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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 IV of the UNCITRAL Model Law on Public Procurement, comprising an introduction and commentary on restricted tendering and request-for-quotations (articles 44 and 45), and on related articles in Chapter II (articles 29 and 34).

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\* This document was submitted less than ten weeks before the opening of the session because of the need to complete inter-sessional informal consultations on the relevant provisions of the draft revised Guide to Enactment.



# **GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT**

## **Part II. Article-by-article commentary**

### **Chapter IV. Procedures for Restricted Tendering, Request-for- Quotations and Request-for-Proposals without negotiation [\*\*hyperlinks\*\*]**

#### **A. Introduction to Chapter IV methods**

##### **Executive Summary**

1. Chapter IV of the Model Law sets out the procedures for three of the various procurement methods that are alternatives to open tendering: restricted tendering [\*\*hyperlink\*\*], request-for-quotations [\*\*hyperlink\*\*] and request-for-proposals without negotiation [\*\*hyperlink\*\*]. The typical use of these methods is in situations in which the procuring entity's needs can be determined and described in accordance with the requirements of article 10 at the outset, and in which there is no requirement for discussions, dialogue or negotiations between the procuring entity and suppliers or contractors; in other respects, these methods address a wide range of circumstances. These circumstances, which form the basis upon which the use of these methods rather than open tendering is justified (in accordance with articles 28 and 29), can be summarized into three broad categories, according to the situations in which they can be used. The first is for the procurement in a limited market of specialised or complex products or services; and the second is for the procurement of products or services that may be of low-value, already available in the market and/or available in a market with numerous suppliers; and the third is for the procurement of products and services for which technical and quality considerations are particularly important. In addition, the conditions for use of the procurement methods under Chapter IV are very closely linked with the rules on solicitation for each method. These rules and categories are explained further in the following sections.

##### **Enactment: policy considerations**

2. A common feature of Chapter IV procurement methods is that they can involve direct solicitation, either as a necessary feature of the method itself (restricted tendering and request-for-quotations) or as an option (request-for-proposals without negotiation). The default rule under the Model Law is for public and unrestricted solicitation, as is explained in section \*\* of the guidance to Part II of Chapter II [\*\*hyperlink\*\*]. Such solicitation involves an advertisement to invite participation in the procurement, the issue of the solicitation documents to all those that respond to the advertisement, and the full consideration of the qualifications and submissions of suppliers and contractors that submit tenders or other offers.

3. Direct solicitation in Chapter IV procurement methods involves risks of abuse in that the identification of the market and hence of the suppliers and contractors to be invited to participate involves assessments that are essentially subjective. It is also at risk of abuse to favour one or more suppliers, or to restrict competition. To mitigate these risks and to introduce transparency, articles 34(5) and 35(4) [\[\\*\\*hyperlinks\\*\\*\]](#) require an advance notice of the procurement to be published both domestically and internationally as per the requirements for an invitation to tender, so that potential suppliers and contractors can contact the procuring entity and request to participate in the procurement.

4. Direct solicitation in restricted tendering and request-for-proposals without negotiation is available in two situations. The first is where the subject-matter comprises specialized or complex products or services and is available in a limited market (the first category described above). Direct solicitation requires an advance notice as described above, and that the solicitation be addressed to all suppliers and contractors from which the subject-matter is available. The implications of these requirements for the effective use of these procurement methods using direct solicitation, are discussed in the following section [\[\\*\\*hyperlink\\*\\*\]](#).

5. Direct solicitation is also available in restricted tendering and request-for-proposals without negotiation where the time and cost of examining and evaluating a large number of tenders would be disproportionate to the value of the procurement (the second category described above). In other words, the situation is that the market includes so many participants that are likely to be qualified that a cost-effective procedure cannot be guaranteed. The solicitation rules therefore allow the number of participants to be capped by the procuring entity, subject to safeguards to address the risks in identifying the appropriate number of invited participants and in the manner in which the suppliers to be invited to participate are chosen.

6. The first safeguard is the requirement for an advance notice of the procurement under articles 34(5) and 35(4) [\[\\*\\*hyperlinks\\*\\*\]](#), as described in paragraph [\\*\\* above](#). The second is that the procuring entity must solicit tenders or proposals from a sufficient number of suppliers to ensure effective competition and must select the participating suppliers in a non-discriminatory manner (see articles 34(1)(b) and 35(2)(b) [\[\\*\\*hyperlinks\\*\\*\]](#)). How to ensure objectivity and avoid discrimination in such solicitation is discussed in the following section [\[\\*\\*hyperlink\\*\\*\]](#).

7. It should be noted that requiring the procuring entity to follow pre-qualification procedures in such cases would add administrative steps, but would not address the central issue, which is that the number of potentially qualified suppliers is excessive. The requirement under articles 34(1)(b) and 35(2)(b) [\[\\*\\*hyperlinks\\*\\*\]](#) is to find a way of selecting from among the large numbers of potentially qualified suppliers a sufficient number, without discrimination, to ensure effective competition. The requirement must also be read in the light of the requirement under article 28(2) [\[\\*\\*hyperlink\\*\\*\]](#) to maximize competition to the extent possible. Techniques for so doing are also discussed in the following Section [\[\\*\\*hyperlink\\*\\*\]](#).

8. Request-for-quotations procedures, which by their nature involve direct solicitation, do not include the above safeguards, as further discussed in the commentary to that procurement method in [\[\\*\\*Section/paragraph \\*\\* below\\*\\*\]](#). In

particular, there is no requirement for an advance notice of the procurement or for publication of the terms of the procurement, and it is also likely that where a procurement falls below the low-value threshold for the use of this procurement method, it will also fall below the threshold for publication of a contract award notice under article 23 [\[\\*\\*hyperlink\\*\\*\]](#). As a result, the method is flexible but not transparent; this is the policy reason for restricting it so that it is an exceptional method, as the commentary to the method also explains.

