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## United Nations Commission on International Trade Law Forty-fourth session

### Summary record of the 927th meeting

Held at the Vienna International Centre, Vienna, on Tuesday, 28 June 2011, at 9.30 a.m.

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

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*The meeting was called to order at 9.35 a.m.*

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

1. **Mr. Fruhmenn** (Austria), further reporting on the discussions in the drafting group, said that it proposed that the reference to requirements for prequalification and preselection be moved from article 10 to article 9, so that article 9 (4) would end with the additional sentence “The prequalification or preselection documents shall set out a description of the subject matter of the procurement.”

2. The drafting group proposed that the words “including concerning” be deleted from article 10 (3).

3. It proposed that the first sentence of article 10 (4) be amended to read “To the extent practicable, the description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical, quality and performance characteristics of that subject matter.” It also proposed that that formulation be used elsewhere in the text of the revised Model Law as appropriate.

4. With regard to article 11, the drafting group proposed that: the words “relating to the subject matter” be inserted in the chapeau of article 11 (2), so that it would read “The evaluation criteria relating to the subject matter may include:”, the word “The” be deleted from article 11 (2)(a), so that it would read simply “Price”; article 11 (3) be modified to read “To the extent practicable, all non-price evaluation criteria shall be objective, quantifiable and expressed in monetary terms.” — with a note in the Guide to Enactment stating that it was not always possible to express non-price evaluation criteria in monetary terms; the phrase “or any other preference” be added in article 11 (4)(b), so that it read “A margin of preference for the benefit of domestic suppliers or contractors or domestically produced goods or any other preference, if authorized or required ...”; article 11 (5)(b) be amended to read “All evaluation criteria established pursuant to this article, including price as modified by any preference”; and article 11 (5)(c) be modified to read “The procuring entity shall set out the relative weights of all evaluation criteria, except where the procurement is conducted under article 48, in which

case the procuring entity may list all evaluation criteria in descending order of importance;”.

5. **The acting Chairperson**, in response to a point raised by **Mr. Wallace** (United States of America), said that “The procuring entity shall set out ...” could be deleted from the modified article 11 (5)(c) as that wording was already contained in the chapeau to the paragraph. The beginning of article 11 (5)(c) would then read: “The relative weights of all evaluation criteria, except ...”.

6. **Ms. Nicholas** (Secretariat), in response to a question from **Mr. D’Allaire** (Canada), said that the Secretariat understood that the policy objective behind article 24 (3) was that full transparency should be the rule, but an exception could be made when the disclosure of prices might impede future fair competition — for example, by facilitating collusion. Perhaps article 24 (3) might indicate that prices should in principle be disclosed only to the suppliers that had made submissions, particularly as in tendering proceedings the prices were read out at a public hearing.

7. **Mr. Fruhmenn** (Austria) said that article 24 (4) absolutely prohibited the disclosure of information relating to prices, as subparagraph (a) contained a reference to the impediment of fair competition and there was no such reference in subparagraph (b).

8. **The acting Chairperson**, recalling previous discussions, invited the Commission to consider the connection between subparagraph (1)(s) and paragraphs (3) and (4) of article 24 and whether there should be a policy that, as a rule, there should be disclosure of non-winning competitors’ prices, except when such disclosure would have a negative impact on fair competition. He further invited the Commission to consider whether prices should be disclosed in the event of cancellation of the procurement.

9. **Mr. D’Allaire** (Canada), agreeing with the Secretariat’s understanding of the policy objective behind article 24 (3), said that for each submission “the price, or the basis for determining the price, and a summary of the other principal terms and conditions” should appear in the record of the procurement proceedings; thus, subparagraph (s) was needed. Paragraph (3) achieved the policy objective of enabling bidders to learn the price in each submission and

obtain any other information covered by that paragraph. Paragraph (4) provided appropriate safeguards, especially through the provision that information should not be disclosed if its disclosure would impede fair competition.

10. The possible ambiguity in subparagraph (s) could perhaps be addressed through a change in the order of the words so that the subparagraph read “For each submission, the price, or the basis for determining the price, and a summary of the other principal terms and conditions;”. Otherwise, the text reflected the policy objective behind article 24 (3).

