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Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials for the use of electronic reverse auctions in public procurement

Note by the Secretariat

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 65 of document A/CN.9/WG.I/WP.49, which is before the Working Group at its eleventh session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments, including the use of electronic reverse auctions (“ERAs”), in public procurement.

2. Such use was included in the topics before the Working Group at its sixth to tenth sessions. At its tenth session, the Working Group requested the Secretariat to revise the relevant drafting materials that it had considered at the session.¹ This note has been prepared pursuant to that request, and sets out the drafting materials on ERAs, revised to take account of the Working Group’s deliberations at its tenth session.²

II. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law

A. Location of draft provisions

3. At its tenth session, the Working Group agreed on a preliminary basis to include provisions stipulating the conditions for the use of ERAs in chapter II of the Model Law (which listed methods of procurement and their conditions for use). Provisions on procedural matters of ERAs, it was agreed, would be included elsewhere, such as in chapter V of the Model Law (which described procedures for alternative methods of procurement). This location, it was observed, would permit ERAs to be employed not only on a stand-alone basis, but also in conjunction with various procurement methods, such as tendering or request for quotations, and procurement techniques that may be envisaged by the revised Model Law, such as framework agreements.³

4. If the Working Group decides to keep the provisions relating to ERAs in the locations agreed to on a preliminary basis at the tenth session, the Working Group may wish to consider splitting each of the two relevant chapters into sections: the first section would deal with procurement methods while the other would deal with procurement mechanisms, such as ERAs. Consequentially, the titles of the amended chapters should include not only a reference to procurement methods but also to procurement mechanisms (the Working Group may wish to consider in due course which generic term it should apply to procurement mechanisms, such as ERAs, framework agreements, suppliers’ lists and dynamic purchasing systems, which are not procurement methods).

5. Following this approach, draft provisions on conditions for the use of ERAs are presented in article 22 bis, proposed to be included in section II of an expanded

¹ A/CN.9/615, para. 11.

² Ibid., paras. 37 to 71.

³ Ibid., paras. 37-38, 50, 59 and 64.

chapter II. Draft provisions on procedural aspects of ERAs are presented in draft articles 51 bis to 51 septies,⁴ proposed to be included in a section of an expanded chapter V.

B. Conditions for the use of electronic reverse auctions: draft article 22 bis

1. Proposed draft text for the revised Model Law

6. The draft article 22 bis below draws on the text of a draft article on conditions for the use of electronic reverse auctions that was before the Working Group at its tenth session, and reflects amendments suggested to be made thereto:⁵

“Article 22 bis. Conditions for use of electronic reverse auctions

“A procuring entity may engage in procurement by means of an electronic reverse auction in accordance with articles [51 bis to 51 septies] in the following circumstances:

[(a) Where it is feasible for the procuring entity to formulate detailed and precise specifications for the goods [or construction or, in the case of services, to identify their detailed and precise characteristics]];

(b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction such that effective competition is ensured;

(c) Where the procurement concerns goods[, construction or services] that are generally available on the market[, provided that the construction or services are of a simple nature]; and

(d) Where the price is the only criterion to be used in determining the successful bid. [The procurement regulations may establish conditions for the use of electronic reverse auctions in procurement where other criteria [that can be expressed in monetary terms and can be evaluated automatically through the auction] may be used in determining the successful bid.]”

Commentary

7. Subparagraph (a) is placed in square brackets, to reflect (as noted at the Working Group’s tenth session) that text may be superfluous in the light of subparagraph (c) (compliance with the conditions of the latter, it was said, necessarily involved compliance with the requirements of subparagraph (a)).⁶ Other changes have been made to that paragraph to align it with the wording of similar provisions of the Model Law.⁷

⁴ Although the Working Group, at its tenth session, anticipated that the provisions relating to procedural aspects of ERAs, which were presented at that session in two articles (47 bis and 47 ter), would be merged in one composite article, it was not feasible to comply with that request due to the length of the provisions and distinct matters and stages of ERA that they address. *Ibid.*, paras. 48, 57 and 63.

⁵ *Ibid.*, paras. 41, 45, 51 and 52.

⁶ *Ibid.*, para. 42.

⁷ See, for example, articles 19 (1)(a) and 38 (g) of the Model Law, where the reference is made to

8. The references to “construction or services” throughout the text above, and the provision in subparagraph (c) linked to it, were put in square brackets as was agreed at the Working Group’s tenth session.⁸ The understanding is that the square brackets will remain in the final text and the Guide will explain that an enacting State may decide to delete the words contained in the square brackets and thus restrict the use of ERAs to procurement of goods alone.

