



General Assembly

Distr.: General
21 December 2010

Original: English

**United Nations Commission
on International Trade Law**
Forty-fourth session
Vienna, 27 June-15 July 2011

Draft revised text of the Model Law

Note by the Secretariat

Addendum

This note sets out a proposal for articles 14-25 of chapter I (General provisions).



CHAPTER I. GENERAL PROVISIONS
(continued)

Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for preselection or for presenting submissions

(1) The manner, place and deadline for presenting applications to pre-qualify or for preselection shall be set out in the invitation to pre-qualify or to preselection and the pre-qualification or preselection documents, as applicable. The manner, place and deadline for presenting submissions shall be set out in the solicitation documents.

(2) Deadlines for presenting applications to pre-qualify or for preselection or for presenting submissions shall be expressed as a specific date and time and shall allow sufficient time for suppliers or contractors to prepare and present their applications or submissions, taking into account the reasonable needs of the procuring entity.

(3) If the procuring entity issues a clarification or modification of the pre-qualification, preselection or solicitation documents, it shall, prior to applicable deadline for presenting applications to pre-qualify or for preselection or for presenting submissions, extend the deadline if necessary or as required under article 15 (3) of this Law, in order to afford suppliers or contractors sufficient time to take the clarification or modification into account in their applications or submissions.

(4) The procuring entity may, in its absolute discretion, prior to a deadline for presenting applications to pre-qualify or for preselection or for presenting submissions, extend the applicable deadline if it is not possible for one or more suppliers or contractors to present their applications or submissions by the deadline initially stipulated, because of any circumstance beyond their control.

(5) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the pre-qualification, preselection or solicitation documents.

Article 15. Clarifications and modifications of solicitation documents

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting submissions. The procuring entity shall respond within such time as will enable the supplier or contractor to present its submission in timely fashion and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for presenting submissions, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If as a result of a clarification or modification issued in accordance with this article, the information published when first soliciting the participation of suppliers or contractors in the procurement proceedings becomes materially inaccurate, the procuring entity shall cause the amended information to be published in the same manner and place in which the original information was published, and shall extend the deadline for presentation of submissions as provided for in article 14 (3) of this Law.

(4) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their submissions.

Article 16. Tender securities

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a tender security:

(a) The requirement shall apply to all suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity. In cases of domestic procurement, the solicitation documents may in addition stipulate that the tender security shall be issued by an issuer in this State;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an issuer in this State if the tender security and the issuer otherwise conform to requirements set out in the solicitation documents, unless:

(i) The acceptance by the procuring entity of such a tender security would be in violation of a law of this State; or

(ii) The procuring entity in cases of domestic procurement requires a tender security to be issued by an issuer in this State;

(d) Prior to presenting a submission, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or has otherwise ceased to be creditworthy;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security; any requirement that refers directly or indirectly to the conduct of the supplier or contractor presenting the submission may relate only to:

(i) Withdrawal or modification of the submission after the deadline for presenting submissions, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign a procurement contract if so required by the solicitation documents; and

(iii) Failure to provide a required security for the performance of the contract after the successful submission has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall promptly return, or procure the return of, the security document after the earliest of the following events:

(a) The expiry of the tender security;

(b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) The cancellation of the procurement;

(d) The withdrawal of a submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

Article 17. Pre-qualification proceedings

(1) The procuring entity may engage in pre-qualification proceedings with a view to identifying, prior to solicitation, suppliers and contractors that are qualified. The provisions of article 9 of this Law shall apply to pre-qualification proceedings.

(2) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to pre-qualify is to be published). Unless decided otherwise by the procuring entity in the circumstances referred to in article 32 (4) of this Law, the invitation to pre-qualify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

