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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 chapter III (Open tendering) of the UNCITRAL Model Law on Public Procurement.



GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

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Part II. Article-by-article commentary

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CHAPTER III. OPEN TENDERING

The provisions on open tendering, with few exceptions, are applicable under the Model Law to two-stage tendering and restricted tendering proceedings. The guidance provided to this chapter is therefore applicable to those procurement methods as appropriate.

Article 35. Procedures for soliciting tenders

Article 35 cross-refers to the provisions of article 32, which regulate the solicitation in open tendering, two-stage tendering and electronic reverse auctions used as a stand-alone procurement method. That article provides for open international solicitation as the default rule. The exceptions to international solicitation referred to in article 32 (4), and as explained in the guidance to that article, are designed to accommodate domestic and low-value procurements.

Article 36. Contents of invitation to tender

In order to promote efficiency and transparency, article 36 requires that invitations to tender should contain all information required for suppliers or contractors to be able to ascertain whether the subject matter being procured is of a type that they can provide and, if so, how they can participate in the open tendering proceedings. The specified information requirements are the required minimum, and so do not preclude the procuring entity from including additional information that it considers appropriate. The procuring entity may decide not to include references to the currency of payment and the language or languages of solicitation documents in domestic procurement, if it would be unnecessary in the circumstances; however, an indication of the language or languages may still be important in some multilingual countries.

Article 37. Provision of solicitation documents

1. The solicitation documents are intended to provide suppliers or contractors with the information they need to prepare their tenders and to inform them of the rules and procedures according to which the open tendering proceedings will be conducted. Article 37 has been included in order to ensure that all suppliers or

contractors that have expressed an interest in participating in the open tendering proceedings and that comply with the procedures set out by the procuring entity are provided with the solicitation documents. These procedures are to be set out in the invitation to tender in accordance with article 36 and may concern such matters as the means of obtaining the solicitation documents, the place where they may be obtained, the price to be paid for the solicitation documents, the means and currency of payment as well as a more substantive matter referred to in subparagraph (d) of article 36 that the participation in the given procurement proceedings may be limited in accordance with article 8 (with the consequence that suppliers or contractors excluded from participation in the procurement proceedings will not be able to obtain the solicitation documents).

2. The purpose of including a provision concerning the price to be charged for the solicitation documents is to enable the procuring entity to recover its costs of, for example, printing and providing those documents, but to avoid excessively high charges that could inhibit qualified suppliers or contractors from participating in open tendering proceedings. Development costs (including consultancy fees and advertising costs) are not to be recovered through this provision. The costs should be limited to the charges incurred in fact in providing the documents.

Article 38. Contents of solicitation documents

1. Article 38 contains a listing of the minimum information required to be included in the solicitation documents. This minimum information enables suppliers and contractors to submit tenders that meet the needs of the procuring entity and to verify that the procuring entity can compare tenders in an objective and fair manner. Many of the items listed in article 38 are regulated or dealt with in other provisions of the Model Law, such as article 9 on qualifications, article 10 on the description of the subject matter of the procurement and terms and conditions of the procurement contract (or framework agreement) and article 11 on evaluation criteria. The enumeration in this article of items that are required to be in the solicitation documents, including all items the inclusion of which is expressly provided for elsewhere in the Model Law, is useful because it enables procuring entities to use the article as a “check-list” in preparing the solicitation documents. The need for all information listed is however to be assessed by the procuring entity on a case-by-case basis: some information listed (such as in subparagraphs (i), (j) and (s)) may be irrelevant in domestic procurement or, as in the case with information in subparagraph (g), where presentation of partial tenders is not permitted.