9. With reference to the square brackets in subparagraph (d), the Working Group’s attention is drawn to the lack of common understanding in the Working Group at its tenth session as regards whether ERAs are to be used in procurement where all criteria for determining a successful bid can be expressed in monetary terms and automatically evaluated through the auction,⁹ or also in a more complex procurement, where not all award criteria are evaluated automatically through the auction. The Working Group considered allowing any type of ERAs in the long term, so long as transparency and objectivity in the process are preserved.¹⁰

10. Subparagraph (d), as drafted above, allows an enacting State: (i) to restrict the use of ERAs to procurement where price is the only award criterion; or (ii) to allow the use of ERAs in procurement where other award criteria may be used, provided that all award criteria can be quantified and automatically evaluated through the auction; or (iii) to allow ERAs in procurement where pre-auction evaluation of non-quantifiable criteria may take place. In the latter case, the results of such an evaluation are to be factored in the auction through a mathematical formula that allows automatic re-ranking of bidders on the basis of the results of the pre-auction evaluation and values presented through the auction.

11. All these options would be available to an enacting State if both pairs of square brackets remain in the final text. The Guide would provide guidance to the enacting State on each option, in particular pointing out: (i) that under the provisions ERAs are mainly intended for the use procurement where price is the only award criterion; (ii) benefits and risks arising from each option; and (iii) that the choice will depend on the experience with ERAs in any particular jurisdiction. Alternatively, particularly considering the longer-term view, some options could be excluded from the Model Law text at this stage, but discussed in the Guide as possible future additions where appropriate in the light of experience gained in the operation of ERAs.

12. Other provisions on ERAs in this note were drafted with a view of accommodating the use of ERAs in all three situations described in paragraph 10 above.

2. Proposed draft text for the revised Guide

13. At its tenth session, the Working Group made a number of suggestions for revision of the Guide text that would accompany the Model Law provisions on the conditions for the use of ERAs.¹¹ The revised text for the Guide that will reflect

characteristics rather than specifications, of services.

⁸ A/CN.9/615, para. 41 (i).

⁹ Ibid., paras. 44, 45, 51 and 55.

¹⁰ Ibid., para. 55.

¹¹ Ibid., paras. 46 and 47.

those suggestions as well as the suggestions made at the Working Group's eighth and ninth sessions¹² will be prepared and presented to the Working Group at a future session, taking account of discussions of the draft article above. The new text intends to replace in entirety the texts in documents A/CN.9/WG.I/WP.40 (the text following paragraph 17) and 43 (the text following paragraph 35) that were before the Working Group at its eighth and ninth sessions, respectively.

C. Procedures in the pre-auction and auction stages: draft articles 51 bis to septies

1. Proposed draft texts for the revised Model Law

14. The following draft articles 51 bis to septies reflect, with some exceptions identified below, amendments suggested to be made to draft provisions on procedural aspects of ERAs at the Working Group's tenth session.¹³

“Article 51 bis. General provisions

An electronic reverse auction may be used as a stand-alone electronic reverse auction or in procurement by means of restricted tendering, competitive negotiation and request for quotations proceedings [or on reopening competition under a framework agreement and dynamic purchasing systems], when the procuring entity decides that the award of the procurement contract shall be preceded by an electronic reverse auction, provided that the conditions for the use of an electronic reverse auction stipulated in article 22 bis are met.”

Commentary to draft article 51 bis above

15. In the draft article, references are made to procurement methods where it may be appropriate, in the light of the conditions for the use of ERAs set out in draft article 22 bis above, and of the existing provisions of the Model Law, to use ERAs as an optional phase preceding the award of the procurement contract.

16. For instance, the requirements in draft article 22 bis (a) and (c) prevent the use of ERAs in two-stage tendering, request for proposals and the principal method for procurement of services. According to the Model Law provisions on conditions for use of those procurement methods and on their procedures, each of these procurement methods is mainly intended for use in procurement of complex goods, construction or services.¹⁴ Single-source procurement is naturally excluded from the scope of draft article 51 bis.

17. In other procurement methods, such as restricted tendering, competitive negotiation and request for quotations, the use of ERAs may be envisaged, provided that the conditions for their use set out in draft article 22 bis are met. In addition, the use of ERAs may be appropriate in framework agreements and dynamic

¹² For ease of reference, most of them have been listed in paragraphs 11 to 16 of document A/CN.9/WG.I/WP.48 that was before the Working Group at its tenth session.

¹³ A/CN.9/615, paras. 48-63 and 67.

¹⁴ See article 18 (3) and chapter IV of the Model Law as relevant to the principal method for procurement of services; and articles 19 (1), 46 and 48 of the Model Law as relevant to two-stage tendering and request for proposals.

purchasing systems upon (re)opening competition, as for example envisaged in European Union Directive 2004/18/EC, article 54 (2). Inclusion of references to these procurement mechanisms in draft article 51 bis above is indicative and without prejudice to the Working Group's deliberations on these procurement mechanisms (see A/CN.9/WG.I/WP.52 and Add.1).