9. The use of e-procurement means that many elements of the examination and evaluation of tenders can be automated, saving both time and costs, and reducing the administrative burden that underlies the justification for direct solicitation in Chapter IV procurement methods. In addition, the e-procurement and the tools it offers — such as electronic reverse auctions under Chapter VI, and framework agreements and e-catalogues under Chapter VII [\[\\*\\*hyperlink\\*\\*\]](#) — provide techniques that should diminish the need for the request-for-quotations method.

10. The issues arising from the third category of Chapter IV procurement methods — those in which technical and quality considerations are particularly important — include the solicitation questions discussed for the first category of chapter IV procurement methods described above. The use of the method to ensure that technical and quality considerations are appropriately treated is discussed in the commentary to request-for-proposals without negotiation below [\[\\*\\*hyperlink\\*\\*\]](#).

11. In the light of all the above considerations, enacting States may wish to consider whether their local circumstances require all chapter IV procurement methods, as well as framework agreements and electronic reverse auctions. Where all these methods are provided for, enacting States may wish to regulate their use in more detail than the Model Law provides, to ensure that the methods are not used where more transparent and objective procedures could be used in the alternative. The issues that might inform regulations, rules or guidance to such end are discussed in the following section.

## **Issues of implementation and use**

12. It will be evident that assessing whether the conditions for use of the procurement methods in Chapter IV applies involves significant discretion on the part of the procuring entity. As the above discussion of the policy issues regarding the procurement methods in Chapter IV indicates, the main issues to be addressed in ensuring effective implementation and use of these methods are:

(a) To emphasize the requirement for the publication of an advance notice of the procurement where direct solicitation is used, other than in request-for-quotations, as a transparency safeguard;

(b) To ensure that, where direct solicitation is used for highly complex or specialized procurement in a limited market, the market in which the items or services are available is correctly defined;

(c) To ensure that, where direct solicitation is used because of the likely excessive numbers of qualified suppliers (see paragraph \*\* above), that the identification of the number of participants to be invited and the participants to be invited is carried out objectively; and

(d) To discuss ways of reducing the administrative burden of public and unrestricted solicitation, without compromising objectivity, transparency and competition.

13. As regards advance notices, it should be noted that the notices in effect test the procuring entity's view of the extent of the market. They therefore are a way of mitigating the risk of abuse in market definition or identification of appropriate participants. The requirement for such notices is essential in the fight against corruption and as a means to achieve transparency. Together with the provisions of chapter VIII [\[\\*\\*hyperlinks\\*\\*\]](#), advance notices enable and encourage aggrieved suppliers or contractors to seek redress earlier in the procurement process rather than at a later stage where redress may not be possible or will be costly to the public and available remedies will thus be limited.

14. It is important to note that there is no threshold below which the requirement for advance notices is relaxed. This safeguard is particularly important given that the estimated value of the types of procurement described above may well fall below the threshold for publication of a contract award notice under article 23. The advance notices provide an oversight mechanism for the exercise of the procuring entity's discretion in assessing the markets and participants for the procurement concerned, and the enacting State may wish to ensure that the oversight of such procurements includes the monitoring of responses to such notices.

15. As regards the question of market definition, the importance of a consistent approach and the safeguard that the procuring entity must invite all potential suppliers or contractors to participate should be emphasized in rules for and guidance to procurement officials. As market definition is also a feature of competition law and policy, the suggested interaction between the competition law body and the public procurement agency or similar body described in section [\\*\\* of the general commentary above \[\\*\\*hyperlink\\*\\*\]](#) may allow the experience of the former body in the provision of rules and guidance to assist procuring entities and ensure objectivity in this regard.

16. Procuring entities should also be encouraged to bear in mind the risks of failing to identify all potential suppliers and contractors in limited markets. They include a challenge under Chapter VIII of the Model Law from a supplier or contractor that considers he is able to supply the subject-matter of the procurement but has not been invited to participate. If previously unknown suppliers respond to the advance notice, they must be permitted to submit a tender or proposals unless they are disqualified or otherwise do not comply with the terms of the notice (for example, overseas suppliers where the procurement is purely domestic under article 8 of the Law). Where the extent of the market is not fully known or understood, therefore, a risk that rises where there may be overseas suppliers, public and unrestricted solicitation or open tendering with pre-qualification may be appropriate alternatives. An alternative approach would be to allow the use of pre-selection procedures as provided for in request-for-proposals with dialogue, under article 49920 [\[\\*\\*hyperlink\\*\\*\]](#). The latter approaches, in particular, means that only qualified participants or only the best qualified suppliers are able to present tenders or proposals. The procuring entity may be required to examine pre-qualification or pre-selection applications, but need not examine and evaluate tenders or proposals from unqualified suppliers, reducing the overall administrative burden.

17. In addition, the link between the requirement to invite all potential suppliers and contractors and the provisions of articles 14 and 15 of the Model Law should be highlighted: they raise the risks of an additional administrative burden and delays in the procurement should an additional supplier emerge. These articles require a submission deadline that provides sufficient time for suppliers or contractors to present their submissions, and permit the extension of the submission deadline if required. Although the provisions do not expressly require the extension of the submission deadline where new suppliers emerge, such a requirement can be inferred from the requirement for sufficient time to present submissions, and the public procurement agency or other body issuing regulations or rules and other guidance may wish to include such an express requirement. A practical way to minimize the risk of late requests to participate is to include, in the advance notice, a statement requesting potential participants to identify themselves to the procuring entity before the date upon which the solicitation documents will be issued.