2. One category of items listed in article 38 concerns the subject matter of the procurement and terms and conditions of the procurement contract (subparagraphs (b)-(f) and (w)). The purpose of including these provisions is to provide all potential suppliers or contractors with sufficient information about the procuring entity’s requirements as regards suppliers or contractors, the subject matter of the procurement, terms and conditions of delivery and other terms and conditions of the procurement contract (or framework agreement). This information is essential for suppliers or contractors to determine their qualifications, ability and capacity to perform the procurement contract in question. Although the specification of the exact quantity of the goods is generally required under subparagraph (d), where tendering proceedings are used for the award of framework agreements the

procuring entity will be in the position to specify at the outset of the procurement only an estimated quantity and will be permitted to do so under provisions of chapter VII of the Model Law (for further guidance, see paragraphs ... below). The reference to “contract form” in subparagraph (e) is linked to the formalities referred to in subparagraph (w) of this article: whereas under subparagraph (w) the procuring entity may specify that a procurement contract is to be concluded in writing, under subparagraph (e) the procuring entity will be required to specify in addition, where applicable, whether a contract in standard form is to be signed (which itself may provide, for example, standard terms and conditions of delivery, a standard warranty period, and a standard schedule of payments, etc.).

3. The second category of items listed concerns instructions for preparing and submitting tenders (subparagraphs (a), (g) through (p) and (u), such as the manner, place and deadline for presenting tenders and the manner of formulation of the tender price). The purpose of including these provisions is to limit the possibility that qualified suppliers or contractors would be placed at a disadvantage or their tenders even rejected due to lack of clarity as to how the tenders should be prepared. As is the case with the same type of information under article 36, the procuring entity may decide not to include references to the currency of payment and the language or languages of solicitation documents in domestic procurement, if it would be unnecessary in the circumstances; however, an indication of the language or languages may still be important in some multilingual countries.

4. The Model Law recognizes that, for procurement actions that are separable into two or more distinct elements (e.g., the procurement of different types of laboratory apparatus; the procurement of a hydroelectric plant consisting of the construction of a dam and the supply of a generator), a procuring entity may wish to permit suppliers or contractors to submit tenders either for the entirety of the procurement or for one or more portions thereof. That approach might enable the procuring entity to maximize economy by procuring either from a single supplier or contractor or from a combination of them, depending on which approach the tenders revealed to be more cost effective. Permitting partial tenders may also facilitate participation by SMEs, who may have the capacity to submit tenders only for certain portions of the procurement. Article 38 (g) is therefore included to allow such partial tenders and make the tender evaluation stage as objective, transparent and efficient as possible, since the procuring entity should not be permitted to divide the entirety of the procurement into separate contracts merely as it sees fit after tenders are submitted.

5. Some other items in article 38 (subparagraphs (b), (c) and (q)-(s)) concern in particular the manner in which qualifications of suppliers and contractors will be ascertained and the tenders will be examined and evaluated and the applicable criteria; their disclosure is required to achieve transparency and fairness in the tendering proceedings. The relevance of information listed in subparagraph (s) should however be assessed in domestic procurement.

6. Information referred to in subparagraphs (t) and (v) is an application of the general principle of transparency underpinning the Model Law: it informs suppliers and contractors about the legal framework applicable to public procurement in the enacting States in general and specific rules that may be applicable to the particular procurement proceedings (for example, if any classified information is involved); it also informs suppliers about the possibility of challenging and appealing the

procuring entity's decisions or actions, alerting them in particular whether a specifically dedicated and defined time frame (standstill period) will be provided enabling them to challenge the procuring entity's decisions and actions as regards examination and evaluation of tenders before the procurement contract enters into force. The place where applicable laws and regulations may be found, referred to in subparagraph (t), intends to refer not to the physical location but rather to an official publication or portal where authoritative texts of laws and regulations of the enacting State are made accessible to the public and systematically maintained (see the relevant guidance to article 5 of the Model Law in paragraphs ... above).

7. The article lists only the minimum information that must be provided. The procuring entity may decide to include additional information, for example the manner in which arithmetical errors under article 42 (1) would be corrected if necessary.¹

8. All categories of items listed in article 38, supplemented by items listed in article 36 (contents of invitation to tender) comprise terms and conditions of solicitation. Any or all of them may be challenged by suppliers or contractors under chapter VIII of the Model Law before the deadline for presenting submissions.