18. No reference in draft article above is made to chapter III (Tendering proceedings). This is because one of the variations of stand-alone ERAs under draft article 51 ter below would constitute the use of ERAs in chapter III tendering proceedings.

“Article 51 ter. Pre-auction procedures in stand-alone electronic reverse auctions

(1) The procuring entity shall cause a notice of the electronic reverse auction to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(2) The notice shall include, at a minimum, the following:

(a) Information referred to in article 25 (1)(a), (d) and (e), and article 27 (d), (f), (h) to (j) and (t) to (y);

(b)

Alternative A

[The statement that price is the only criterion to be used by the procuring entity in determining the successful bid;]

Alternative B

[The criteria to be used by the procuring entity in determining the successful bid, provided that such criteria can be expressed in monetary terms and can be evaluated automatically through the electronic reverse auction, and, where applicable, any mathematical formula to be used in the auction that will automatically rank and re-rank suppliers or contractors participating in the auction (the “bidders”) on the basis of the values submitted through the auction;]

Alternative C

[The criteria to be used by the procuring entity in determining the successful bid and, where applicable, any mathematical formula to be used in the auction that will automatically rank and re-rank suppliers or contractors participating in the auction (the “bidders”) on the basis of the results of the pre-auction evaluation, if any, and values submitted through the auction. If not all award criteria are subject of automatic evaluation through the electronic reverse auction, in addition information about:

(i) Features, the values for which are subject of evaluation through the electronic reverse auction, provided that such features can be expressed in monetary terms and can be evaluated automatically through the auction; and

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- (ii) Features, the values for which are subject of evaluation before the auction and the relative weight assigned to such features in the evaluation procedure;]
 - (c) Whether any limitation on the number of suppliers or contractors to be invited to the auction is imposed, and if so, such number and the criteria and procedure that will be followed in selecting that number of suppliers or contractors;
 - (d) Whether prequalification is required and, if so, information referred to in article 25 (2)(a) to (e);
 - (e) Whether submission of initial bids is required and, if so:
 - (i) information referred to in articles 25 (f) to (j);
 - (ii) whether initial bids are to be submitted for assessment of their responsiveness to the requirements specified in the notice of the auction or in addition for their full or partial evaluation; and
 - (iii) if evaluation is involved, procedures and criteria to be used in such evaluation;
 - (f) The [website or other electronic] address at which the electronic reverse auction will be held, and information about the electronic equipment being used and technical specifications for connection;
 - (g) The manner and, if already known, deadline by which the suppliers and contractors shall register to participate in the auction;
 - (h) If already known, the date and time of the opening and criteria governing the closing of the auction;
 - (i) If already known, whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage);
 - (j) The rules for the conduct of the electronic reverse auction;
 - (k) Unless set out in the rules for the conduct of the electronic reverse auction, the information that will be made available to the bidders in the course of the auction and, where appropriate, how and when it will be made available; and
 - (l) Unless set out in the rules for the conduct of the electronic reverse auction, the conditions under which the bidders will be able to bid and, in particular, any minimum differences in price or other features that must be improved in any new submission during the auction.
- (3) Except as provided for in paragraphs (4) to (6) of this article, the notice of the electronic reverse auction shall serve as an invitation to participate in the auction and shall be complete in all respects, including as regards information specified in paragraph (7) of this article.
- (4) Where a limitation on the number of suppliers or contractors to be invited to the auction is imposed, the procuring entity shall:

- (a) Select suppliers or contractors corresponding to the number and in accordance with the criteria and procedure specified in the notice of the electronic reverse auction; and
 - (b) Send an invitation to prequalify or to submit initial bids or to participate in the auction, as the case may be, individually and simultaneously to each selected supplier or contractor.
- (5) Where prequalification is required, the procuring entity shall:
 - (a) Prequalify suppliers or contractors in accordance with article 7; and
 - (b) Send an invitation to submit initial bids or to participate in the auction, as the case may be, individually and simultaneously to each prequalified supplier or contractor.
- (6) Where submission of the initial bids is required, the procuring entity shall:
 - (a) Include in the solicitation documents information referred to in article 27 (a), (k) to (s) and (z) of this Law;
 - (b) Solicit and examine initial bids in accordance with articles 26, 28 to 32, 33 (1) and 34 (1) of this Law;
 - (c) As specified in the notice of the electronic reverse auction, assess responsiveness of initial bids to all requirements set out in the notice of the electronic reverse auction in accordance with article 34 (2) or in addition carry out full or partial evaluation of initial bids in accordance with the procedures and criteria set out in the notice of the electronic reverse auction; and
 - (d) Send an invitation to participate in the auction individually and simultaneously to each supplier or contractor except for those whose bid has been rejected in accordance with article 34 (3). Where evaluation of initial bids took place, the invitation shall be accompanied by the information on the outcome of such evaluation, including any ranking assigned to each supplier or contractor concerned.
- (7) Unless already provided in the notice of the electronic reverse auction, the invitation to participate in the auction shall set out:
 - (a) The manner and deadline by which the invited suppliers and contractors shall register to participate in the auction;
 - (b) The date and time of the opening and criteria governing the closing of the auction;
 - (c) The requirements for registration and identification of bidders at the opening of the auction;
 - (d) Information concerning individual connection to the electronic equipment being used; and
 - (e) All other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction.