11. In response to a question from the **acting Chairperson**, he said that the stage at which a cancellation occurred would determine whether or not prices were disclosed. If, at the time of the cancellation, the submission envelopes had already been opened with all suppliers present, the prices would have been disclosed; otherwise, they would not be in the record. It was hard to imagine a situation where a cancellation would determine whether the record was disclosed or not.

12. **The acting Chairperson** said that that was true in the case of tenders, but the Model Law covered other procurement methods involving several stages, such as negotiations where the price was subject to scrutiny. He invited the Commission to consider whether the price should be included in the record in such cases.

13. **Mr. Grand d’Esnon** (France) said, regarding subparagraph (s), that a distinction should be made between “the price” and “the basis for determining the price”. It was normal practice for prices to be disclosed to all suppliers or contractors in the tendering proceedings at the opening of tenders, but “the basis for determining the price” was often an industrial secret, and he therefore believed that it should not have to be disclosed.

14. Regarding paragraph (3), he considered that the phrase “or on cancellation of the procurement” should be deleted. The disclosure of prices after a procurement had been cancelled might well facilitate future collusion.

15. **The acting Chairperson** said it was his understanding that the information indicated in subparagraph 4 (b) could be covered by

subparagraph (a) unless the disclosure of that information was prohibited absolutely.

16. With regard to paragraph (3), he asked whether the Commission agreed with the representative of France that the phrase “or on cancellation of the procurement” should be deleted.

17. **Mr. Yukins** (United States of America) said that in his view the phrase should be deleted.

18. Regarding what the acting Chairperson had just said about subparagraphs (4) (a) and (b), he wondered whether the acting Chairperson was proposing that they be merged. Paragraph (4) (b) probably referred to bid evaluation sheets, which could be extremely valuable to competitors with access to them as they gave an insight into the views of bid evaluators; they were therefore sensitive documents. The conditions referred to in subparagraph 4 (a) would not normally apply to bid evaluation sheets. However, there appeared to be no reason not to merge the two subparagraphs, since the reference to information relating to the examination and evaluation of submissions could be included in subparagraph (a) without prejudice to the intention of subparagraph (b).

19. **The acting Chairperson** said that, given the sensitivity of bid evaluation sheets, as pointed out by the representative of the United States of America, it might be preferable to keep subparagraph (b) separate.

20. With regard to paragraph (3), he took it that the Commission wished to delete the phrase “or on cancellation of the procurement” and to retain both subparagraph (1) (s) and the references to that subparagraph in paragraph (3), subject to any further drafting changes.

21. **Mr. D’Allaire** (Canada) said that his delegation had no objection to deletion of the reference to cancellation in paragraph (3). In the event of the cancellation of a procurement, suppliers should not be provided with the information in question unless they applied successfully to a court with a view to obtaining that information.

22. His delegation shared the concerns of the delegation of France with regard to the reference, in subparagraph 1 (s), to “the basis for determining the price”. Perhaps the reference could simply be deleted, since, as was clear from the chapeau of paragraph 1, the procuring entity would be expected to maintain a

detailed record of the proceedings, and such a record might well include “the basis for determining the price”. Alternatively, “the basis for determining the price” could be included as a separate subparagraph under paragraph (1) but not referred to in paragraph (3), thus ensuring that the basis for determining the price was not subject to disclosure.

23. **Mr. Fruhmann** (Austria), having endorsed the comments made by the representative of Canada, said that, if paragraph (4) was going to be revised, his delegation would like to see the revised text before drawing any conclusion with regard to that paragraph and to subparagraph (1) (s). The paragraph should simply reflect the fact that the non-disclosure rule applicable to submission prices was absolute and was not linked to the fair competition rule set out in subparagraph 4 (a).

24. **Mr. Wallace** (United States of America), noting that the purpose of the reference to “a basis for determining the price” in the 1994 Model Law was explained in the Guide to Enactment, said that it might be unwise to remove the reference to “the basis for determining the price” from article 24 (1)(s) of the revised Model Law.

25. **Mr. Fruhmann** (Austria) said that information on the basis for determining the price could be important, enabling the procuring entity to determine whether the price indicated in a submission was abnormally low, and a requirement that such information be included in the record of the procurement proceedings might deter bidders from making submissions with abnormally low prices. However, while the basis for determining the price should be included in the record, such information was sensitive and should therefore never be disclosed. The present wording of subparagraph (1) (s) was, in his view, therefore acceptable.