SECTION II. PRESENTATION OF TENDERS

Article 39. Presentation of tenders

1. Paragraph (1) ensures equitable treatment of all suppliers and contractors by requiring that the manner, place and the deadline for submission of tenders be specified in the solicitation documents (under article 2, the solicitation documents are defined as encompassing any amendments thereto). This requirement is further elaborated in article 14 on the rules concerning the manner, place and deadline for presenting application to pre-qualify or applications for preselection or for presenting submissions. Particular safeguards are included in that article, as well as in article 15 (3), to address situations in which changes are made to the information originally issued about the procurement procedure concerned. Where those changes make the originally published information materially inaccurate, the amended information is to be published in the same manner and place in which the original information about procurement was published. Under article 14 (5), notice of any extension of the deadline is also to be given to each supplier or contractor to which the procuring entity provided the solicitation documents. (For the guidance to the relevant provisions of articles 14 and 15, see paragraphs ... above.)

2. Paragraph (2) contains specific requirements as regards the form and manner of presentation of tenders that complement the general requirements of form and means of communication found in article 7 (see the commentary to article 7 in

¹ At its nineteenth session, the Working Group was requested to consider (A/CN.9/WG.I/WP.75/Add.3, footnote 49) whether the article should require the solicitation documents to specify the manner in which arithmetical errors would be corrected. The attention in this regard was drawn to the relevant discussion and query raised at the Working Group's seventeenth session (A/CN.9/687, para. 151). The Working Group did not address this issue. Further guidance on this point may need to be included here as well in the commentary to the relevant provisions of article 42.

paragraphs ... of this Guide). The article provides that tenders have to be presented in writing and signed, and that their authenticity, security, integrity and confidentiality have to be preserved. The requirement for “writing” seeks to ensure the compliance with the form requirement found in article 7 (1) (tenders have to be presented in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference). The requirement for a “signature” seeks to ensure that suppliers or contractors presenting a tender identify themselves and confirm their approval of the content of their presented tenders, with sufficient credibility. The requirement of “authenticity” is intended to provide the appropriate level of assurance that a tender presented by a supplier or contractor to the procuring entity is final and authoritative, cannot be repudiated and is traceable to the supplier or contractor submitting it. Together with the requirements of “writing” and “signature”, it thus is aimed at ensuring that there would be tangible evidence of the existence and nature of the intent on the part of the suppliers or contractors presenting the tenders to be bound by the information contained in their tenders. Additionally, that evidence would be preserved for record-keeping, control and audit. The requirements for “security”, “integrity” and “confidentiality” of tenders are intended to ensure that the information in presented tenders cannot be altered, added to or manipulated (“security” and “integrity”), and that it cannot be accessed until the time specified for public opening and thereafter only by authorized persons and only for prescribed purposes, and according to the rules (“confidentiality”).

3. In the paper-based environment, all the requirements described in the preceding paragraph of this Guide are met by suppliers or contractors presenting to the procuring entity, in a sealed envelope, tenders or parts thereof presumed to be duly signed and authenticated (at a risk of being rejected at the time of the opening of tenders if otherwise), and by the procuring entity keeping the sealed envelopes unopened until the time of their public opening. In the non-paper environment, the same requirements may be fulfilled by various standards and methods as long as such standards and methods provide at least a similar degree of assurances that tenders presented are indeed in writing, signed and authenticated and that their security, integrity and confidentiality are preserved. The procurement or other appropriate regulations should establish clear rules as regards the relevant requirements, and when necessary develop functional equivalents for the non-paper-based environment. Caution should be exercised not to tie legal requirements to a given state of technological development. The system, at a minimum, has to guarantee that no person can have access to the content of tenders after their receipt by the procuring entity prior to the time set up for formal opening of tenders. It must also guarantee that only authorized persons clearly identified to the system will have the right to open tenders at the time of formal opening of tenders and will have access to the content of tenders at subsequent stages of the procurement proceedings. The system must also be set up in a way that allows traceability of all operations in relation to presented tenders, including the exact time and date of receipt of tenders, verification of who accessed tenders and when, and whether tenders supposed to be inaccessible have been compromised or tampered with. Appropriate measures should be in place to verify that tenders would not be deleted or damaged or affected in other unauthorized ways when they are opened and subsequently used. Standards and methods used should be commensurate with risk. A strong level of authentication and security can be achieved by various commercial

software that is available at any given time but this will not be appropriate for low risk small value procurement. The choice should therefore be based on the cost-benefit analysis. Caution should also be exercised not to impose higher security measures than otherwise would be applicable in paper-based environment since these measures can discourage the participation of suppliers or contractors in non-paper-based procurement. These and other issues will have to be addressed in the procurement or other appropriate regulations. (For the general discussion of issues arising from the use of e-procurement, see paragraphs ... of Part I of the Guide.)