18. As regards direct solicitation used to avoid the disproportionate costs of examining a large number of tenders or proposals as against the value of the procurement, both identifying the appropriate maximum and the manner of selection of the suppliers to be invited to participate will be key in avoiding misuse or overuse.

19. The procuring entity will have significant discretion in deciding the appropriate maximum by reference to the circumstances of the procurement concerned: the regulations, rules or guidance should also discuss a reasonable minimum. Here, they may also refer to the requirement under article 28(2) of the Model Law to seek to maximize competition to the extent possible when selecting and using any method of procurement [\[\\*\\*hyperlink\\*\\*\]](#). In request-for-quotations the minimum number of participants is three suppliers, but that method is available in a far narrower range of circumstances than other Chapter IV procurement methods. Many commentators consider that a minimum of five invited participants is a reasonable number to avoid collusion and the ability to direct the procurement towards a favour supplier in most circumstances.

20. Objectivity in identifying the suppliers or participants within the stated number can be achieved by various methods, such as first-come, first-served, the drawing of lots or other random choice in a commodity-type market. The goal should be to achieve maximum effective competition to the extent practicable. Here, it should be noted that the manner in which the suppliers will be selected to participate may also be challenged under chapter VIII of the Model Law [\[\\*\\*hyperlink\\*\\*\]](#), but on the basis of a discriminatory selection rather than non-selection per se. Where repeated procedures are concerned, and the same limited group is repeatedly selected, though, it may be easier to show a lack of objectivity in the selection. In such cases, the procuring entity should be advised to take particular care to be demonstrably objective in its selection of the suppliers to be invited to participate (or may wish to consider the use of a tool such as a framework agreement, as noted above); rules and guidance should also emphasize that the desired goal of saving time and costs could be frustrated in the event of a challenge.

21. While the requirements for direct solicitation in request-for-quotations are less stringent, stipulating that as many suppliers and contractors as practicable, but at least three should be invited to participate, the requirement should also be read together with that in article 28(2) to seek to maximize competition to the extent

possible [\[\\*\\*hyperlink\\*\\*\]](#). In addition, and as explained in the guidance to that procurement method below [\[\\*\\*hyperlink\\*\\*\]](#), the rules on estimation of the value of the procurement under article 12 [\[\\*\\*hyperlink\\*\\*\]](#) should be clarified to make it clear how a series of low-value procurements over a given period should be aggregated for the purposes of applicable thresholds.

22. As regards reducing the administrative burden of public and unrestricted solicitation, without compromising objectivity, transparency and competition, the Model Law contains several procurement methods and tools that can be procedurally efficient. For example, framework agreements are designed for repeated procurements, which may well be the situation in the types of relatively simple and low-value procurement that characterise the second category of Chapter IV procurement methods (request-for-quotations and some types of restricted tendering and request-for-proposals without negotiation). Framework agreements allow many mandatory procedural steps to be conducted once for what would otherwise be a series of procurements: these steps involve examination and evaluation of submissions, as further explained in the commentary to that procurement method [\[\\*\\*hyperlink\\*\\*\]](#). Electronic reverse auctions can involve administratively simpler procedures than tendering, as further explained in the commentary to that procurement method [\[\\*\\*hyperlink\\*\\*\]](#). In addition, e-procurement techniques and methods generally involve higher levels of transparency than traditional request-for-quotations, and as they require public and unrestricted solicitation as a general rule, higher levels of transparency in this aspect than the relevant restricted tendering and request for proposals methods.

## **B. Guidance on Chapter IV procurement methods**

23. In order to assist the reader, the commentary to each of the Chapter IV procurement methods below includes a general description of each method and its main policy issues, and commentary on its conditions for use, its solicitation rules, and on the procedural articles for each such method. The procedures are set out in Chapter V itself, but as the conditions for use and solicitation rules are set out in Chapter II, the commentary also cross-refers to the issues raised by the relevant provisions in Chapter II [\[\\*\\*hyperlink\\*\\*\]](#), expanding on that commentary where necessary.

### **1. Restricted tendering**

#### General description and main policy issues

24. As noted in the introductory section to this Chapter [\[\\*\\*hyperlink\\*\\*\]](#), restricted tendering has been included in order to enable the procuring entity, in exceptional cases, to solicit participation only from a limited number of suppliers or contractors. Those exceptional cases are: the procurement of technically complex or specialized subject-matter that is available from only a limited number of suppliers (for example, equipment for nuclear power plants); or where the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject-matter of the procurement (for example, the supply of badges or pins intended to be traded at sporting events). As explained

in the introductory section, a requirement for public and unrestricted solicitation in such cases would be inappropriate.

**Article 29(1). Conditions for use of restricted tendering [\[\\*\\*hyperlink\\*\\*\]](#).**

25. Article 29(1) sets out the conditions for use of restricted tendering. Although the use of restricted tendering is subject to transparency safeguards, in that an advance notice of the procurement is required under the provisions of article 34(5), and its procedures follow open tendering other than as regards solicitation, strict and narrow conditions for use have been included for restricted tendering, which have to be read together with the rules on solicitation in article 34(1). These conditions and rules are based on the notion that the use of restricted tendering other than in the limited situations set out would fundamentally impair the objectives of the Model Law.

