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Summary record of the 926th meeting
Held at the Vienna International Centre, Vienna, on Monday, 27 June 2011, at 2 p.m.

Acting Chairperson: Mr. Wiwen-Nilsson.....(Sweden)

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The meeting was called to order at 2.20 p.m.

Finalization and adoption of the UNCITRAL Model Law on Public Procurement (*continued*) (A/CN.9/729 and Add.1 to 8)

1. **The acting Chairperson** invited **Mr. Fruhmann** (Austria) to report on the progress of work in the drafting group.

2. **Mr. Fruhmann** (Austria) said that the drafting group had agreed that "procurement" should be taken to mean "public procurement" throughout the Model Law.

3. The drafting group had agreed that there should be definitions of "pre-qualification" and "pre-selection" in article 2, with "pre-qualification" defined as "the procedure set out in article 17 to identify, prior to solicitation, suppliers or contractors that are qualified" and "pre-selection" defined as "the procedure set out in article 48 (3) to identify, prior to solicitation, a limited number of suppliers or contractors that best meet the qualification criteria for the procurement concerned".

4. The drafting group agreed that the definition of "solicitation" in article 2 (o) should be amended to read "an invitation to tender, to present submissions or to participate in request for proposals proceedings or electronic reverse auctions;". The definition would not cover invitations to pre-qualification or pre-selection, as those actions preceded the solicitation proceedings.

5. Regarding article 2 (e), the drafting group agreed that the phrase "a procurement conducted" should be amended to read "a procedure conducted", in order to be consistent with the use of "procedure" in subparagraph (2)(e)(iv).

6. Regarding article 5, the drafting group had agreed that the phrase "Except as provided for in paragraph (2) of this article, the text of" in paragraph (1) should be deleted and that the Guide to Enactment would explain that paragraph (2) covered case law while paragraph (1) covered legal texts of general application, which would not include things such as internal memoranda.

7. The drafting group had agreed that the terms "the public" and "the general public" should be amended to "any person" throughout the text.

8. **Ms. Nicholas** (Secretariat), recalling the point raised during the previous meeting by the representative of Mexico with regard to the words "the reasons and circumstances" in article 8 (4) and her response,[1] said that, if the legal tradition of an enacting State required the inclusion in procurement proceedings records of statements of "grounds and circumstances", that State could, in the article drawing on article 8 (4), specify "grounds and circumstances" instead of "reasons and circumstances".

9. Recalling the point raised by the representative of Mexico with regard to subparagraph (8)(b) of article 9,[2] she said that in expressions like "materially inaccurate" and "materially incomplete" the word "materially" was difficult to translate from English into other languages, especially as it was understood differently in different jurisdictions. There seemed to be no intention of changing the wording of article 9 (8), where the aim of subparagraph (8)(a) was to ensure that if information was false there would automatically be disqualification while the aim of subparagraph (8)(b) was to give the procuring entity some leeway in less serious cases. The Guide to Enactment should explain the policy objective of article 9 (8) and the concept of "materiality".

10. **Ms. Andres** (Canada), pointing out that subparagraph (2)(f) of article 9 spoke of "false statements or misrepresentations as to ... qualifications" while subparagraph (8)(a) spoke of information concerning qualifications that was "false", suggested that subparagraph (8)(a) be amended to read "… the information submitted … was false or misleading".

11. She asked what the difference was between "false statements" and "misrepresentations" in subparagraph (2)(f).

12. **Ms. Nicholas** (Secretariat) said that, in the Secretariat's view, "misrepresentation" was always understood to imply an intention to mislead.

13. **Mr. Yukins** (United States of America) asked how the comments from Ukraine contained in document A/CN.9/730 were to be dealt with.

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[1] See document A/CN.9/SR.925, paragraphs 53, 55 and 56.

[2] See document A/CN.9/SR.925, paragraphs 54 and 59-61.

14. **The acting Chairperson** said that it was for Ukraine to present those comments orally in the Commission. As there was no delegation from Ukraine present, they would not be considered, unless they were presented orally by another delegation.

15. **Mr. Fruhmann** (Austria), referring to article 14 (5), asked how suppliers or contractors not known to the procuring entity could access information on deadline extensions.

16. **Ms. Nicholas** (Secretariat) said that a deadline extension constituted a material change to the original information published by the procuring entity and would therefore, pursuant to article 15 (3), require the publication of a general notice. The link between article 14 (5) and article 15 (3) could be explained in the Guide to Enactment.

17. **Mr. Fruhmann** (Austria), referring to article 16, proposed that subparagraph (1)(c)(ii) be deleted as subparagraph (1)(b) already covered the question of the issuing of a tender security in cases of domestic procurement.

18. He took it that subparagraph (1)(f)(i) should be read to mean "Withdrawal or modification of the submission after the deadline for presenting submissions, or withdrawal or modification of the submission before the deadline if so stipulated in the solicitation documents;".

19. **The acting Chairperson** said that the proposal made by the representative of Austria regarding subparagraph (1)(c)(ii) could be dealt with as a drafting issue.

