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Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement

Note by the Secretariat

Addendum

This addendum sets out a proposal for the Guide text to accompany articles 54-56 of chapter VI (Electronic reverse auctions) of the UNCITRAL Model Law on Public Procurement, and points regarding electronic reverse auctions proposed to be discussed in a section of the Guide to Enactment addressing changes from the 1994 text of the Model Law.



GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

B. Provisions on electronic reverse auctions to be included in the article-by-article commentary (*continued*)

Article 54. Registration for the electronic reverse auction and timing of holding of the auction

1. This article regulates the essential aspects of registration for the auction and the timing of the auction, and is intended to ensure the fair and equitable treatment of participating bidders, through the transparency requirements in paragraphs (1) and (2) (communicating confirmation of registration and, where relevant, a decision on the cancellation of the auction promptly to each registered supplier or contractor) and the requirement in paragraph (3) that reasonable time be afforded to suppliers or contractors to prepare for the auction. The latter requirement is also important, especially in stand-alone ERAs, to permit an effective challenge to the terms of solicitation under chapter VIII. Such a challenge can be made only up to the deadline for presentation of submissions, which in simple auctions (with no pre-auction examination or evaluation of initial bids) means up to the opening of the auction; in other cases, it means up to the presentation of initial bids. The period of time between the issue of the invitation to the auction and the auction itself should therefore be determined by reference to what sufficient time to prepare for the auction will be in the circumstances (the simpler the auction, the shorter the possible duration). Other considerations include how to provide a minimum period that will allow a challenge to the terms of solicitation. The time requirement is qualified, as stipulated in paragraph (3), by the reasonable needs of the procuring entity, which may in limited circumstances (for example, in cases of extreme urgency following catastrophic events) prevail over the other considerations.

2. Paragraph (2) allows the procuring entity to cancel the auction if the number of suppliers or contractors registered for the auction is insufficient to ensure effective competition. The provisions are not prescriptive: they give discretion to the procuring entity to decide on whether the auction in such circumstances should be cancelled. Since the decision not to cancel may be inconsistent with the general thrust of competition and avoiding collusion, it should be justified only in the truly exceptional cases where the procurement must continue despite the lack of effective competition. The enacting State is encouraged to provide in the procurement regulations for the exhaustive list of circumstances that would justify the auction to proceed in such cases. There may be other reasons permitting cancellation (for example, suspicion of collusion as explained in paragraph ... above). The provisions do not apply in situations when the procuring entity must cancel the auction, for example under article 52 (1) (j) when any required minimum number of registered suppliers or contractors has not been reached (see paragraphs ... above), or when the procuring entity must terminate the auction for technical grounds under article 55 (5) (see paragraphs ... below).

3. In stand-alone ERAs, the cancellation of the auction means the cancellation of the procurement. The procuring entity, upon analysing the reasons leading to the

cancellation, may decide that another ERA would be appropriate, for example if mistakes in the description that caused a failure of sufficient number of suppliers or contractors to register for the auction can be rectified, or may choose another procurement method. Where ERAs as a phase are used, the cancellation of the auction will not necessarily lead to the cancellation of the procurement: the procuring entity may decide to award the contract on the basis of the results of the pre-auction examination and evaluation of bids, provided that this option was specified at the outset of the procurement.¹

4. Where ERAs as a phase are used, the procuring entity should also specify at the outset of the procurement any consequences if suppliers or contractors fail to register for the auction [and address issues of tender securities if needed].²

Article 55. Requirements during the electronic reverse auction

1. This article regulates the requirements during auctions, whether stand-alone ERAs or ERAs as a phase. Paragraph (1) specifies two types of auctions: the first type, simpler auctions, where the winning (lowest) price determines the successful bid; and a second type, where the winning bid is determined on the basis of price and additional non-price criteria. Such additional non-price criteria may vary from near-price criteria (such as delivery and guarantee terms) to more complex criteria (such as the level of emissions in cars). Regardless of the complexity of such additional criteria, all must be assigned a value, expressed in figures or percentages, in a pre-disclosed mathematical formula that makes their automatic evaluation possible. As required under articles 52 and 53 of the Model Law, information about each criterion used in evaluation, the value assigned to it and the mathematical formula are to be disclosed at the outset of the procurement proceedings; they cannot be varied during the auction. What can be varied during the auction are prices and modifiable elements.³