26. Restricted tendering underground 1(a) is available only where all suppliers or contractors that can supply the subject-matter are invited to participate. Restricted tendering underground (1)(b) can be used only where the procuring entity solicits tenders from a sufficient number of suppliers to ensure effective competition, and chooses the selected participants in a non-discriminatory fashion. The risks to the efficiency and effectiveness of the procurement process if these rules are not respected, in terms of procedural delays, additional steps in the process and challenges under the Model Law are highlighted in the commentary in the introduction to Chapter IV procurement methods above [\[\\*\\*hyperlink\\*\\*\]](#).

27. The procuring entity runs fewer risks if recourse to restricted tendering has been justified on the ground referred to in paragraph (1)(b), that is the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject-matter of the procurement. As long as it has selected a sufficient number of suppliers or contractors in an objective manner to ensure effective competition, the procuring entity in such cases may decline to consider requests to tender coming from additional suppliers or contractors responding to the notice published in accordance with article 34(5).

28. The provisions of paragraph (1)(b) should also be read together with article 12 of the Model Law containing rules on estimation of the value of the procurement. That article contains essential safeguards against the artificial division of the subject-matter of the procurement for the purpose, for example, of justifying the use of restricted tendering on the ground set out in paragraph (1)(b), i.e. that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject-matter of the procurement. The procuring entity should also be provided with guidance on aggregation rules where there are repeated procurements, as noted in paragraph [\\*\\*](#) of the introductory section [\\*\\*](#) above [\[\\*\\*hyperlink\\*\\*\]](#).

29. The procuring entity, under article 29(3) [\[\\*\\*hyperlink\\*\\*\]](#) read together with the provisions of article 25(1)(e) [\[\\*\\*hyperlink\\*\\*\]](#), is required to put on the record a statement of the reasons and circumstances relied upon by the procuring entity to justify the use of restricted tendering instead of open tendering, in such detail as would allow the decision to be overseen or challenged where appropriate. However, the justification need not be included in the notice of the procurement (to avoid inaccurate summaries or excessively long notices). (See, also, the guidance to

article 25 that explains how suppliers that may wish to challenge the choice of procurement method can have access to the justification in the record. [\[\\*\\*hyperlink\\*\\*\]](#))

**Article 34(1) and (5). Solicitation in restricted tendering [\[\\*\\*hyperlink\\*\\*\]](#).**

30. Article 34(1) sets out minimum solicitation requirements in restricted tendering. They have been drafted in order to give effect to the purpose of article 29(1), i.e. limiting the use of restricted tendering to truly exceptional cases while maintaining the appropriate degree of competition. They are tailored specifically to each of the two exceptional cases reflected in the conditions for use: in the case of restricted tendering on the first ground (under article 29(1)(a) [\[\\*\\*hyperlink\\*\\*\]](#)), i.e. where the procurement is of technically complex or specialized subject-matter available from only a limited number of suppliers, all the suppliers or contractors that could provide that subject-matter must be invited to participate. In the case of restricted tendering on the second ground (under article 29(1)(a) [\[\\*\\*hyperlink\\*\\*\]](#)), i.e. that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject-matter of the procurement, suppliers or contractors should be invited in a non-discriminatory manner and in a sufficient number to ensure effective competition. The policy and implementation issues that should inform the guidance given to procuring entities in this regard is discussed in [\[\\*\\*section/paragraphs\\*\\*\]](#) of the introductory section to this Chapter above [\[\\*\\*hyperlinks\\*\\*\]](#).

31. The requirement for selection in a non-discriminatory manner also presupposes notification to the public in accordance with paragraph (5) of article 34 of not only the procuring entity's decision to use restricted tendering also of the maximum number of participants to be selected, and the manner of selection up to the maximum number notified — see, also, paragraphs [\\*\\*](#) of the introductory section to this Chapter above [\[\\*\\*hyperlinks\\*\\*\]](#).

**Article 45. Restricted tendering [\[\\*\\*hyperlink\\*\\*\]](#).**

32. Article 45 regulates the procedures for restricted tendering. The provisions are very short, in that they apply the provisions of Chapter III governing open tendering [\[\\*\\*hyperlink\\*\\*\]](#) to restricted tendering, save as regards solicitation as discussed in paragraphs [\\*\\*](#) above.

33. Paragraph (2) therefore excludes articles 36 to 38 [\[\\*\\*hyperlinks\\*\\*\]](#) from restricted tendering. Article 36 regulates procedures for soliciting tenders in open tendering and is therefore not applicable to restricted tendering. Article 37 [\[\\*\\*hyperlink\\*\\*\]](#) regulates the contents of an invitation to tender to be published in open tendering. In restricted tendering, it is not necessary to issue an invitation to tender; where one is issued, it need not include all information listed in article 37. As regards article 38 [\[\\*\\*hyperlink\\*\\*\]](#), the solicitation documents in restricted tendering will be provided to all suppliers that were directly invited and that expressed interest in tendering.

34. Some provisions of article 38 [\[\\*\\*hyperlink\\*\\*\]](#) will also not be applicable to restricted tendering. If the procuring entity decides to charge a price for the solicitation documents in restricted tendering, it should, despite the exclusion of article 38 from application to restricted tendering, be bound by the provision in its

last sentence of (“the price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors”). This provision appears in other articles of the Model Law in similar context and may be considered as referring to good practice that is aimed at preventing the procuring entity from applying excessively high charges for the solicitation documents. The negative effect of such charges on participation in procurement of suppliers or contractors, in particular SMEs, and prices that suppliers or contractors participating in the procurement would eventually offer, should be carefully considered. Enacting States may wish to make express provision to such effect in the procurement regulations required under article 4 [\[\\*\\*hyperlink\\*\\*\]](#).