4. Paragraph (2) (b) requires the procuring entity to provide to the suppliers or contractors a receipt showing the date and time when their tender was received. In the paper-based environment, this usually is achieved through the procuring entity's written confirmation on a paper that the tender has been received with a stamp indicating day, time and place of receipt. In the non-paper-based environment, this should be done automatically. In situations where the system of receipt of tenders makes it impossible to establish the time of receipt with precision, the procuring entity may need to have an element of discretion to establish the degree of precision to which the time of receipt of tenders presented would be recorded. However, this element of discretion should be regulated by reference to the applicable legal norms in electronic commerce, in order to prevent abuse and ensure objectivity. Whatever the method of recording the date and time will be used in any given procurement, it must be disclosed at the outset of the procurement proceedings in the solicitation documents. With these safeguards, the certification of receipt provided by the procuring entity should be conclusive. When the submission of a tender fails, particularly arising from the protective measures taken by the procuring entity to prevent the system from being damaged as a result of a receipt of a tender, it shall be considered that no submission was made, as an application of the general rule that the submission of tenders is at the risk of the suppliers or contractors. Suppliers or contractors whose tenders cannot be received by the procuring entity's system should be instantaneously informed about the event in order to allow them where possible to re-submit tenders before the deadline for submission has expired. No re-submission after the expiry of the deadline shall be allowed.

5. Paragraph (2) (c) raises issues of security, integrity and confidentiality of presented tenders, discussed above. Unlike subparagraph 2 (a)(ii), it does not include a requirement for authenticity of tenders (such issues are relevant at the presentation of tenders only). It is presumed that, upon receipt of a tender by the procuring entity at the date and time recorded in accordance with paragraph 2 (b) of the article, adequate authenticity has already been assured.

6. It is recognized that failures in automatic systems, which may prevent suppliers or contractors from presenting their tenders before the deadline, may inevitably occur. The Model Law leaves the issue to be addressed by procurement or other appropriate regulations. Under the provisions of article 14 (4), the procuring entity may, in its absolute discretion, prior to the deadline for presenting tenders, extend the deadline if it is not possible for one or more suppliers or contractors to present their tenders by the deadline owing to any circumstance beyond their control. In such a case, it would have to give notice of any extension of the deadline promptly to each supplier or contractor to which the procuring entity provided the solicitation documents (see article 14 (5) of the Model Law). Thus, where a failure occurs, the procuring entity has to determine whether the system can be

re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for presenting tenders would be necessary. If, however, the procuring entity determines that a failure in the system will prevent it from proceeding with the procurement, the procuring entity can cancel the procurement and announce new procurement proceedings. Failures in automatic systems occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of automatic systems, can give rise to a challenge by aggrieved suppliers and contractors under article 63 of the Model Law.

7. The rule in paragraph (3) prohibiting the consideration of late tenders is intended to promote economy and efficiency in procurement and the integrity of and confidence in the procurement process. Permitting the consideration of late tenders after the commencement of the opening might enable suppliers or contractors to learn of the contents of other tenders before submitting their own tenders. This could lead to higher prices and could facilitate collusion between suppliers or contractors. It would also be unfair to the other suppliers or contractors. In addition, it could interfere with the orderly and efficient process of opening tenders. The provisions therefore require that any late tenders would be returned unopened to suppliers or contractors submitting them. Enacting States may require recording the submission of late tenders in the documentary record of procurement proceedings under article 24 (1) (w).

Article 40. Period of effectiveness of tenders; modification and withdrawal of tenders

1. Article 40 has been included to make it clear that the procuring entity should stipulate in the solicitation documents the period of time that tenders are to remain in effect.