- (3) The invitation to pre-qualify shall include the following information:
- (a) The name and address of the procuring entity;
 - (b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into in the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;
 - (c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article 9 of this Law;
 - (d) A declaration as required by article 8 of this Law;
 - (e) The means of obtaining the pre-qualification documents and the place where they may be obtained;
 - (f) The price, if any, to be charged by the procuring entity for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents;
 - (g) If a price is charged, the means of payment for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents, and the currency of payment;
 - (h) The language or languages in which the pre-qualification documents and, subsequent to pre-qualification, the solicitation documents are available;
 - (i) The manner, place and deadline for presenting applications to pre-qualify and, if already known, the manner, place and deadline for presenting submissions, in conformity with article 14 of this Law.
- (4) The procuring entity shall provide a set of pre-qualification documents to each supplier or contractor that requests them in accordance with the invitation to pre-qualify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the pre-qualification documents shall reflect only the cost of providing them to suppliers or contractors.
- (5) The pre-qualification documents shall include the following information:
- (a) Instructions for preparing and presenting pre-qualification applications;
 - (b) Any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;
 - (c) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the pre-qualification proceedings, without the intervention of an intermediary;
 - (d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the pre-qualification proceedings and the place where these laws and regulations may be found;

(e) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of applications to pre-qualify and to the pre-qualification proceedings.

(6) The procuring entity shall respond to any request by a supplier or contractor for clarification of the pre-qualification documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting applications to pre-qualify. The procuring entity shall respond within such time as will enable the supplier or contractor to present its application to pre-qualify in timely fashion. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity has provided the pre-qualification documents.

(7) The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set out in the invitation to pre-qualify and in the pre-qualification documents.

(8) Only suppliers or contractors that have been pre-qualified are entitled to participate further in the procurement proceedings.

(9) The procuring entity shall promptly notify each supplier or contractor presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any member of the public, upon request, the names of all suppliers or contractors that have been pre-qualified.

(10) The procuring entity shall promptly communicate to each supplier or contractor that has not been pre-qualified the reasons therefor.

Article 18. Cancellation of the procurement

(1) The procuring entity may cancel the procurement at any time prior to the acceptance of the successful submission and, after the successful submission was accepted, in the circumstances referred to in article 21 (8) of this Law. The procuring entity shall not open any tenders or proposals after taking a decision to cancel the procurement.

(2) The decision of the procuring entity to cancel the procurement and reasons for the decision shall be included in the record of the procurement proceedings and promptly communicated to any supplier or contractor that presented a submission. The procuring entity shall in addition promptly publish a notice of the cancellation of the procurement in the same manner and place in which the original information regarding the procurement proceedings was published, and return any tenders or proposals that remain unopened at the time of the decision to the suppliers or contractors that presented them.

(3) Unless the cancellation of the procurement was a consequence of irresponsible or dilatory conduct on the part of the procuring entity, the procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have presented submissions.

Article 19. Rejection of abnormally low submissions

(1) The procuring entity may reject a submission if the procuring entity has determined that the price in combination with other constituent elements of the submission is abnormally low in relation to the subject matter of the procurement and raises concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

(a) The procuring entity has requested in writing from the supplier or contractor details of the submission that gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;

(b) The procuring entity has taken account of any information provided by the supplier or contractor following this request, and the information included in the submission, but continues, on the basis of all such information, to hold concerns; and

(c) The procuring entity has recorded the concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a submission in accordance with this article and reasons for the decision shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

Article 20. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest

(1) A procuring entity shall exclude a supplier or contractor from the procurement proceedings if:

(a) The supplier or contractor offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, so as to influence an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings; or

(b) The supplier or contractor has an unfair competitive advantage or a conflict of interest in violation of provisions of law of this State.

(2) Any decision of the procuring entity to exclude a supplier or contractor from the procurement proceedings under this article and the reasons therefor shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

Article 21. Acceptance of the successful submission and entry into force of the procurement contract