## 2. Request-for-quotations

### General description and main policy issues

35. The request-for-quotations procedure provides a procurement method appropriate for low-value purchases of a standardized nature (commonly referred to as “off-the-shelf items”). In such cases, engaging in tendering proceedings, which can be costly and time-consuming, may not be justified. Article 29(2) limits the use of this method strictly to procurement of a value below the threshold set in the procurement regulations. As regards the considerations relevant to setting the threshold, see Section [\\*\\*](#) of the commentary in the introduction to Chapter I [\[\\*\\*hyperlink\\*\\*\]](#).

36. In enacting article 29, it should be made clear that use of request-for-quotations is not mandatory for procurement below the threshold value. Article 28 containing the requirement to maximize competition and to have regard for the circumstances surrounding the procurement when choosing a procurement method, and the conditions for use of other procurement methods that might be appropriate, will guide the procuring entity in considering alternatives to request-for-quotations (for the relevant guidance to article 28, see paragraphs [\\*\\*](#) of the commentary to Chapter II [\[\\*\\*hyperlink\\*\\*\]](#)).

37. In particular, the method is not intended to be used for repeated purchases, because of the risk of restricting the market and of abuse in so doing (such as through an abusive selection of participating suppliers or in justifying the need for repeated purchases by, for example, splitting procurement to avoid exceeding the threshold under article 12 (see, further, below [\[\\*\\*hyperlink\\*\\*\]](#))). For repeated purchases, establishing an open framework agreement or, if more complex items are involved, concluding a closed framework agreement as a result of tendering proceedings, is a preferred alternative (see, further, the commentary to Chapter VII [\[\\*\\*hyperlink\\*\\*\]](#)). The use of electronic catalogues may assist in promoting transparency where the procedure is used on a periodic basis. For example, the procurement of spare parts for a fleet of vehicles may be for a single purchase that is unlikely to recur, in which case request-for-quotations may be appropriate; for regular purchases of such spare parts, a framework agreement would be more appropriate.

38. Where procurement of more complex items is involved, tendering with its greater transparency safeguards should be used, and restricted tendering on the ground set out in article 28(1)(b) may be appropriate in such cases. Where initial low-value procurement would have the long-term consequence of committing the

procuring entity to a particular type of technological system or to repeat purchases of similar items, the use of other methods of procurement, perhaps in conjunction with framework agreements, is recommended. For procurement of commodities, simple services and similar items, an alternative approach may be to use an electronic reverse auction. (For the relevant guidance to article 28(1)(b) as applicable to restricted tendering, see paragraphs \*\* of the commentary to Chapter II [\[\\*\\*hyperlink\\*\\*\]](#); for the relevant guidance to provisions on electronic reverse auctions, see paragraphs \*\* of the commentary to Chapter VI [\[\\*\\*hyperlink\\*\\*\]](#); and for the relevant guidance to provisions on framework agreements, see paragraphs \*\* of the commentary to Chapter VII [\[\\*\\*hyperlink\\*\\*\]](#).)

**Article 29(2). Conditions for use of request-for-quotations [\[\\*\\*hyperlink\\*\\*\]](#).**

39. Article 29(2) sets out the conditions for use of request-for-quotations, including the requirement for an upper threshold as set out above, and the requirement that the subject-matter of the procurement is not produced to the particular design of the procuring entity.

40. The provisions of paragraph (2) should be read together with article 12 of the Model Law containing rules on estimating the value of the procurement. That article gives added and important effect to the intended limited scope for the use of request-for-quotations. It does so by prohibiting the artificial division of the subject-matter of the procurement for the purpose of circumventing the value limit on the use of request-for-quotations with a view to avoiding use of the more competitive methods of procurement, a prohibition that is essential to the objectives of the Model Law.

**Article 34(2) and (5). Solicitation in request-for-quotations [\[\\*\\*hyperlink\\*\\*\]](#).**

41. Article 34(2) [\[\\*\\*hyperlink\\*\\*\]](#) regulates solicitation in request-for-quotations proceedings. The objectives of the Model Law of fostering and encouraging participation and competition are applicable to procurement regardless of its value. Thus, the procuring entity is bound to request quotations from as many suppliers or contractors as practicable, but from at least three, without exception. This minimum requirement is present in the light of the type of the subject-matter supposed to be procured by means of request-for-quotations — readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market (article 29(2) [\[\\*\\*hyperlink\\*\\*\]](#)). For this type of procurement, it should always be possible to request quotations from at least three suppliers or contractors that are capable of providing the subject-matter of the procurement. The use of electronic procurement also allows the procuring entity to reach a broader audience and ensure that a sufficient number of quotations is sought.

42. Enacting States may wish to provide guidance to ensure that the selection of participants in request-for-quotations procedures is not carried out in a way so as to restrict market access or to allow abuse of the procedures, as there are no provisions in the Model Law that regulate the manner in which the participants are to be identified. Examples of abuse include the selection of two suppliers whose prices are known to be high, or two suppliers that are geographically remote, so as to direct the procurement towards a third, chosen supplier. The considerations raised as regards the manner of selection of participating suppliers in the context of the use of

restricted tendering on the ground of article 29(1)(b) are relevant here (see the commentary in the introduction to Chapter IV above [\[\\*\\*hyperlink\\*\\*\]](#)). In addition, procedures that require the comparison of historical offers and to ensure rotation among suppliers, where the same items may be procured occasionally, are useful. Oversight procedures should identify the winning suppliers under this method, so that repeat awards can be evaluated.