2. It is of obvious importance that the length of the period of effectiveness of tenders should be stipulated in the solicitation documents, taking into account the circumstances peculiar to the particular tendering proceeding. It would not be a viable solution to fix in a procurement law a generally applicable and lengthy period of effectiveness, with the aim of covering the needs of most if not all tendering proceedings. So doing would be inefficient since for many cases the period would be longer than necessary. Excessively lengthy periods may result in higher tender prices, since suppliers or contractors would have to include in their prices an increment to compensate for the costs and risks to which they would be exposed during such a period (e.g., tied capacity and inability to tender elsewhere; the risks of higher manufacturing or construction costs).

3. Paragraph (2) has been included to enable the procuring entity to deal with delays in tendering proceedings following requests for extensions of the tender validity period. The procedure is not compulsory on suppliers and contractors, so as not to force them to remain bound to their tenders for unexpectedly long durations — a risk that would discourage suppliers and contractors from participating or drive up their tender prices. In order also to prolong, where necessary, the protection afforded by tender securities, it is provided that a supplier or contractor failing to obtain a security to cover the extended validity period of the

tender is considered as having refused to extend the validity period of its tender. In such a case, the effectiveness of the tender of the supplier or contractor will terminate upon the expiry of the original period of effectiveness specified in the solicitation documents.

4. Paragraph (3) is an essential companion of the provisions in article 15 concerning clarifications and modifications of the solicitation documents. This is because it permits suppliers and contractors to respond to clarifications and modifications of solicitation documents, or to other circumstances, either by modifying their tenders, if necessary, or by withdrawing them if they so choose. Such a rule facilitates participation, while protecting the interests of the procuring entity by permitting forfeiture of the tender security for modification or withdrawal following the deadline for submission of tenders. However, in order to take account of a contrary approach found in the existing law and practice of some States, paragraph (3) permits the procuring entity to depart from the general rule and to impose forfeiture of the tender security for modifications and withdrawals prior to the deadline for submission of tenders, but only if so stipulated in the solicitation documents. (See also the relevant comments to article 47 in paragraphs ... below.)

SECTION III. EVALUATION OF TENDERS

Article 41. Opening of tenders

1. The rule in paragraph (1) is intended to prevent time gaps between the deadline for submission of tenders and the opening of tenders. Such gaps may create opportunities for misconduct (e.g., disclosure of the contents of tenders prior to the designated opening time) and deprive suppliers and contractors of an opportunity to minimize that risk by submitting a tender at the last minute, immediately prior to the opening of tenders.²

2. Paragraph (2) sets out a rule that the procuring entity must permit all suppliers or contractors that have presented tenders, or their representatives, to be present at the opening of tenders. The modalities for the opening of tenders established by the procuring entity (the place, manner, time and procedures for the opening of tenders) should allow for the presence of suppliers or contractors, taking into account such factors as time difference, the need to supplement any physical location for opening of tenders with any means of ensuring presence of those who cannot be present at the physical location or opting for a virtual location. The presence may be in person or otherwise by any means that complies with requirements of article 7 of the Model Law (for a discussion of the relevant requirements, see paragraphs ... of this Guide). The second sentence of paragraph (2) supplements those requirements of article 7 (4) clarifying that, in the context of the opening of tenders, suppliers or contractors are deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the

² Explanation of further risks of departing from the requirements of the Model Law that tenders must be opened at the time specified in the solicitation documents as the deadline for presenting tenders, and practical considerations that should be taken into account in implementing that requirement, may need to be added (A/CN.9/687, para. 150).

opening of the tenders. This provision is consistent with other international instruments addressing the same matter.³

3. The term “fully and contemporaneously” in this context means that suppliers or contractors must be given the opportunity to observe (either by hearing or reading) all and the same information given out during the opening. This opportunity must be given at the same time as any person physically present at the opening of tenders would observe or hear the information concerned, subject to the time taken to upload it where it is to be read. The information concerned includes the announcements made in accordance with article 41 (3).

4. Suppliers must also be able to intervene where any improprieties take place, to the extent that they would be able to do so if they were physically present. The system in place therefore has to be capable of receiving and acknowledging or responding to suppliers’ feedback without delay. Different methods may exist to satisfy the requirement for full and contemporaneous appraisal using information technology systems. Regardless of the method used, sufficient information about them must be communicated to suppliers or contractors well in advance to enable them to take all measures required to connect themselves to the system in order to observe opening of tenders.