2. Paragraph (2) lists the essential requirements for holding the auction: in this respect, they reflect the features of the auction system under the Model Law and as defined in article 2 (by contrast with some other types of auction that are in use in practice), implement the conditions for use of auctions as set out in article 30 and elaborate on the requirements contained in articles 52 and 53. Subparagraphs (a) and (c), for example, highlight the continuous process of bidding. Subparagraph (a) in addition requires that the bidders are provided with an equal opportunity to bid. In practical terms, this means for example, that the system must record bids immediately upon receipt, regardless of the originator, and must evaluate them and their effect on other bids. The system must promptly communicate the relevant information to all bidders. The latter requirement is elaborated in subparagraph (c), which refers to instantaneous communication to each bidder of sufficient information allowing it to determine the standing of its bid vis-à-vis other bids. The drafting of these provisions indicates that the same information is not necessarily

¹ The text reflects the points made in the Working Group; however the option to award the contract on the basis of the results of the pre-auction examination and evaluation of bids, provided that this option was specified at the outset of the procurement, is not explicitly envisaged in the text of the Model Law.

² As regards the text put in square brackets, see footnote 14 in document A/CN.9/731/Add.6.

³ The term “modifiable elements” may need further explanation in the Guide.

communicated to all bidders, but the information communicated must be sufficient to allow this determination to be made, and it must ensure the fair and equitable treatment of bidders.

3. The Model Law is intentionally silent on the nature of the information that must be disclosed to fulfil this requirement. In deciding on how to regulate this issue, enacting States will need to balance considerations of transparency and promoting rigorous bidding against avoiding collusion and preventing the disclosure of commercially sensitive information. Appropriate options, depending on the auction and reflecting its complexity and other factors, include: (a) disclosing whether or not a bidder was leading the auction or had submitted the leading price; (b) disclosing the leading price; (c) disclosing to each bidder its standing compared with the leading bid (but no information on other bids); and (d) disclosing the spread of all bids. In addition, the procuring entity should be able to see the spread of all bids. Enacting States should be aware that, as experience in some jurisdictions indicates, the disclosure of the leading price could encourage very small reductions in the bid price, and thereby prevent the procuring entity from obtaining the best result; it could also encourage the submission of abnormally low bids. The greater the degree of information provided about other bids, the greater the possible risks of collusion; suppliers may also be able to reverse engineer others' bids in more complex auctions using the mathematical formula provided. [There are reported difficulties in preventing these situations; at the same time, ensuring a meaningful bidding process and automatic evaluation while not revealing commercially sensitive information is also problematic.]⁴ Whatever decision is taken by the procuring entity as regards the type of information that is to be disclosed during the auction, this decision must be reflected in the rules for the auction that are made available to potential bidders before the auction commences. These provisions supplement the requirement in articles 52 (1) (g) and 53 (1) (a) to disclose the criteria and procedure that will be used during the auction and the requirement to provide the results of any pre-auction evaluation.

4. Subparagraph (b) reiterates the principle of automatic evaluation of bids during the auction. Together with subparagraph (d), it highlights the importance of avoiding any human intervention during the running of the auction. The auction device collects electronically the bids which are automatically evaluated according to the criteria and processes disclosed in the invitation to the auction. The collection device should ascribe identification tags to each bid that do not compromise anonymity. Online capacity should also exist to allow an immediate and automatic rejection of invalid bids, with immediate notification of the rejection and an explanation of the reasons for rejection.⁵ A contact point for urgent communications concerning possible technical problems should be offered to bidders. Such a contact point must be external to the auction device [and to the procurement proceedings in question].⁶

⁴ Examples of existing good practices as regards the text put in square brackets may need to be included in the Guide. The provision of the guidance to the Secretariat is requested.

⁵ Further explanation in the Guide may be needed. The provision of the guidance to the Secretariat is requested.

⁶ Further explanation in the Guide may be needed. The provision of the guidance to the Secretariat is requested.