43. Although request-for-quotations is available in a far narrower range of circumstances than other second-category Chapter IV procurement methods (the conditions being designed to ensure that the scope for use and consequently misuse of the method is limited), enacting States may alternatively consider a cautious approach and set out in regulations, rules or guidance the same requirements for objectivity and ensuring effective competition as for those other methods. So doing may to some extent reduce the flexibility in the method, but should make oversight of transparency, competition, and fair and equitable treatment that underpin the Model Law easier to monitor and will enhance consistency. Where this approach is combined with e-procurement, the additional administrative burden may be negligible

44. Electronic methods of requesting quotations may generally be particularly cost-effective for low-value procurement and ensuring also more transparent selection. The use of electronic catalogues as a source of quotations may in particular be considered to offer better opportunity for transparency in the selection of suppliers from which to request quotations, in that such selection can be evaluated against those suppliers offering relevant items in catalogues (see, also, the guidance on framework agreements under chapter VII for the repeated procurement of low-cost items). Ensuring adequate transparency is a key issue, given that procurement under this method is not required to be preceded by a notice of the procurement (see, further, paragraph ... above) and may fall below the threshold for an individual public announcement of the contract award under article 23 [\[\\*\\*hyperlink\\*\\*\]](#).

45. The requirement to request quotations from at least three suppliers or contractors should not however be interpreted as invalidating the procurement where in response to request-for-quotations addressed to three or more suppliers only one or two quotations were received.

**Article 46. Request-for-quotations [\[\\*\\*hyperlink\\*\\*\]](#).**

46. Article 46 [\[\\*\\*hyperlink\\*\\*\]](#) sets out the procedures for request-for-quotations. In the light of the nature and low value of the subject-matter to be procured, only minimum procedural requirements are included, designed to provide for the fair and equitable treatment of suppliers or contractors participating in the procurement. Overseeing the use of the method, using electronic tools where possible to amortise the costs of so doing in low-value procurement, can introduce transparency and safeguards against abuse in practice.

47. With respect to the requirement in paragraph (1) that suppliers from which quotations are requested should be informed as to the charges to be included in the quotation, the procuring entity may wish to consider using recognized trade terms, in particular INCOTERMS, or other standard trade descriptions in common use — such as those in the information technology and communications markets — so that

the off-the-shelf items for which the method is designed can be defined by reference to industry standards. So doing will both enhance transparency and reduce the administrative burden of submitting and reviewing quotations.

### **3. Request-for-proposals without negotiation**

#### General description and main policy issues

48. Request-for-proposals without negotiation is a procurement method that may be used where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of their quality and technical aspects. When using this method, as a request-for-proposals procurement method, the procuring entity will express its needs in a functional or output-based manner which, while it may include technical specifications, is not based on a single technical solution.

49. This approach is appropriate where the procuring entity does not wish to be influenced by the financial aspects of proposals when it examines and evaluates their quality and technical aspects. These circumstances may arise, for example, where the procuring entity wishes to consider whether a particular technical solution will work, or to assess the quality of key personnel. The method is therefore suitable for procurement of items or services of a relatively standard nature, where all aspects of the proposals can be evaluated without resort to discussions, dialogue or negotiations with suppliers.

50. In this regard, it is important to delineate clearly the scope of “quality and technical” aspects of the proposals from their “financial aspects”. The term “financial aspects” in this context includes all the commercial aspects of the proposals that cannot be set out in the terms of reference as well as the final price. In particular, the financial capabilities of the suppliers or contractors, which will be assessed as part of the examination of their proposals and qualifications, are part of the “quality and technical” aspects. In other cases, however, the distinction may vary from case-to-case. For example, insurance or guarantee requirements, and delivery times and warranty terms may determine whether or not a proposal meets the minimum requirements of the procuring entity, in which case these aspects of the proposal are part of the “quality and technical” aspects. In other cases, they will be expressed as part of the commercial terms of the contract, in which case they fall within “financial” aspects. The regulations, or rules or other guidance to be issued by the public procurement agency or similar body should be sufficiently articulate to assist procuring entities to ensure that they are sufficiently clear and transparent in their requirements; otherwise, the quality of proposals will be impaired, and there may be delays in the procurement process while uncertainties are resolved, using the mechanisms provided in articles 15 and 16 [\[\\*\\*hyperlinks\\*\\*\]](#).

51. The procurement method covered by the paragraph is therefore not appropriate in procurement where price is the only award criterion or one of the main award criteria, or where a complete evaluation would not be possible without evaluating price and non-price criteria together. In such circumstances, a tendering procurement method that focuses on the price, and which does not provide for a sequential examination and evaluation of quality and technical aspects and of financial aspects, would be appropriate. The procuring entity may find that a tendering-based procurement method is also more appropriate where it has many

technical requirements. The method is also not appropriate where there is a need to negotiate on any aspects of proposals (be they quality, technical or financial) since the method, like tendering, does not allow for dialogue or negotiations (for the types of procurement in which dialogue or negotiations may be appropriate and necessary, see the commentary to procurement methods under Chapter V [\[\\*\\*hyperlink\\*\\*\]](#)).

52. In practical terms, the technical and quality proposals will be submitted in one envelope (or its electronic equivalent), and they will require manual evaluation by suitably qualified individuals. For those proposals that respond to the terms of reference, a second envelope (or electronic equivalent) containing the financial aspects of the proposal concerned is opened. The financial aspects may be susceptible to automated evaluation.

53. Under the Model Law, request-for-proposals without negotiation is available, subject to its conditions for use, for all types of procurement, in conformity with UNCITRAL's decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 28(2) of the Model Law; for the relevant guidance, see paragraphs [\\*\\*](#) of the commentary in the introduction to Chapter II [\[\\*\\*hyperlink\\*\\*\]](#)). Enacting States should be aware nevertheless that some multilateral development banks recommend, where procurement methods sharing the features of request-for-proposals without negotiation as provided for in the revised Model Law are to be used, that they be used for the procurement of well-defined services that are neither complex nor costly, including consultancy services such as the development of curricula. Such services are usually outsourced because procuring entities generally lack the internal capacity to undertake this type of work. Some multilateral development banks may not authorize the use of this method in other circumstances, at least as regards projects financed by them.