5. The rule requiring the procuring entity to permit all suppliers or contractors that have presented tenders, or their representatives, to be present at the opening of tenders contributes to transparency of the tendering proceedings. It enables suppliers and contractors to observe that the procurement laws and regulations are being complied with and helps to promote confidence that decisions will not be taken on an arbitrary or improper basis. For similar reasons, paragraph (3) requires that at such an opening the names of suppliers or contractors that have presented tenders, as well as the prices of their tenders, are to be announced to those present. With the same objectives in view, provision is also made for the communication of that information to participating suppliers or contractors that were not present or represented at the opening of tenders.

6. Where automated opening of tenders takes place, the enacting State should be aware of additional safeguards that must be in place to ensure transparency and integrity of the process of the opening of tenders. The system must guarantee that only authorized persons clearly identified to the system will have the right to set or change in the system the time for opening tenders in accordance with paragraph (1) of the article, without compromising the security, integrity and confidentiality of tenders. Only such persons will have the right to open tenders at the set time. The enacting State may require that at least two authorized persons should by simultaneous action perform opening of tenders. “Simultaneous action” in this context means that the designated authorized persons within almost the same time span shall open the same components of a tender and produce logs of what components have been opened and when. It is advisable that before the tenders are opened, the system should confirm the security of tenders by verifying that no authorized access has been detected. The authorized persons should be required to verify the authenticity and integrity of tenders and their timely presentation.

³ Sufficiency of the discussion of “deemed” present or “virtual” presence of suppliers or contractors at the opening of tenders in the presented draft is to be considered.

7. Measures should be in place to prevent the integrity of tenders from being compromised, to prevent their deletion or to prevent the destruction of the system when the system opens them, such as through virus or similar infection. The system must also be set up in a way that provides for the traceability of all operations during the opening of tenders, including the identification of the individual that opened each tender and its components, and the date and time each was opened. It must also guarantee that the tenders opened will remain accessible only to persons authorized to acquaint themselves with their contents and data (such as to members of an evaluation committee or auditors at subsequent stages of the procurement proceedings). These and related technical issues should be addressed in procurement and other regulations to be adopted by the enacting State.

Article 42. Examination and evaluation of tenders

1. Paragraph (1) to (3) regulate examination of tenders, which encompasses ascertainment of qualifications of suppliers and contractors presenting tenders, assessment of responsiveness of tenders of qualified suppliers or contractors and determination whether any ground for rejection of tenders in accordance with paragraph (3) of the article is present. As required by various provisions of the Model Law, including article 10 and 38, all examination criteria and procedure are to be disclosed to suppliers or contractors at the outset of the procurement proceedings.

2. The purpose of paragraph (1) is to enable the procuring entity to seek from suppliers or contractors clarifications of their tenders in order to assist in the examination and evaluation of tenders, while making it clear that this should not involve changes in the substance of tenders. Paragraph (1)(b), which refers to the correction of purely arithmetical errors, is not intended to refer to abnormally low tender prices that are suspected to result from misunderstandings or to other errors not apparent on the face of the tender. Enactment of the related notice requirement is important since, in paragraph (3)(b), provision is made for the mandatory rejection of the tender if the correction is not accepted.⁴

3. Paragraph (2) sets forth the rule to be followed in determining whether tenders are responsive and permits a tender to be regarded as responsive even if it contains minor deviations. Permitting the procuring entity to consider tenders with minor deviations promotes participation and competition in tendering proceedings. Quantification of such minor deviations is required so that tenders may be compared objectively in a way that reflects positively on tenders that do comply to a full degree.⁵

4. Paragraph (3) lists grounds for rejection of tenders. The list is exhaustive and refers only to the grounds that explicitly provided for in the Model Law. The ground listed in subparagraph (a) — the absence of qualifications — is to be implemented in the light of article 9 listing permissible qualification requirements and grounds for disqualification. The ground listed in subparagraph (b) — refusal by the supplier

⁴ Further elaboration on the rules and principles applicable to the correction by the procuring entity of arithmetical errors and the role of the solicitation documents in this regard may be needed.