(8) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.

(9) The auction shall not take place before expiry of [two] working days after the notice of the electronic reverse auction has been issued or, where invitations to participate in the auction are sent, from the date of sending the invitations to all suppliers or contractors concerned.”

Commentary to draft article 51 ter above

General comments

19. The text above has been drafted to allow the use of stand-alone ERAs in different situations envisaged in draft article 22 bis (d) above.

20. Some provisions are tailored for simple ERAs, where only price or in addition other quantifiable features are used as award criteria to be evaluated automatically through the auction. Other provisions are tailored for more complex ERAs where some award criteria are to be evaluated before the auction.

21. The draft article envisages that the procuring entity may request the submission of initial bids. In simple ERAs, this may be necessary to assess responsiveness of bids to the requirements set out in the notice of the ERA. In more complex ERAs, this will be necessary for pre-auction evaluation, full or partial, during which initial bids are not only checked against the requirements set out in the notice of ERA but they are also compared with each other.

22. In both simple and complex ERAs, pre-selection and/or prequalification may be involved. When no pre-selection is involved, the procuring entity invites all suppliers or contractors who expressed interest to participate in the auction directly to the ERA or to prequalify or to submit initial bids, as the case may be.

23. When a large number of suppliers or contractors is anticipated to express interest to participate in the ERA, the procuring entity may for justified reasons, such as limited system capacity, restrict the number of suppliers or contractors who will be invited to proceed to the next stage of the ERA. The draft article requires that the procuring entity should specify in the notice any restrictions on the number, the number of suppliers or contractors to be pre-selected and any pre-selection criteria and procedure (such as first fifty who expressed interest).

24. The draft article allows but does not require prequalification. As is the practice in some jurisdictions, the procuring entity may choose to hold post-auction evaluation of qualifications of only the supplier or contractor who submits the successful bid.

Paragraph (1)

25. The Working Group may wish to decide whether the suggested wording should be replaced by the wording of, or a cross-reference to, article 24, which requires wider publicity of a solicitation notice.

Paragraph (2)

26. The cross-references in subparagraph 2 (a) are to those provisions of articles 25 and 27 that refer to information that will have to be included in the notice

on the ERA regardless of whether pre-selection, prequalification or submission of initial bids is required. Specific information to be included in the notice on the ERA where pre-selection, prequalification or the submission of initial bids is required is set out in subparagraphs (c) to (e) above, respectively.

27. The alternatives in subparagraph (b) reflect changes made to the conditions for the use of ERAs in draft article 22 bis, subparagraph (d), above. Alternative A covers situations where the successful bid is determined exclusively on the basis of the price. Alternative B covers situations where price and other criteria that can be expressed in monetary terms and automatically evaluated through the auction, such as delivery time, can be used in determining the successful bid. Alternative C covers the broadest situations where any criteria can be used in determining the successful bid.

28. The Working Group may wish to consider defining in subparagraph (b) suppliers or contractors participating in the auction as “bidders”, and use this term consistently in subsequent provisions according to the context, as was done above.

29. Subparagraphs (f) to (l) are based on the relevant provisions that were before the Working Group at its tenth session and reflect drafting suggestions proposed to those provisions at that session.¹⁵ The Working Group deferred its decision on whether in subparagraph (f) the reference should be to the address or to the website or other electronic address.¹⁶

30. Subparagraphs (g) to (i) include the qualifier phrase “if already known”. These words were included to indicate that some type of information may not be known at the time of a notice of the ERA, especially if prequalification or assessment or evaluation of initial bids is involved.

Paragraph (3)

31. The paragraph is new. It intends to cover situations where no pre-selection, prequalification or pre-auction assessment or evaluation of initial bids is involved. In such case, a notice of the ERA has to serve as an invitation to participate in the auction and therefore has to be complete in all relevant respects to enable suppliers or contractors to participate in the auction.