5. Paragraphs (3) and (5) of the article reiterate another important principle underlying auctions as provided for in the Model Law — the need to preserve the anonymity of bidders before, during and after the auction. Paragraph (3) reflects this principle by prohibiting the procuring entity from disclosing the identity of any bidder during the auction. Paragraph (5) extends this prohibition to the post-auction stage, including where the auction is suspended or terminated. The provisions should be construed broadly, prohibiting not only explicit disclosure but also indirect disclosure, e.g. by allowing the identities of the bidders to be disclosed or identified by other bidders. Operators of the auction system on behalf of the procuring entity, including any persons involved, or others involved in the process in other capacities, e.g. the contact point for urgent communications concerning possible technical problems, should be regarded as agents for the procuring entity in that regard, and so subject to the same prohibition. It is clear, however, that there may be practical difficulties in preserving the anonymity of bidders, despite the provisions of this article and the chapter as a whole, in procurement for which a more or less stable pool of providers exists, and in repeated procurement of similar items through ERAs.⁷

6. Paragraph (4) supplements the requirements in articles 52 (1) (o) and 53 (2) (c) as regards the need to disclose the criteria governing the closing of the auction at the latest before the auction is held. These rules, which will have been previously disclosed, may not be changed during the auction. Further, under no circumstances may the auction be closed before the established deadline even if no bidding takes place. It is commonly observed in practice that active bidding starts towards the closure of the auction. Giving the discretion to the procuring entity to close the auction before the established deadline would open the door to abuse, for example by allowing pre-auction arrangements between a bidder and the procuring entity to influence the outcome of the auction in favour of that bidder. On the other hand, there is no prohibition against extending the deadline for submission of bids as long as it is done in a transparent manner. This facility may prove useful, for example when the auction had to be suspended for technical reasons (as provided for in paragraph (5) of the article). It is good practice to require the rules of the auction to address the criteria and procedures for any extension of the deadline for submission of bids.

7. Suppliers may withdraw from the ERA before its closure. This should not affect the auction unless the withdrawal occurs for reasons requiring suspension or termination of the auction under paragraph (5) of the article (for example, failures in the procuring entity's communication system). In all other cases, the auction must proceed. Upon the closure of the auction, the procuring entity may need to analyse the reasons for withdrawal, especially if a substantial number of bidders have withdrawn, and any negative effect of such withdrawal on the outcome of the auction. The procuring entity's right to cancel the procurement at any stage of the procurement is reiterated in article 56, which in this respect supplements article 18 (1) (for the guidance to article 18 on cancellation of the procurement, see paragraphs ... above).

⁷ Examples of existing good practices to mitigate such risks may need to be included in the Guide. The provision of the guidance to the Secretariat is requested.

8. Paragraph (5) requires terminating or suspending of the auction in the circumstances set out in the paragraph. Apart from failures in the procuring entity's communication system that risk the proper conduct of the auction, there may be other reasons for termination or suspension of the auction. While it would not be possible to list all of them in the procurement law, the Model Law requires setting them all in the rules for the conduct of the auction that are to be made available under articles 52 and 53 as applicable. No further discretion should be given to the procuring entity in this respect since the exercise of such discretion could lead to abuse and human intervention in the process. Although in some cases this intervention may be unavoidable, such cases must be minimized. For example, enacting States may put in place through the procurement regulations mechanisms for procuring entities to monitor the auction proceedings for market manipulation [and to permit them to intervene to prevent possible collusive behaviour. This should however be coupled with the requirement for the procuring entity to possess good intelligence on past similar transactions, the relevant marketplace and market structure. Enacting States should be aware that practical difficulties may exist in distinguishing justifiable from collusive behaviour and therefore any discretion given to procuring entities in this respect should be carefully regulated in order to prevent abuses and unjustifiable disruptions.]⁸

9. The rules for the conduct of the auction must also provide for procedural safeguards that should be in place to protect the interests of bidders in case of the termination or suspension of the auction, such as: immediate and simultaneous notification of all bidders about suspension or termination; and in the case of suspension, the time for the reopening of the auction and the new deadline for its closure.

10. A termination of the auction, unlike suspension, is likely to lead to the cancellation of the procurement (for the differences between simple and complex auctions in this regard, see paragraph 3 of the commentary to article 54 above).⁹

Article 56. Requirements after the electronic reverse auction

1. This article regulates steps to be taken after the auction, regardless of whether it is a stand-alone ERA or ERA as a phase. The applicable rules are the same since in all cases the auction precedes the award of the procurement contract. No further evaluation or negotiation is allowed after the auction has been held to avoid impropriety, favouritism or corruption. The results of the auction are therefore intended to be the final results of the procurement proceedings. The practical implication is that, where the solicitation documents stipulate that the procurement contract is to be awarded to the lowest priced bid, the bidder with that bid is to be awarded the procurement contract and the winning price is to figure in the procurement contract. Where the solicitation documents stipulate price and non-price criteria for the award of the procurement contract, the bidder submitting

⁸ It is to be considered whether this guidance should be expanded, left as is, or moved to a more general discussion of collusion.