20. As to his comment regarding subparagraph (1)(f)(i), in the light of subparagraph (2)(d) the presumption was that a submission could be withdrawn or modified before the deadline but only under exceptional circumstances afterwards. That too could be dealt with as a drafting issue.

21. **Mr. Loken** (United States of America), referring to the first sentence in article 17 (2), recalled that in document A/CN.9/730 his delegation had recommended that it be amended to read "If the procuring entity engages in pre-qualification proceedings ... an invitation to pre-qualify to be published in the publication identified in the procurement regulations".

22. **Mr. Fruhmann** (Austria), having endorsed the proposal made by the delegation of the United States of America, questioned the use in article 17 (3)(b) of the words "the timetable"; at the time when an invitation to pre-qualify was sent out, there would usually not be a timetable for the provision of the services. Perhaps one could say "the envisaged timetable" or "the indicative timetable".

23. **The acting Chairperson** suggested the words "the time period". Perhaps the matter should be referred to the drafting group.

24. **Mr. Fruhmann** (Austria), referring to subparagraph (1)(a) of article 20, said that, while he did not think that there should be a "de minimis" gratuity threshold, he would like it to be clearly explained in the Guide to Enactment that not every offer of a gratuity should trigger exclusion, as a misinterpretation of the subparagraph could give rise to unintended consequences.

25. He would also like the meaning of the term "unfair competitive advantage" in subparagraph (1)(b) to be clarified in the Guide to Enactment.

26. **Mr. Yukins** (United States of America) said that his delegation was opposed to the idea of a "de minimis" gratuity threshold as even a very small gratuity could constitute a significant inducement in some cases.

27. As to the meaning of "unfair competitive advantage", the draft Guide already gave instances of what might constitute an unfair competitive advantage, and it rightly indicated that the enacting State itself should address the issue in the light of prevailing circumstances.

28. It was important for procurement specialists to consider competition issues not only in the context of a single procurement exercise, but also in the context of the overall competition policies of States.

29. **Mr. Jezewski** (Poland), expressing opposition to the idea of a "de minimis" gratuity threshold, said that the important consideration was whether there had been intent to influence the decision of a public official.

30. **Mr. Grand d'Esnon** (France), having expressed opposition to the idea of a "de minimis" gratuity threshold, said that the Guide to Enactment should perhaps point out that some States had codes of

conduct for public officials that public officials involved in public procurement were required to sign.

31. **Mr. Phua** (Singapore), expressing opposition to the idea of a "de minimis" gratuity threshold, said that public officials in his country had to seek the approval of their superiors before accepting even small gifts.

32. As regards the issue of "unfair competitive advantage", the WTO General Procurement Agreement of 1994 provided examples of measures taken to preclude unfair competitive advantage in procurement proceedings.

33. **The acting Chairperson** took it that the Commission did not wish to change article 20.

34. **Mr. Loken** (United States of America), drawing attention to his delegation's proposal contained in document A/CN.9/730 for an article 20 bis on clarifications of qualification data and submissions, asked whether it would be appropriate to include in the Model Law a similar provision to govern pre-qualification data and whether there should be a generic article on clarifications of qualification data and submissions in chapter I.

35. **The acting Chairperson** suggested that the issue of clarifications of qualification data and submissions be dealt with in the relevant articles.

36. **Mr. D'Allaire** (Canada), expressing support for that suggestion, said that the point in time when a procuring entity would seek clarification would vary between procurement methods.

37. Referring to article 21 (3)(b), he proposed amending it to read "Where the contract price is less than the threshold amount set out in the procurement regulations;". That wording would be similar to that at the end of article 28 (2).

38. **Ms. Andres** (Canada) proposed the addition, at the end of the last sentence of article 21 (7), of the words "unless the extension has been granted to the procuring entity by suppliers or contractors that presented submissions and the entities that provided the tender security". With such an addition to article 21 (7) the solicitation process would not have to be reopened.

39. **The acting Chairperson** said that, if there were no objections, he would assume that the proposal made by the delegation of the United States of America regarding an article 20 bis was acceptable.

40. **Mr. Fruhmann** (Austria) endorsed the proposal made by the delegation of the United States of America regarding an article 20 bis and the proposal made by the delegation of Canada regarding article 21 (7).

41. **Mr. Grand d'Esnon** (France), while expressing support for the wording proposed by the delegation of the United States of America for an additional article, suggested that the additional article be placed before article 19.

42. **The acting Chairperson** noted, with regard to the proposal made by the delegation of Canada for an addition to article 21 (7), that article 40 (2) provided for the extension of periods of effectiveness of tenders.

43. **Ms. González Lozano** (Mexico), expressing support for the proposal made by the representative of the United States of America regarding an article 20 bis, asked if the clarification provided by a supplier or contractor would ever be disclosed to other suppliers or contractors and, if so, at what point.

44. **Mr. Loken** (United States of America), noting that the proposed language was based to a large extent on article 42 (1), said that the clarification provided by a supplier or contractor would not be disclosed to other suppliers or contractors.