Paragraph (4)

Paragraph (4) is also new and was included to address pre-selection procedures. It supplements paragraph 2 (c).

Paragraphs (5), (6) and (7)

32. The paragraphs are based on the relevant provisions that were before the Working Group at its tenth session.¹⁷

¹⁵ A/CN.9/615, para. 67 under (ii), (iii) and (v).

¹⁶ Ibid., para. 67 (ii).

¹⁷ Ibid., the text of article 47 bis following para. 53, paras. 3 to 6.

Paragraphs (8) and (9)

33. The paragraphs are new. Paragraph (8) provides suppliers or contractors with the means to learn that they would indeed be considered as registered and therefore have access right to the system at the time the auction opens.

34. Paragraph (9) intends to ensure that: (i) when invitations to participate in the auction are sent, interested suppliers will have sufficient time to receive such invitation, subsequently properly to connect themselves to the system, to comply with other technical requirements to participate in the auction and to report any problems to the procuring entity; and (ii) when the notice of the ERA serves as invitation to participate in the ERA, interested suppliers will have sufficient time not only to comply with connection and other technical requirements to participate in the auction but also to prepare and submit responsive bids during the auction. The two-day requirement is taken from the European Union Directive 2004/18/EC, article 54 (4), second paragraph. The Working Group may wish to decide that instead of fixing any time frame in numbers, the provision should contain the requirement of “[adequate/reasonable] time which is sufficiently long to allow suppliers or contractors to prepare for the auction.” This would be consistent with the approach taken, for example, in article 30 of the Model Law where the reference is made to “reasonable time”, and would be sufficiently flexible to accommodate different situations in practice.

“Article 51 quater. Pre-auction procedures in procurement by means of restricted tendering, competitive negotiation or request for quotations

(1) When the procuring entity decides that the award of the procurement contract in procurement by means of restricted tendering, competitive negotiation or request for quotations shall be preceded by an electronic reverse auction, the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings shall state that fact and provide information referred to in article 51 ter (2)(b) and (f) to (l).

(2) The provisions of this Law applicable to the relevant procurement proceedings shall regulate procedures preceding the electronic reverse auction in the procurement proceedings concerned.

(3) The procuring entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor admitted to participate in the auction.

(4) Unless already provided when first soliciting the participation of suppliers or contractors in the procurement proceedings, the invitation to participate in the auction shall set out all information referred to in article 51 ter (7).

(5) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.

(6) The auction shall not take place before expiry of [two] working days after invitations to participate in the auction have been sent to all suppliers or contractors admitted to participate in the auction.”

Commentary to article 51 quater above

35. Since ERA under draft article 51 quater is an optional phase in the referred procurement methods, all stages up to the auction itself, including solicitation mechanisms, submission of tenders, offers or quotations, their evaluation, if any, and admission of suppliers or contractors to the auction, will be regulated by the applicable provisions of the Model Law. Paragraph (2) contains cross-references to those provisions of the Model Law.

36. Provisions in paragraphs (1) and (3) to (6) intend to accommodate the use of ERAs in those procurement proceedings. Paragraph (1) requires disclosing at the beginning of the procurement proceedings the fact that ERA will be held and other information relevant to ERA, which is the same as listed in article 51 ter (2)(b) and (f) to (l). To avoid repetitive listing, an appropriate cross-reference to draft article 51 ter has been inserted. Provisions of paragraphs (4) to (6) above correspond in the relevant parts to the provisions of paragraphs (7) to (9) of draft article 51 ter.

37. No provisions have been drafted on the use of ERAs in framework agreements or other procurement mechanisms, pending the Working Group's consideration of the relevant topics.

“Article 51 quinquies. Requirement of effective competition

(1) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction in accordance with articles 51 ter (4) to (6) and article 51 quater (3) is sufficient to secure effective competition.

(2) If the number of suppliers or contractors registered to participate in the auction is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity [shall] withdraw the electronic reverse auction.”

Commentary to article 51 quinquies above

38. The draft article is based on the provisions that were before the Working Group at its previous sessions as amended at the tenth session.¹⁸ In paragraph (2), the words “the number of suppliers or contractors registered to participate in the auction” replaced the previous wording “the number of suppliers or contractors at any time before the opening of the auction”, which was very broad.

39. The purpose of the draft article as revised is to ensure that the procuring entity keeps in mind the requirement of effective competition (see draft article 22 bis (b) above) at the stage of issuing invitations to participate in the auction, where applicable, and after a deadline for the registration to participate in the auction has expired, when it has a number of suppliers or contractors registered to participate in the auction.