- (1) The procuring entity shall accept the successful submission unless:
 - (a) The supplier or contractor presenting the successful submission is disqualified in accordance with article 9 of this Law; or
 - (b) The procurement is cancelled in accordance with article 18 (1) of this Law; or
 - (c) The submission found successful at the end of evaluation is rejected as abnormally low under article 19 of this Law; or
 - (d) The supplier or contractor presenting the successful submission is excluded from the procurement proceedings on the grounds specified in article 20 of this Law.
- (2) The procuring entity shall promptly notify each supplier or contractor that presented submissions of its decision to accept the successful submission at the end of the standstill period. The notice shall contain, at a minimum, the following information:
 - (a) The name and address of the supplier or contractor presenting the successful submission;
 - (b) The contract price or, where the successful submission was ascertained on the basis of price and other criteria, the contract price and a summary of other characteristics and relative advantages of the successful submission; and
 - (c) The duration of the standstill period as set out in the solicitation documents, which shall be [at least] ... working days (the enacting State specifies the period of time) [unless the procurement regulations provide otherwise] and shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors that presented submissions.
- (3) Paragraph (2) of this article shall not apply to awards of procurement contracts:
 - (a) Under a framework agreement procedure without second-stage competition;
 - (b) Where the contract price is less than ... (the enacting State specifies a threshold); or
 - (c) Where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period. The decision of the procuring entity that such urgent considerations exist and the reasons for the decision shall be included in the record of the procurement proceedings.
- (4) Upon expiry of the standstill period, or where there is none, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission, unless the [name of court or courts] or [name of the relevant organ designated by the enacting State] orders otherwise.

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- (5) Unless a written procurement contract and/or approval by another authority is/are required, a procurement contract in accordance with the terms and conditions of the successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in effect.
- (6) Where the solicitation documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:
- (a) The procuring entity and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;
- (b) Unless the solicitation documents stipulate that the procurement contract is subject to approval by another authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity. Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.
- (7) Where the solicitation documents stipulate that the procurement contract is subject to approval by another authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance 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 submissions specified in the solicitation documents or the period of effectiveness of the tender security required under article 16 of this Law.
- (8) If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract as required, or fails to provide any required security for the performance of the contract, the procuring entity may either cancel the procurement, or may decide to select the next successful submission from among those remaining in effect, in accordance with the criteria and procedures set out in this Law and in the solicitation documents. In the latter case, the provisions of this article shall apply *mutatis mutandis* to such submission.
- (9) Notices under this article are dispatched when they are promptly and properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by any reliable means specified in accordance with article 7 of this Law.
- (10) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given promptly to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

Article 22. Public notice of awards of procurement contract and framework agreement

- (1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name(s) of the supplier(s) or contractor(s) to which the procurement contract or the framework agreement was awarded and, in the case of procurement contracts, the contract price.
- (2) Paragraph (1) is not applicable to awards where the contract price is less than ... (the enacting State specifies a threshold). The procuring entity shall publish a cumulative notice of such awards from time to time but at least once a year.
- (3) The procurement regulations shall provide for the manner of publication of the notices required under this article.

Article 23. Confidentiality

- (1) In its communications with suppliers or contractors or the public, the procuring entity shall not disclose any information if its non-disclosure is necessary for the protection of essential security interests of the State or if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition, unless disclosure of that information is ordered by the [name of court or courts] or [name of the relevant organ designated by the enacting State] and in such case, subject to the conditions of such an order.
- (2) Other than when providing or publishing information pursuant to articles 21 (2) and (10), 22, 24 and 41 of this Law, the procuring entity shall treat applications to pre-qualify or for preselection and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors or to any other person not authorized to have access to this type of information.
- (3) Any discussions, communications, negotiations and dialogue between the procuring entity and a supplier or contractor pursuant to articles 47 (3) and 48 to 50 of this Law shall be confidential. Unless required by law or ordered by the [name of court or courts] or [name of the relevant organ designated by the enacting State] or permitted in the solicitation documents, no party to any discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogue without the consent of the other party.
- (4) Subject to the requirements in paragraph (1) of this article, in procurement involving classified information, the procuring entity may:
 - (a) Impose on suppliers or contractors requirements aimed at protecting classified information; and
 - (b) Demand that suppliers or contractors ensure compliance with requirements aimed at protecting classified information by their subcontractors.

