Set of Multilaterally

Agreed Equitable Principles and Rules for the Control of Restrictive Practices" (A/RES/35/63, 5 December 1980). It was further observed that intentional ALTs might also arise if suppliers sought a contract at any price, for example, if they were seeking to secure credit and avoid insolvency.

71. The Working Group noted that the performance risks arising from the acceptance of an ALT could have highly undesirable consequences during the contract phase, and that solutions available at that stage, which included termination of the contract or seeking additional guarantees, might only be invoked in extreme cases (see also A/CN.9/WG.1/WP.36, para. 15). Thus, the Working Group concluded, the focus of the Model Law should be on the identification of possible ALTs so that their submission could be avoided.

72. The Working Group took note of the results of the comparative study on current legislative provisions in national and international systems on the topic of ALTs, details of which were found in paragraphs 26 to 61 of A/CN.9/WG.I/WP.36. In summary, the Working Group noted that there was little legislation prohibiting the submission of ALTS per se, but that various analytical techniques (focusing on prices and risks) were more commonly employed to identify and address them. In this regard, it was stressed that the aim of such analyses was to establish whether prices were "realistic" in the light of market conditions regarding prices and, where such information might be available, costs. Further, it was noted that many systems enabled procuring entities to take steps to investigate suspected ALTs and, indeed, required such steps to be taken before any ALT could be rejected as such, a procedure known as a price justification procedure. For example, in the European Union, article 55 of Directive 2004/18/EC stated that a procuring entity, before it could reject a possible ALT, must request details in writing of the relevant constituent elements of the tender concerned.

73. The Working Group was also informed that, in some jurisdictions, the risks of ALTs were also addressed by legislation that provided for suppliers to be held accountable for their tenders or other bids. In other words, suppliers could be required to complete the contract for the price stipulated in the initial bid, and unjustified requests for variations to that amount would be rejected. Thus the supplier would bear the risk of the submission of an ALT.

74. The Working Group recalled that the Model Law did not expressly address ALTs, and therefore a procuring entity would not be able to reject an ALT even where identified, though a procuring entity could reject a supplier or tender that was considered unqualified or unresponsive under the current provisions of articles 6 and 34, respectively. In this regard, it was noted that article 6 of the Model Law provided that the qualifications of suppliers were to be assessed on the basis of (inter alia) their professional, managerial and technical qualifications and competence, their resources and solvency, and that their directors were not subject to criminal investigation or prosecution. Under article 34 (3) of the Model Law, the procuring entity was required to reject any tenders that were non-responsive or if the supplier concerned was not qualified.

75. Although it was acknowledged that these provisions might enable possible ALTs to be addressed, it was noted that there was no opportunity afforded to the procuring entity to investigate a possible ALT using a price justification procedure. In this regard, the Working Group noted that article 34 (1)(a) of the Model Law permitted

the procuring entity to seek clarification of a tender, but according to the Guide to Enactment the provision "[was] not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or from other errors not apparent on the face of the tender" (A/CN.9/WG.1/WP.36, para. 23, citing A/CN.9/375).

76. Accordingly, the Working Group decided that the Model Law should be amended so as to allow procuring entities to investigate possible ALTs through a price justification procedure. The Working Group also expressed the view that appropriate further guidance should be provided in the Guide to Enactment.

77. In this regard, it was stated that the Model Law should address ALTs, regardless of whether they were intentional or unintentional, but that intentional ALTs were more appropriately regulated by competition and, perhaps, criminal law. The Working Group also heard the view that it was important not to introduce subjectivity into the assessment of possible ALTs, and therefore the objective structure of the current text of article 34 of the Model Law should not be compromised in the revisions to be made.

78. The Working Group expressed the view that providing a definition of an ALT in the text of the Model Law might be unnecessary and noted that the new European Union Directives did not provide such a definition.

79. The Working Group requested the Secretariat to formulate draft provisions for its consideration at a future session, taking into account a proposal from the Working Group that a new provision could be added as article 34 (3)(e) of the Model Law or elsewhere in the text to the effect that if a tender price were abnormally low and raised justified concerns as to the ability of the tenderer to perform the contract, the procuring entity should be authorized to reject the tender. It was noted that any rejection in such cases would be subject to two qualifications: first, that the tenderer had been given an opportunity to explain its prices through a price justification procedure and, second, that justification for the rejection should be included in the record of the procurement proceedings, such that any challenge to the rejection could be considered in the light of that justification. The Working Group further requested the Secretariat to review article XIII.4 of the GPA (which recognized the right of the procuring entity to ensure via enquiry of suppliers that they could comply with the conditions of participation and were capable of fulfilling the terms of the contract) and any proposed revised text, in order to take account of the approach set out in those provisions.

80. The Working Group also took note of the suggestion contained in paragraph 80 of A/CN.9/WG.1/WP.36 that article 34 (4)(b) of the Model Law could be amended to provide that the successful tender would be that submitted by a supplier that had been determined to be fully qualified to undertake the contract, and whose tender was the lowest responsive tender. The Working Group did not consider that this provision alone would be sufficient to address the issues of ALTs.

81. The Working Group also requested the Secretariat to draft text that would enable the procuring entity to conduct a price justification procedure, in addition to removing the commentary in the Guide regarding article 34 (1)(a) of the Model Law that prevented that provision from being used to seek price justification in the submission of suspected ALTs. The Working Group did not come to a firm

conclusion as to where that provision should be located, but agreed to revisit the issue once revised draft provisions were before it for consideration.

82. The Working Group generally agreed that the items set out in paragraph 76 of A/CN.9/WG.1/WP.36 might form the basis of further guidance to be provided in the Guide to Enactment, and that the Model Law's current provisions concerning the evaluation of tenders and qualification criteria should be amplified in the Guide to Enactment so as to aid the identification of ALTs, the assessment of performance risk and subsequent action to address these issues.