45. **Ms. González Lozano** (Mexico) said that, if a supplier or contractor was requested to provide a clarification, there should be a point at which all suppliers or contractors that had submitted tenders ought to be informed of the content of the clarification. For example, if the supplier or contractor providing the clarification subsequently won the contract and other suppliers or contractors wished to challenge the decision, they should be entitled to know what the clarification had been.

The meeting was suspended at 3.45 p.m. and resumed at 4.10 p.m.

46. **The acting Chairperson**, recalling that the representative of the United States of America had said that the proposed article 20 bis was based to a large extent on article 42 (1), asked the Secretariat to comment on the connection between the two articles.

47. **Ms. Nicholas** (Secretariat) said that, in the light of consultations during the suspension of the

meeting, it was the Secretariat's understanding that article 42 (1) would be used as the basis for article 20 bis/article 18 bis, the aim being to ensure the same procedures applied in the clarification of tenders as in the clarification of qualification data. Care would be taken to make it clear that the clarification procedures should not be a cover for negotiations.

48. **The acting Chairperson** said he assumed that the Commission wished to accept the proposals made by the delegation of Canada regarding article 21 (3)(b) and article 21 (7), with possible drafting refinements.

49. **Ms. Nicholas** (Secretariat), referring to subparagraph (2)(c) of article 21 and to document A/CN.9/731/Add.3, said that Working Group I had recognized that it would be difficult to specify one minimum standstill period for all types of procurement. The subparagraph was therefore drafted in such a way as to allow the enacting State to determine what the minimum standstill period should be in each instance.

50. **The acting Chairperson** proposed that the subparagraph provide for the duration of the standstill period to be as established in the solicitation documents in accordance with the requirements of the procurement regulations, which could specify different standstill periods for different situations.

51. **Mr. Yukins** (United States of America), recalling the proposal made by the delegation of Canada with regard to article 21 (3)(b), proposed that article 22 (2) provide for the minimum threshold to be specified in the procurement regulations.

52. **Mr. Fruhmann** (Austria), referring to the second sentence in article 23 (3), said that procuring entities in some European Union countries included in their solicitation documents a requirement that suppliers or contractors give their consent to the disclosure of all information provided by them to the procuring entities, acceptance of that requirement being a precondition for participation in the procurement proceedings. That practice, which could open the way to manipulation, would be permitted under article 23 (3) as it now stood.

53. **The acting Chairperson** proposed that the phrase "or permitted in the solicitation documents" in article 23 (3) be deleted.

54. **Mr. Fruhmann** (Austria), while expressing support for the proposal, said that the deletion of that phrase would not be sufficient to cover all cases of attempts to circumvent the spirit of the Model Law.

55. **Mr. Grand d'Esnon** (France), while expressing support for deletion of the phrase "or permitted in the solicitation documents", said that, even without that phrase, disclosure would be possible at a later stage with "the consent of the other party". In that connection, he suggested that "the other party" be amended to "the other parties".

56. **The acting Chairperson** said that confidentiality should be equally strong throughout the procurement process and proposed that it be made clear in the Guide that the option of "consent in advance" should be resorted to only under exceptional circumstances.

57. **Mr. Maradiaga Maradiaga** (Honduras) said it was important that the problem of possible manipulation by the procuring entity through its handling of confidential information be addressed fully in the Guide to Enactment.

58. **Mr. Fruhmann** (Austria), referring to article 24, said that, in the event of a cancellation of procurement proceedings, some of the information whose inclusion in the record was required might not yet exist or might not be available.

59. He proposed the insertion of the phrase "unless such information has not arisen in the procurement proceedings" in paragraph (3) following ", on request,", with an accompanying explanation in the Guide to Enactment.

60. **Ms. Nicholas** (Secretariat), responding to a point raised by the representative of Austria, said that it was the Secretariat's understanding that the price in the winning submission would usually be disclosed to the general public in the contract award notice, but not the prices in the other submissions. However, there was a need to clarify whether prices should be disclosed to competing suppliers or contractors. Working Group I had highlighted the tension between the need to avoid collusion and the need to be transparent, and the Secretariat would welcome the Commission's guidance in that matter.

61. As regards the proposal made by the representative of Austria for an addition to paragraph (3) of article 24, in the event of a cancellation of the procurement there would be no acceptance of a successful submission. The Secretariat

would need to check why it was provided that the cancellation of a procurement should lead to the disclosure of information that had become irrelevant. Perhaps the phrase "or on cancellation of the procurement" should be deleted.

62. **Mr. Yukins** (United States of America), referring to subparagraph (1)(s) of article 24, said that most suppliers or contractors had no problem with the disclosure of contract prices, but did not like to disclose component prices, as competitors might then be able to work out the cost structure on which a winning bid was based — in other words, "the basis for determining the price".

63. **The acting Chairperson** proposed that the words "the basis for determining the price" in subparagraph (1)(s) of article 24 be deleted.

64. **Ms. Nicholas** (Secretariat) said that the references to subparagraph (1)(s) should then be deleted from paragraph (3), which would then be consistent with paragraph (4).

65. The record maintained by the procuring entity should still include the information called for in subparagraph (1)(s), but that information would not be disclosed.

66. **The acting Chairperson** proposed that the matter be referred to the drafting group.

The meeting rose at 5 p.m.