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Finalization and adoption of the UNCITRAL Model Law on Public Procurement

Compilation of comments by Governments and international Organizations on the draft Model Law on Public Procurement

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I. Introduction

1. In preparation for the forty-fourth session of the Commission (Vienna, 27 June-8 July 2011), the text of the draft Model Law on Public Procurement, as it resulted from the nineteenth session of UNCITRAL Working Group I (Procurement) (Vienna, 1-5 November 2010) (contained in document A/CN.9/729 and its addenda), was circulated in accordance with the practice of UNCITRAL to all Governments and interested international organizations for comment.

2. The present document reproduces the comments received by the Secretariat on the draft text, in the form in which they were received by the Secretariat. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments received from Governments and international organizations

A. Comments received from Governments

Ukraine

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[Date: 19 April 2011]

Article 11. Rules concerning evaluation criteria and procedures

According to subparagraphs 2 (b) and (c), the evaluation criteria may include the environmental characteristics of the subject matter, and the experience, reliability and professional and managerial competence of the participant in procurement proceedings and of the personnel. Paragraph 4 states that evaluation criteria may also include any of the criteria required by the legislation of the State concerned. We also propose setting a percentage ratio for price and non-price criteria.

Article 15. Clarifications and modifications of solicitation documents

Paragraph 1 of this article provides that the procuring entity shall respond to any request by a participant for clarification within a “reasonable time” prior to the deadline for presenting submissions. Paragraph 2 also provides that at any time prior to the deadline for presenting submissions, the procuring entity may modify the solicitation documents. We propose that the minimum time prior to the deadline for presenting submissions during which modifications may be introduced to the solicitation documents by the procuring entity should be defined since the indeterminacy of this time period could seriously hamper the work of the procuring entity and give rise to unfounded challenges of the entity’s further actions, which could in turn prolong the procurement proceedings without justification.

We believe that clearly defining a time period by the end of which the procuring entity has an obligation to inform the supplier regarding any of its decisions would significantly decrease the grounds for any further challenge of the procuring entity’s

actions and decisions. We also propose replacing the phrase “reasonable time” with a more clearly defined time period.

Article 19. Rejection of abnormally low submissions

This article contains the provision that the procuring entity may reject a submission if the procuring entity believes that the participant’s submission proposes an “abnormally low price”. We would propose, however, that the concept of an “abnormally high price” should also be defined in this article and that a provision should be introduced allowing the procuring entity to reject a submission if the procuring entity believes that the participant’s submission proposes an abnormally high price.

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

We believe there is a need for clarification of the meaning of the concept “unfair competitive advantage”.

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

Paragraph 5 of this article allows for procurement contracts to be concluded orally. It must be noted that under Ukrainian national legislation, a procurement contract must be concluded in written form. We propose that the provision allowing for the oral conclusion of a procurement contract should be deleted, in order to avoid possible abuses and unregulated modifications during the performance of the procurement contract.

Article 26. Methods of procurement*

Paragraph 1 of this article provides for 10 methods of procurement. It must be noted that this list is only partially in accordance with the methods established under Ukrainian law. National legislation does not provide for such procurement methods as restricted tendering, request for proposals without consecutive negotiations, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations or electronic reverse auction.

Article 42. Examination and evaluation of tenders

According to paragraph 2 (b) of this article, the procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents.

In order to ensure harmony with national standards, we believe it is necessary to clearly define what is meant by minor deviations. Examples should be provided on how this criterion is applicable in practice, since the establishment of such a criterion could lead to a prejudiced examination of tenders and to inconsistency

* *Translator’s note:* This title was missing in the Russian text.

regarding whether or not a tender meets the requirements set out in the solicitation documents.

United States of America

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Article 17(2): We recommend that the publication be identified in regulations rather than in the model law itself, in order to provide more flexibility in case domestic procedures change. The revised sentence might read:

“(2) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in the publication identified in the procurement regulations.”

Article 20(bis): With regard to footnote 4 in WP.77/Add.6: We propose that a general provision along these lines be added to the text, perhaps as a new article 20(bis). The text of such a new article might read:

“The procuring entity may ask any supplier or contractor for clarification of its qualification data or proposal, as the case may be, to assist it in its analysis of such data, or evaluation of such proposal, as the case may be. Such clarification may not affect the substance of such data or proposal. The procuring entity shall promptly communicate to the supplier or contractor its acceptance of the clarification.”

The Guide to 20(bis) would cross-refer to article 42(1) which deals with such matters in greater detail with regard to tenders.

Article 21(3)(b): We recommend that the monetary threshold be set forth in regulations rather than in the model law itself, in order to provide more flexibility in light of inflation, fluctuating exchange rates, etc. The revised sentence might read:

“(b) Where the contract price is less than the threshold amount set out in the procurement regulations; or”

Article 22(2): We recommend that the monetary threshold be set forth in regulations rather than in the model law itself, in order to provide more flexibility in light of inflation, fluctuating exchange rates, etc. The revised sentence might read:

“(2) Paragraph (1) is not applicable to awards where the contract price is less than the threshold amount set out in the procurement regulations.”

Article 33(5): We recommend that the publication be identified in regulations rather than in the model law itself, in order to provide more flexibility in case domestic procedures change. The revised sentence might read:

“(5) Prior to direct solicitation in accordance with the provisions of paragraphs (1), (3) and (4) of this article, the procuring entity shall cause a notice of the procurement to be published in the publication identified in the procurement regulations.”

Article 33(6): This provision should also refer to article 29(4)(a), which also deals with cases of urgency.