**Article 29(3). Conditions for use of request-for-proposals without negotiation [\[\\*\\*hyperlink\\*\\*\]](#).**

54. Article 29(3) provides for the conditions for use of request-for-proposals without negotiation. By stating that the method is available where the procuring entity “needs to” consider the financial aspects of proposals separately from its examination and evaluation of their quality and technical aspects, they are intended to require an objective and demonstrable need for this approach. As the procedures indicate, the method involves a sequential examination and evaluation procedure, in which the quality and technical aspects are considered first. Only if the technical proposal fully responds to the terms of reference in the request for proposals will the procuring entity continue to consider the price and financial aspects of the proposal concerned. For a discussion of the delineation between quality, technical and financial aspects of proposals, see paragraphs [\\*\\*](#) above.

**Article 35. Solicitation in request-for-proposals procurement methods, and its particular application to request-for-proposals without negotiation [\[\\*\\*hyperlink\\*\\*\]](#).**

55. Article 35 regulates solicitation in request-for-proposals procurement methods. The default rule under the Model Law is for public and unrestricted solicitation in these methods, as that term is explained in section [\\*\\*](#) of the guidance to Part II of

Chapter II [\[\\*\\*hyperlink\\*\\*\]](#). Public and unrestricted solicitation involves an advertisement to invite participation in the procurement, the issue of the solicitation documents to all those that respond to the advertisement, and the full consideration of the qualifications and submissions of suppliers and contractors that submit tenders or other offers.

56. In request-for-proposals proceedings, an exception set out in article 35(1)(a) allows the above default rule to be relaxed and direct solicitation to be used where the subject-matter of the procurement is available from a limited number of suppliers or contractors, a situation that may arise in the circumstances in which request-for-proposals without negotiations is available. The relaxation of the default rule is also contingent upon soliciting proposals from all such suppliers and contractors (see article 35(2)(a) [\[\\*\\*hyperlink\\*\\*\]](#), and upon a prior public advance notice of the procurement under article 35(3) [\[\\*\\*hyperlink\\*\\*\]](#). For a discussion of these requirements and their consequences, notably arising from the risk of unknown suppliers emerging as a result of the advance notice, see the commentary on solicitation in the introduction to Chapter IV [\[\\*\\*hyperlink\\*\\*\]](#)).<sup>1</sup>

57. Where request for proposals without negotiation are preceded by pre-qualification proceedings, solicitation is subject to separate regulation under article 18 [\[\\*\\*hyperlink\\*\\*\]](#), the provisions of which also require international solicitation in the same manner as is required in article 33 [\[\\*\\*hyperlink\\*\\*\]](#). Further guidance is set out in the commentary to the guidance to those articles [\[\\*\\*hyperlinks\\*\\*\]](#). After the pre-qualification proceedings have been completed, the request for proposals must be provided to all pre-qualified suppliers.

58. The exceptions to the default rule requiring international solicitation, other than where the procurement process follows pre-qualification proceedings under article 18 [\[\\*\\*hyperlink\\*\\*\]](#), are contained in article 35(1)(b) and (c). Paragraph (1)(c) mirrors the exceptions for open tendering in article 33(4): that is, for domestic and low-value procurement. The commentary to Part II of Chapter II [\[\\*\\*hyperlink\\*\\*\]](#) discusses the policy issues arising in allowing for these latter exceptions; they are grounded in permitting a relaxation of international advertisement where its benefits will be outweighed by its costs, or where it is simply irrelevant.

59. A further exception set out in paragraph (1)(b) in effect offers a choice between open and direct solicitation. Recognizing that in certain instances, the requirement of open solicitation might be inappropriate or might defeat the objectives of cost-efficiency, paragraph (2) of this article then sets out the cases where the procuring entity may engage in direct solicitation. They are two-fold: where the subject-matter of the procurement, by reason of its highly complex or specialized nature, is available from a limited number of suppliers or contractors (article 35(2)(a) [\[\\*\\*hyperlink\\*\\*\]](#)) or where the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the procurement (under article 35(2)(b) [\[\\*\\*hyperlink\\*\\*\]](#)). The considerations that arise in both allowing for and using direct solicitation in these circumstances are discussed in paragraphs [\\*\\*](#) of the commentary in the introduction to Chapter IV [\[\\*\\*hyperlink\\*\\*\]](#)

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<sup>1</sup> The implication is that the procuring entity is not authorized to reject any unsolicited proposals. Does the Working Group consider a discussion of the manner in which the procuring entity should consider any such proposals is required?

60. Article 35(2)(c) sets out a distinct third ground that may justify the use of direct solicitation in request-for-proposals proceedings — procurement involving classified information. In such cases, the procuring entity must again solicit proposals from a sufficient number of suppliers or contractors to ensure effective competition.

61. Articles 35(3) and (4) are included to provide for transparency and accountability when direct solicitation is used. Paragraph (3) requires the procuring entity including in the record of procurement proceedings a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings. Paragraph (4) requires the procuring entity, where it engages in direct solicitation publish an advance notice of the procurement (under article 33(5) [\[\\*\\*hyperlink\\*\\*\]](#)) (unless classified information would thereby be compromised). The commentary to part II of Chapter II [\[\\*\\*hyperlink\\*\\*\]](#) discusses the reasons for, contents and form of such notices.