⁹ Further explanation as to how termination of the auction could not lead to cancellation in stand-alone ERAs is needed.

the most advantageous bid¹⁰ as determined through the application of the pre-disclosed mathematical formula is to be awarded the procurement contract and the terms and conditions of the winning bid are to figure in the procurement contract. The limited exceptions to these rules are spelled out in paragraphs (2) and (3).

2. Paragraph (2) is applicable to simple stand-alone ERAs (which are not preceded by initial bids). In such auctions, assessments of qualification and responsiveness are carried out after the auction, and only with respect to the winner and the winning bid. This approach saves time and cost. If the winner turns out to be unqualified or its bid unresponsive, the procuring entity has two options: either to cancel the procurement proceedings or award the procurement contract to the next winning bidder, provided that the latter is qualified and its bid is responsive. This approach proceeds on the assumption that all bidders responding to the invitation can deliver the requested products or services at more or less the same level of quality; where the procurement involves simple, off-the-shelf goods or services, the risk to the procuring entity is low, because alternative sources of supply will be readily available. Guidance to suppliers that will participate in auctions should underscore this possibility, so that they are not lured into presenting unsustainable bids at later stages of the auction.

3. Paragraph (3) is applicable to any type of auction, and addresses the situation in which the winning bid appears to the procuring entity to be abnormally low (for an explanation of this term, see the guidance to article 19 in paragraph ... above). The provisions of this paragraph are also subject to the general rules on the investigation of abnormally low submissions contained in article 19, including the safeguards to ensure an objective and transparent assessment. If all conditions of article 19 for rejecting the abnormally low bid have been fulfilled, the procuring entity may reject the bid and choose either to cancel the procurement proceedings or award the procurement contract to the next winning bidder (see the guidance to that article on the appropriate procedures). This exception to the general rule requiring the award of the procurement contract to the winning bidder as determined at the end of the auction is included, in particular, to prevent dumping. The provisions of the Model Law have been drafted to allow greater flexibility to the procuring entity, but subject to the safeguards against abuse provided for in article 19.

4. In deciding which option to follow under paragraph (2) or (3) — to cancel the procurement proceedings or award the procurement contract to the next winning bidder — the procuring entity should assess the consequences of cancelling the auction, in particular whether holding a second auction in the same procurement proceedings would be possible and the costs of an alternative procurement method. In particular, the anonymity of the bidders may have been compromised and any re-opening of competition may also be jeopardized. This risk, however, should not encourage the procuring entity always to opt for the next winning bid, in particular where collusion between the winning bidder and the next winning bidder is suspected. The provisions of paragraph (2) and (3) are drafted with the intention of avoiding the imposition of any particular step on the procuring entity.

¹⁰ No explanation of the term “most advantageous bid” is made in the commentary to article 56: this notion will be addressed elsewhere, unless it is considered that such explanation is required in the context of article 56 as well.

5. In either case under paragraph (2) or (3), prompt action must be taken after the auction, in strict compliance with the applicable provisions of the Model Law, so as to ensure that the final outcome should be determined as soon as reasonably practical. These steps should not be treated as an opportunity to undermine the automatic identification of the winning bid.¹¹

C. Points regarding electronic reverse auctions proposed to be discussed in a section of the Guide to Enactment addressing changes from the 1994 text of the Model Law

ERAs have been increasing in use since the adoption by UNCITRAL of the 1994 Model Law. The 1994 text did not provide for traditional in-person auctions, in large part because of observed collusion. Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs, and by permitting the anonymity of the bidders to be preserved as the auctions take place virtually, rather than in person. For this reason, the Model Law allows only online auctions with automatic evaluation processes, where the anonymity of the bidders, and the confidentiality and traceability of the proceedings, can be preserved. The risk of collusion may nevertheless be present even in ERAs especially when they are used as a phase in other procurement methods or preceded by off-line examination or evaluation of initial bids.

¹¹ The provision of the guidance to the Secretariat is required on the following points raised in the Working Group: on the practical implications of each option described in paragraphs (2) and (3); on the appropriate explanation of the nature of bids (binding/non-binding and under which conditions); and on the use of standstill periods and review in the auction context (including whether this guidance should be under article 21 and chapter VIII with a cross-reference here, or vice versa).