Article 24. Documentary record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings that includes the following information:

(a) A brief description of the subject matter of the procurement;

(b) The names and addresses of suppliers or contractors that presented submissions, and the name(s) and address(es) of the supplier(s) or contractor(s) with which the procurement contract is entered into and the contract price (in the case of a framework agreement procedure, in addition the name(s) and address(es) of the supplier(s) or contractor(s) with which the framework agreement is concluded);

(c) A statement of the reasons and circumstances relied upon by the procuring entity for the decision as regards means of communication and any requirement of form;

(d) In the procurement proceedings in which the procuring entity, in accordance with article 8 of this Law, limits participation of suppliers or contractors, a statement of the reasons and circumstances relied upon by the procuring entity for imposing the limitation;

(e) If the procuring entity uses a method of procurement other than open tendering, a statement of the reasons and circumstances relied upon by the procuring entity to justify the use of such other method;

(f) In the case of procurement by means of an auction or involving an auction as a phase preceding the award of the procurement contract, a statement of the reasons and circumstances relied upon by the procuring entity for the use of the auction, and information about the date and time of the opening and closing of the auction;

(g) In the case of a framework agreement procedure, a statement of the reasons and circumstances upon which it relied to justify the use of a framework agreement procedure and the type of framework agreement selected;

(h) If the procurement is cancelled pursuant to article 18 (1) of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision to cancel the procurement;

(i) If any socio-economic policies were considered in the procurement proceedings, details of such policies and the manner in which they were applied;

(j) If no standstill period was applied, a statement of the reasons and circumstances relied upon by the procuring entity in deciding not to apply a standstill period;

(k) In the case of a challenge or appeal under chapter VIII of this Law, a copy of the application for reconsideration or review and the appeal, as applicable, and of all decisions taken in the relevant challenge or appeal proceedings or both and the reasons therefor;

(l) A summary of any requests for clarification of the pre-qualification or preselection documents, if any, or solicitation documents, the responses thereto, as well as a summary of any modification of those documents;

(m) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented applications to pre-qualify or for preselection, if any, or submissions;

(n) If a submission is rejected pursuant to article 19 of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;

(o) If a supplier or contractor is excluded from the procurement proceedings pursuant to article 20 of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;

(p) A copy of the notice of the standstill period given in accordance with article 21 (2) of this Law;

(q) If the procurement proceedings resulted in the award of a procurement contract in accordance with article 21 (8) of this Law, a statement to that effect and of the reasons therefor;

(r) The contract price and other principal terms and conditions of the procurement contract; where the written procurement contract has been concluded, a copy thereof. (In the case of a framework agreement procedure, in addition a summary of the principal terms and conditions of the framework agreement or copy of any written framework agreement concluded);

(s) The price, or the basis for determining the price, and a summary of the other principal terms and conditions, of each submission;

(t) A summary of the evaluation of submissions, including the application of any margin of preference pursuant to article 11 (4) (b) of this Law, and the reasons and circumstances on which the procuring entity relied to justify any rejection of bids presented during the auction;

(u) Where exemptions from disclosure of information were invoked under article 23 (1) or 68 of this Law, the reasons and circumstances relied upon in invoking them;

(v) In procurement involving classified information, any requirements imposed on suppliers or contractors for the protection of classified information pursuant to article 23 (4) of this Law; and

(w) Other information required to be included in the record in accordance with the provisions of this Law or the procurement regulations.

(2) The portion of the record referred to in subparagraphs (a) to (k) of paragraph (1) of this article shall, on request, be made available to any person after the successful submission has been accepted or the procurement has been cancelled.

(3) Except as disclosed pursuant to article 41 (3) of this Law, the portion of the record referred to in subparagraphs (p) to (t) of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that presented submissions after the decision on acceptance of the successful submission or on cancellation of the procurement has become known to them. Disclosure of the portion of the record referred to in subparagraphs (s) and (t) may be ordered at an earlier stage only by the [name of court or courts] or [name of the relevant organ designated by the enacting State].

(4) Except when ordered to do so by the [name of court or courts] or [name of the relevant organ designated by the enacting State], and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information from the record of the procurement proceedings if its non-disclosure is necessary for the protection of essential security interests of the State or if its disclosure would be contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition;

(b) Information relating to the examination and evaluation of submissions, and submission prices, other than the summary referred to in subparagraph (t) of paragraph (1) of this article.

(5) The procurement entity shall record, file and preserve all documents relating to the procurement proceedings, according to procurement regulations or other provisions of law of this State.

Article 25. Code of conduct

A code of conduct for officers or employees of procuring entities shall be enacted. It shall address, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements. The code of conduct so enacted shall be promptly made accessible to the public and systematically maintained.