40. In accordance with paragraph (2) of the draft article, the procuring entity's decision to withdraw the auction for the reasons that no effective competition can be ensured has to be based not on the number of invited suppliers or contractors but on

¹⁸ Ibid., para. 52, under (viii), and para. 53, article 47 bis (7).

the number of suppliers or contractors registered to participate in the auction. This requirement is especially relevant where suppliers or contractors are invited to participate in the auction through the notice of the electronic reverse auction in accordance with draft article 51 ter (3): paragraph (1) of draft article 51 quinquies in such case is not applicable because no separate invitations to participate in the auction are issued.

41. In paragraph (2), the word “shall” is in square brackets, for further consideration by the Working Group. At the tenth session of the Working Group, it was noted that an approach of requiring withdrawal of the auction was too prescriptive compared with a more flexible approach taken in some jurisdictions.¹⁹

“Article 51 sexies. Requirements during the auction

- (1) During an electronic reverse auction:
 - (a) All bidders shall have an equal and continuous opportunity to submit their bids;
 - (b) There shall be automatic evaluation of all bids;
 - (c) The [results of the auction/ranking of the bidders] [according to the pre-disclosed formula] must instantaneously be communicated on a continuous basis to all bidders;
 - (d) There shall be no communication between the procuring entity and the bidders, other than as provided for in paragraphs 1 (a) and (c) above.
- (2) The procuring entity shall not disclose the identity of any bidder [until the auction has closed]. [Articles 33 (2) and (3) shall not apply to a procedure involving an electronic reverse auction].
- (3) The auction shall be closed in accordance with the criteria specified in the notice of the electronic reverse auction or in the invitation to participate in the auction, as the case may be.
- (4) [The procuring entity may suspend or terminate the electronic reverse auction in the case of system or communications failures.]”

Commentary to article 51 sexies above

42. The draft article is based on the provisions that were before the Working Group at its previous sessions as amended at the tenth session.²⁰

Paragraph (1)

43. In paragraph 1 (a), the words “submit their bids” replaced the words “revise their tenders in respect of those features presented through the auction process”. It is suggested as being broader and more accurate to cover various situations, including where no revision of bids through ERA takes place as no initial bids are submitted.

44. Subparagraph (c) has been put in the passive to reflect situations when third parties on behalf of the procuring entity manage ERAs.²¹ As regards the wording in

¹⁹ Ibid., para. 52, under (viii).

²⁰ Ibid., paras. 57-63.

the first pair of square brackets in that subparagraph, the Working Group decided to consider at its next session whether the reference should be to “the results” of the ERA or to “the ranking” of the bidders.²² The latter seems to be more accurate as the reference to the results is more appropriate in the context of final results at the closing of the auction.

45. The second pair of the square brackets in subparagraph (c) has been inserted by the Secretariat to indicate that the reference to a formula will not be appropriate in all cases. In a simple ERA, where the price is the only award criterion, no formula exists. The Working Group may consider deleting these words as being superfluous in the light of the provisions of article 51 ter (2)(b) and through a cross-reference in article 51 quater (1).

46. The Working Group may wish to consider replacing subparagraph (c) with the following wording that draws on the provisions of the European Union Directive 2004/18/EC, article 54, paragraph 6: “Sufficient information to enable the bidders to ascertain their relative ranking at any moment must instantaneously be communicated on a continuous basis to all bidders.”

Paragraph (2)

47. As regards the wording in the first square brackets in paragraph (2), the Working Group, at its tenth session, decided to consider at a future session whether to require that the anonymity of the bidders should be preserved after the closure of the auction.²³

48. As regards the wording in the second pair of square brackets in that paragraph, the Working Group decided at its tenth session that it would revisit at a future session the issue of whether the references to articles 33 (2) and (3)²⁴ should appear in that paragraph, or be replaced with language that would reflect more clearly the use of ERAs.²⁵ The Working Group may wish to consider that, in the absence of a cross-reference to article 33 (2) and (3) in draft articles above, provisions of article 33 (2) and (3) will not apply to ERAs in any case and therefore these words may be superfluous and should be deleted.

Paragraph (4)

49. The entire paragraph (4) was put in the square brackets pending the determination by the Working Group of whether to retain the provision and, if so, what its contents should be, so as to capture only those events that would justify the

²¹ The previous wording was “Procuring entities must instantaneously communicate [the result] of the auction according to the pre-disclosed formula to all bidders on a continuous basis during the auction”. See *ibid.*, para. 62, article 47 ter (1)(b).

²² *Ibid.*, para. 63.

²³ *Ibid.*, para. 60.

²⁴ The provisions of paragraph (2) of the article refer to the presence of suppliers or contractors that have submitted tenders, or their representatives, at the opening of tenders. They are being revised in the light of electronic means of communication (see A/CN.9/WG.I/WP.50, paras. 30 and 31). The provisions of paragraph (3) refer *inter alia* to the public announcement of the name and address of each supplier or contractor whose tender is opened and the tender price.