⁵ Further elaboration on what would constitute “minor deviations” may be needed.

or contractor to accept the correction of the arithmetical error and unresponsiveness of the tender — is to be read together with provisions of paragraph (1) (b) that permit the procuring entity to correct purely arithmetical errors and require it in such case to give notice of such correction to the supplier or contractor that submitted the relevant tender. No further discussion between the procuring entity and supplier or contractor on the corrected arithmetical error should be permitted: the supplier or contractor concerned can either accept the correction made or its tender will be rejected. The ground listed in subparagraph (1) (c) — unresponsiveness of the tender — is to be understood in the light of article 10 and paragraphs (1) and (2) of article 42 that set out the legal framework for the procuring entity to apply in deciding on responsiveness or unresponsiveness of tenders. The grounds listed in subparagraph (d) originate from article 19 that permit the procuring entity to reject an abnormally low submission and from article 20 that require the procuring entity to exclude a supplier or contractor from the procurement proceedings on the grounds of inducement from that supplier or contractor, an unfair competitive advantage or conflicts of interest.

5. Paragraphs (4) to (7) regulate the evaluation of tenders, i.e. comparison of all tenders that have not been rejected as a result of examination. As required under various provisions of the Model Law, such as articles 11 and 38 and paragraph (4) (a) of this article, responsive tenders are evaluated against the pre-disclosed evaluation criteria and in accordance with the pre-disclosed evaluation procedures. The successful tender, as reiterated in paragraph (4) (b) of the article, may be the tender with the lowest tender price or the most advantageous tender.⁶ In accordance with article 11 (5) (a) of the Model Law, whether the successful submission will be ascertained on the basis of only price or of price and other criteria is to be defined in the solicitation documents at the outset of the procurement and cannot be subsequently varied.

6. The rule in paragraph (5) on conversion of tender prices to a single currency for the purposes of comparison and evaluation of tenders is included to promote accuracy and objectivity in the decision of the procuring entity. That single currency is to be defined in the solicitation documents, as required under article 38 (s), together with any applicable exchange rate or the method to be used for determination of the applicable exchange rate. These provisions may be irrelevant in domestic procurement.

7. Paragraph (6) has been included in order to enable procuring entities to require the supplier or contractor submitting the successful tender to reconfirm its qualifications. This may be of particular utility in procurement proceedings of a long duration, in which the procuring entity may wish to verify whether qualification information submitted at an earlier stage remains valid. Use of reconfirmation is left discretionary since the need for it depends on the circumstances of each tendering proceeding.

⁶ Explanation on evolution of procurement practices since 1994 that justified the replacement of the term the “lowest evaluated tender” used in this context in the 1994 Model Law with the term the “most advantageous tender” is needed. Since the point is relevant to other provisions of the Model Law where reference to “most advantageous” is found, to avoid the repetitive discussion, the appropriate location of such explanation in the Guide is still to be considered.

8. In order to make the reconfirmation procedure effective and transparent, paragraph (7) mandates the rejection of a tender upon failure of the supplier or contractor to reconfirm its qualifications, and establishes the procedures to be followed by the procuring entity to select a successful tender in such a case. That paragraph also reiterates the right of the procuring entity to cancel the procurement in such cases, which is an essential safeguard against risks of collusive behaviour by suppliers or contractors.

Article 43. Prohibition of negotiations with suppliers or contractors

Article 43 contains a clear prohibition against negotiations between the procuring entity and a supplier or contractor concerning a tender submitted by the supplier or contractor. This rule has been included because such negotiations might result in an “auction”, in which a tender offered by one supplier or contractor is used to apply pressure on another supplier or contractor to offer a lower price or an otherwise more favourable tender. Many suppliers and contractors refrain from participating in tendering proceedings where such techniques are used or, if they do participate, they raise their tender prices in anticipation of the negotiations. The prohibition of negotiations does not intend to cover discussions that may take place between the procuring entity and a supplier or contractor for the purpose of clarifying its tender in accordance with article 42 (1) of the Model Law, or for concluding the procurement contract.