**Article 47. Request for proposals without negotiation [\[\\*\\*hyperlink\\*\\*\]](#).**

62. Article 47 regulates the procedures for procurement using request for proposals without negotiations. Paragraph (1), by cross-referring to article 35 of the Model Law, reiterates the default rule public and unrestricted international solicitation. The exceptions to that rule are set out in the preceding section.

63. The invitation to participate in the request for proposals without negotiation proceedings must include the minimum information listed in paragraph (2). Providing that minimum information is designed to assist suppliers or contractors in determining whether they are interested and eligible to participate and, if so, how they can participate. The relevant requirements are similar to those applicable to an invitation to tender (article 37 [\[\\*\\*hyperlink\\*\\*\]](#)). They contain the required minimum and do not preclude the procuring entity from including additional information that it considers appropriate. The procuring entity should take into account that it is usual practice to keep the invitation brief and include in it the most essential information about procurement, which is most pertinent to the initial stage of the procurement proceedings. All other information about the procurement, including further details of the information contained in the invitation, is included in the request for proposals (see article 47(4)). This approach helps to avoid repetition, possible inconsistencies and confusion in the content of the documents issued by the procuring entity to suppliers or contractors. Nonetheless, where the procuring entity uses electronic means of advertisement and communication, it is possible to include in the invitation a web link to the terms of the request for proposals itself: this approach is proving beneficial in terms of both efficiency and transparency.

64. Sub-paragraph (2)(e) refers to the minimum requirements with respect to technical and quality characteristics that proposals must meet in order to be considered responsive. This provision covers both the threshold that is to be established for rejecting proposals and assigning scores to proposals that meet or exceed the proposals. Ensuring an accurate statement of minimum requirements and the evaluation criteria (which must also be disclosed by virtue of this paragraph) will be key to facilitating the submission of quality proposals.

65. Paragraph (3) specifies the group of suppliers or contractors to which the request for proposals is to be issued. Depending on the circumstances of the given

procurement, such suppliers may comprise the entire group of suppliers or contractors that respond to the invitation in accordance with the procedures and requirements specified in it; if pre-qualification has taken place, only to those that were pre-qualified; or in the case of direct solicitation, only to those that are directly invited. The provisions contain a standard clause, found also in other provisions of the Model Law in similar context, that the price that may be charged for the request for proposals may reflect only the cost of providing the request for proposals to suppliers or contractors. (See the guidance to article [...] for a further discussion of this limitation.)

66. Paragraph (4) contains a list of the minimum information that should be included in request for proposals in order to assist the suppliers or contractors in preparing their proposals and to enable the procuring entity to compare the proposals on an equal basis. The list is again largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 39) [\[\\*\\*hyperlink\\*\\*\]](#). The differences reflect the procedural specifics of this procurement method, and are aimed at ensuring that the financial aspects of proposals are presented, although simultaneously, separately from quality and technical aspects of the proposals. As explained above, the procuring entity will not have access to the financial aspects of proposals until after it has evaluated their technical and quality aspects. The procuring entity may omit information about currency of payment referred to in sub-paragraph (4)(c) in domestic procurement, if it would be unnecessary in the circumstances.

67. Paragraphs (5) to (10) of the article regulate the sequential examination and evaluation procedure in this procurement method. They ensure that the procuring entity will not be influenced by the financial aspects of proposals when it evaluates quality and technical aspects of proposals and assigns scores to suppliers or contractors as a result of that evaluation. A number of provisions in those paragraphs are aimed at ensuring transparency and integrity in the process. Paragraphs (6) to (8), for example, contain requirements that the results of the evaluation of technical and quality aspects of the proposals are to be promptly reflected in the record of procurement proceedings and communicated to all suppliers or contractors that presented proposals. Special rules are designed for suppliers and contractors whose quality and technical aspects of proposals were rejected: they are to receive promptly not only information about the fact of rejection but also the reasons therefor, and the unopened envelopes containing financial aspects of their proposals are returned to them. These provisions are essential for the timely debriefing of, and effective challenge, by aggrieved suppliers. (For a fuller discussion of the benefits and procedures for debriefing, see [\[\\*\\*section \\*\\* of the general commentary and section \\*\\* of the introduction to Chapter VIII\] \[\\*\\*hyperlinks\\*\\*\]](#).)

68. Paragraphs (8) and (9) allow the presence at the opening of the second envelopes (those containing the financial aspects of proposals) of suppliers or contractors whose proposals as regards quality and technical aspects of proposals met or exceeded the minimum requirements. They can thus verify the accuracy of the information announced by the procuring entity at the opening of second envelopes that is relevant to them, such as on the scores assigned and the financial aspects of their proposals, and can observe whether the successful proposal is

identified in accordance with the criteria and the procedure set out in the request for proposals.

69. The Model Law regulates complex scenarios involving the separate evaluation of all aspects of proposals and combining the results of those evaluations in order to determine the successful proposal. Paragraph (10) therefore defines the successful proposal in this procurement method as the proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price. Enacting States should be aware however that in the procurement of simpler subject-matter, the procuring entity may select the successful proposal on the basis of the price of the proposals that meet or exceed the minimum technical and quality requirements, provided that the statement of the evaluation criteria in the invitation and request for proposals have so provided. This approach may be appropriate in situations where the procuring entity does not need to evaluate quality and technical aspects of proposals and assign any scores but rather establishes a threshold by which to measure quality and technical aspects of proposals at such a high level that all the suppliers or contractors whose proposals attain a rating at or above the threshold can in all probability perform the procurement contract at a more or less equivalent level of competence. There should also be no need in such cases to evaluate any financial aspects of proposals other than price.

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