²⁵ A/CN.9/615, para. 61 (iii), the second part.

suspension or termination of an ERA.²⁶ In this connection, the Working Group may wish to note that suspension of ERAs may be needed in the case of the price justification if an abnormally low bid is submitted (see A/CN.9/WG.I/WP.50, paragraphs 43-49). In addition, article 56 of the Model Law provides for seven-day suspension of procurement proceedings in the case of the submission of complaints. This duration may be excessive and require reconsideration in the context of ERAs.

“Article 51 septies. Award of the procurement contract on the basis of the results of the electronic reverse auction

(1) The procurement contract shall be awarded to the bidder that, at the closure of the auction, submitted the bid with the lowest price or is ranked first, as applicable, except:

- (a) When such bidder fails to:
 - (i) Demonstrate its qualifications in accordance with article 6 when required to do so; or
 - (ii) Sign a written procurement contract if required to do so; or
 - (iii) Provide any required security for the performance of the procurement contract; and
- (b) In the circumstances referred to in articles 12, [12 bis] and 15.

(2) In the circumstances referred to in paragraph 1 (a) and (b) of this article, and subject to the right of the procuring entity, in accordance with article 12 (1) of this Law, to reject all remaining bids, the procuring entity may:

- (a) Hold another auction under the same procurement proceedings; or
- (b) Announce new procurement proceedings; or
- (c) Award the procurement contract to the bidder that, at the closure of the auction, submitted the bid with the second lowest price or is ranked second, as applicable.

(3) Notice of acceptance of the bid shall be given promptly to the bidder that submitted the accepted bid [as well as to other bidders specifying the name and address of the bidder whose bid has been accepted and the bid price].”

Commentary to article 51 septies above

50. The draft article is based on the provisions that were before the Working Group at its previous sessions as amended at the tenth session (see, however, paragraphs 55-56 below).²⁷ The revisions have been made to streamline the text and align some of its provisions with similar provisions of the Model Law, such as those found in articles 34 (7) and 36 (5).

²⁶ Ibid., para. 61, under (iv).

²⁷ Ibid., para. 62, article 47 ter (5) and (6).

Paragraph (1)

51. Paragraph (1) of the draft text above intends to indicate that the auction must be the final stage in the procurement proceedings under the Model Law, after which no evaluation of bids can take place.²⁸ Therefore, as a general rule, the results of the auction must be final and binding upon the procuring entity and the lowest price obtained through the auction must figure in the procurement contract.

52. Exceptions to this rule are provided in subparagraphs (a) and (b). They were drafted on the basis of articles 34 (3)(a) and (d), 34 (7) and 36 (1) and (5) of the Model Law.

53. The reference in subparagraph (b) to article 12 bis is to draft provisions on abnormally low tenders, proposals, offers, quotations or bids, which are proposed to the Working Group at its eleventh session as draft article 12 bis (see document A/CN.9/WG.I/WP.50, the text following paragraph 45. The provisions of draft article 12 bis there enable the procuring entity to reject an abnormally low bid under some conditions).

54. The reference in the same subparagraph to article 15 is to the provisions of the Model Law that allow the procuring entity to reject the tender on the basis of inducements from suppliers or contractors. It corresponds to the reference found in article 34 (3)(d). In the light of the Working Group's decision to strengthen anti-corruption provisions and regulate conflict of interests in the Model Law, provisions of article 15 may be expanded.

Paragraph (2)

55. At the Working Group's tenth session, it was suggested that the procuring entity might not award a procurement contract to another bidder of the same auction if it decides that conditions prevent it from awarding the contract to the successful bidder. It was suggested that in such case, the procuring entity must cancel the results of the auction and may hold a new auction under the same procurement proceedings or announce new procurement proceedings.²⁹

56. Such prescriptive provisions may have disruptive and costly effects on the procurement proceedings. Paragraph (2) above was drafted in a more flexible manner to allow various options at the discretion of the procuring entity. Risks of each option may be explained in the Guide.

Paragraph (3)

57. Paragraph (3) is new and draws on article 36 (1) and (6) of the Model Law. The provisions in square brackets depend on the Working Group's decision on whether anonymity of bidders must be preserved after the auction (see draft article 51 sexies (2) and paragraph 47 above).

2. Proposed draft text for the revised Guide

58. The draft text for the Guide to accompany provisions of the Model Law on the procedural aspects of ERAs was presented by the Secretariat to the Working Group

²⁸ Ibid., para. 55 (ii).

²⁹ Ibid., paras. 61 under (vi) and 62 article 47 ter (6).

at its eighth session in document A/CN.9/WG.I/WP.40 (the text following paragraphs 25 and 35). At that and subsequent sessions, the Working Group did not consider the suggested text in the light of the revisions made to the draft articles on ERAs, which necessitated consequential changes to that text.