26. **Ms. Nicholas** (Secretariat), referring to article 26, said that the implementation of an open framework agreement was in fact a procurement method. Chapter VII of the draft revised Model Law made it clear that closed framework agreements were implemented within a procurement method, whereas the implementation of an open framework agreement was a stand-alone procurement method equivalent to an electronic reverse auction. The Secretariat therefore proposed the inclusion of open framework agreements in the list of procurement methods in article 26 (1).

27. **Mr. Wallace** (United States of America) asked why open framework agreements should be treated as a separate procurement method while closed framework agreements were not. In the United States of America, both open and closed framework agreements were procurement methods.

28. **Ms. Nicholas** (Secretariat) said that, while it was possible for a closed framework agreement to be treated as a procurement method, article 57 (1) referred to the awarding of closed framework agreements “(a) By means of open tendering proceedings ...” or “(b) By means of other procurement methods ...”.

29. If the Commission wished both open and closed framework agreements to be treated as separate procurement methods, drafting changes would have to be made to article 57 (1). In the Secretariat’s view, it would be simpler to refer only to open framework agreements in article 26.

30. **Mr. Grand d’Esnon** (France) said that, in view of the late stage of consideration of the draft revised Model Law, his delegation was in favour of the retention of article 26 as drafted.

31. **Mr. Yukins** (United States of America), referring to article 25, drew attention to the fact that the code of conduct provided for in that article applied only to the conduct of public officials, whereas codes applying to the conduct of suppliers and contractors were becoming increasingly common worldwide. The Model Law would soon have to be amended or supplemented in order to reflect such developments.

32. **The acting Chairperson** suggested that Working Group I examine that issue in the context of the Commission’s future work.

*The meeting was suspended at 10.40 a.m. and resumed at 11.05 a.m.*

33. **Mr. Seweha Boles** (Egypt), referring to article 29 (2)(c), asked how the procuring entity would in practice indicate that it wished to use a particular procurement method because it was the most appropriate one for “the protection of essential security interests of the State”. That might be a valid reason, but article 27 (3) spoke of “a statement of the reasons and circumstances”.

34. **The acting Chairperson** said that, in his view, the “security” reason would have to be backed up by a statement of circumstances.

35. **Mr. Seweha Boles** (Egypt) asked whether that would apply even in times of high international tension affecting the State.

36. **The acting Chairperson** said that, in his view, it would.

37. **Mr. Fruhmann** (Austria), referring to article 31 (1)(a), proposed the insertion of the words “or repeated” after “indefinite” in the phrase “is expected to arise on an indefinite basis”.

38. If that proposal were not acceptable, perhaps the drafting group could agree on a definition of “indefinite” for inclusion in the Guide to Enactment.

39. **The acting Chairperson**, following an intervention by **Mr. Yukins** (United States of America), suggested the insertion of the words “or repeated” after “indefinite”.

40. **Ms. Nicholas** (Secretariat) said that it was the Secretariat’s understanding that the use of the word “indefinite” was intended to permit the conclusion of a framework agreement in order to ensure security of supply. If the Secretariat’s understanding was considered to be correct, that could be stated in the Guide to Enactment.

41. **Mr. Fruhmann** (Austria) proposed the deletion of the words “the low value of” in article 32 (4). The expression “low value” was being used there in a manner different from the manner in which it was being used elsewhere in the draft revised Model Law, where it was being used to indicate a threshold value. The subject matter of the procurement should be what counted.

42. **Mr. Yukins** (United States of America) said that his delegation was strongly opposed to that proposal. The deletion would open the door to domestic preferences based on subjective judgements.

43. The present wording was in accordance with the World Bank’s procurement guidelines.

44. **Ms. Andres** (Canada) said that the purpose of article 32 (4) was presumably to relieve the procuring entity of the obligation to widely publicize an invitation to tender if the costs of so doing were disproportionately high relative to the value of the

subject matter of the procurement, which was a good reason for retention of the words “the low value of”. However, their retention might create problems. Perhaps the purpose of article 32 (4) could be achieved through reformulation.