59. The new text for the Guide, which will replace in entirety the previously proposed text, will be prepared and presented to the Working Group at a future session, taking account of the Working Group consideration of the draft articles above.

D. Consequential changes to other provisions of the Model Law

1. Previously suggested changes to provisions of chapter III “Tendering proceedings” (articles 27, 31, 32 and 34)

60. In compliance with the Working Group’s understanding at its tenth session that ERAs could be used not only in tendering but also in other procurement methods and as a stand-alone ERA,³⁰ this note does not suggest making changes to articles 27, 31, 32 and 34 of the Model Law applicable to tendering proceedings, and to the accompanying provisions of the Guide. Instead, the issues considered in conjunction with those articles have been addressed in articles 51 bis to septies above as follows:

Contents of solicitation documents (article 27)

61. The suggested changes to article 27 have been incorporated in draft article 51 ter above and by cross-reference in draft article 51 quater.

Period of effectiveness of tenders; modification and withdrawal of tenders (article 31)

62. At its tenth session, the Working Group decided to look at a future session into the question of how and when bids in the context of ERAs could be modified or withdrawn.³¹ Currently, the Model Law regulates the subject explicitly only in the context of tendering proceedings (article 31).

63. Draft article 51 ter (6), which deals with situations where ERA is preceded by assessment or evaluation of initial bids, incorporates provisions of article 31 by cross-reference. The Working Group may wish to consider whether the provisions of article 31 should be extended to offers in competitive negotiations and to quotations in request of quotations proceedings when ERAs are used under article 51 quater. Currently, the Model Law does not regulate the subject in the context of those procurement proceedings (see articles 49 and 50).

Tender securities (article 32 of the Model Law)

64. At its tenth session, the Working Group noted that tender securities were not often used in the specific context of ERAs. Views differed as to whether the Guide should discourage requiring tender securities in the context of ERAs, or whether a

³⁰ Ibid., paras. 37, 50, 59 and 64.

³¹ Ibid., para. 65.

more flexible approach would be desirable (in that requiring a tender security could serve as a disincentive to withdraw the bid before the opening of the auction).³² At the eighth session, it was suggested that the Guide should note that practices might continue to evolve, as more relevant experience was accumulated.³³

65. Currently, the Model Law regulates the subject explicitly only in the context of tendering proceedings (article 32). Draft article 51 ter (6) above, which, as already noted, deals with situations where ERA is preceded by assessment or evaluation of initial bids, incorporates provisions of article 32 by cross-reference. If the Working Group decides to envisage explicitly that tender securities could be required in other cases, a cross-reference to article 27 (1) should be added to draft article 51 ter (2)(a) above.

Examination, evaluation and comparison of tenders (article 34)

66. At its tenth session, the Working Group agreed that the following wording would be considered at a future session as a change to the current article 34 (1)(a): “No change in a matter of substance in the initial tender, including changes in price, shall be sought, offered or permitted, except during the auction itself”. That wording would ensure, it was said at that session, that changes to tenders in ERAs would be permitted only during the auction phase itself, and would avoid giving the impression that changes could be made during the auction phase to make unresponsive tenders responsive.³⁴

67. Since article 34 is applicable to tendering proceedings alone, the Working Group may wish to reconsider amending this article because such amendment would be necessitated solely by the distinct features of ERAs. The Working Group may consider that a cross-reference to article 34 (1) in the context of assessment or evaluation of initial bids in draft article 51 ter (6) above, and possibly additional explanation in the Guide, would sufficiently cover the point.

2. Record of procurement proceedings (article 11 of the Model Law)

68. At its tenth session, the Working Group decided to revisit the question of what information should be reflected in the record of procurement in conjunction with the use of ERAs.³⁵ The following proposed addition to article 11 of the Model Law was before the Working Group at its previous sessions:³⁶

“Article 11. Record of procurement proceedings

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

...

[new paragraph] “In procurement proceedings involving the use of electronic reverse auctions pursuant to [article 22 bis], a statement to that effect.”

³² Ibid., para. 69.

³³ A/CN.9/590, para. 100.

³⁴ A/CN.9/615, para. 71.

³⁵ Ibid., para. 65.

³⁶ A/CN.9/WG.I/WP.43, para. 59, and A/CN.9/WG.I/WP.40/Add.1, para. 3.

69. The location of the provisions on ERAs in article 11 is to be considered in conjunction with the Working Group decision on what information should be reflected in the record of procurement proceedings in the context of ERAs, and in the light of the Working Group's decision at the tenth session that ERAs can be used not only in tendering proceedings.