45. **The acting Chairperson** said that the phrase “only domestic suppliers or contractors are likely to be interested in presenting submissions” suggested that the issue was not that of the disproportionate relationship between the costs of widely publicizing an invitation to tender and the value of the subject matter of the procurement.

46. **Ms. Nicholas** (Secretariat) said that article 32 (4) was not designed to enable procuring entities to reject foreign suppliers and contractors; it would only enable them to decide not to widely publicize invitations to tender. That point could be explained in the Guide to Enactment.

47. **Mr. Grand d’Esnon** (France), calling for retention of the words “the low value of”, said that all international instruments relating to public procurement contained the concept of a “threshold value” below which foreign suppliers and contractors would not be interested in tendering.

48. **The acting Chairperson** suggested the deletion simply of the word “low”.

49. **Mr. Yukins** (United States of America) urged that article 32 (4) be left as it stood. Readers of the revised Model Law would not be confused by the words “the low value” in that paragraph, whereas they might well wonder why those words did not appear in the revised text.

50. **The acting Chairperson**, after consulting with **Mr. Fruhmann** (Austria), suggested that article 32 (4) be left as it stood.

51. **Mr. Xiao** (China), referring to article 32 (2), said that his delegation had problems with the idea of invitations to tender having to be published “in a language customarily used in international trade”. In many countries, especially developing ones, procurement officials would have problems in meeting the requirement in question, particularly officials who dealt only with small-scale procurement.

52. **The acting Chairperson** pointed out that article 32 (2) referred only to invitations to tender, not to solicitation documents.

53. **Mr. Grand d'Esnon** (France), expressing support for the intervention of the representative of China, said that the situation regarding the languages customarily used in international trade was constantly evolving. In his opinion, therefore, the phrase "in a language customarily used in international trade" should be dropped.

54. **Mr. Yukins** (United States of America), calling for retention of the phrase, said that the growing translation capabilities available through the Internet would with time make translating into languages customarily used in international trade very easy.

55. The **acting Chairperson** suggested, following an intervention by **Mr. Grand d'Esnon** (France), that article 32 (2) be amended so that it read something like "The invitation shall also be published internationally such that it will attract international suppliers and contractors."

56. **Mr. Loken** (United States of America) suggested wording on the lines of "The invitation shall also be published internationally in a medium accessible to international suppliers and contractors."

57. The **acting Chairperson** said that, if the underlying idea was clear, the formulation of the sentence could be left to the drafting group.

58. **Mr. Loken** (United States of America), drawing attention to the recommendation made in writing by his country with regard to article 33 (5),<sup>1</sup> said that the recommendation was applicable to article 32 (1) also.

59. **Mr. Seweha Boles** (Egypt) questioned the rationale for omitting from article 33 (6) a reference to article 29 (4)(a).

60. **Ms. Nicholas** (Secretariat) said that Working Group I had decided to omit a reference to article 29 (4)(a) because there could be many kinds of urgency, some purely the fault of the procurement entity, and the omission of a reference to article 29 (4)(a) was intended to prevent misuse of the provision in question.

61. In that connection, she said that there was no mandatory deadline for the publication of a notice of a

procurement; publication merely had to occur reasonably in advance of the solicitation of tenders.

62. **Mr. Loken** (United States of America) said that he recalled no discussion on the issue in Working Group I. At all events, he saw no reason to make a distinction between various kinds of urgency.

63. **Ms. Nicholas** (Secretariat) said that Working Group I had considered that, in the event of a lesser degree of urgency, there should be an opportunity to publish a notice of the procurement in the interests of transparency, so that the use of single-source procurement pursuant to article 29 (5) or of competitive negotiations pursuant to article 29 (4) could be subjected to scrutiny and, if necessary, challenged.

64. The **acting Chairperson** said that the Commission ought perhaps to review the system provided for in article 50 so as to determine whether there was a need for a notice.

65. **Mr. Seweha Boles** (Egypt) said that, to avoid confusion over various degrees of urgency, article 33 (6) should read something like "The requirements of paragraph (5) shall not apply in the case of a catastrophic event."

66. **Mr. Grand d'Esnon** (France) expressed support for the position of the representative of Egypt.

67. The **acting Chairperson** said that no delegation appeared to be against the inclusion of a reference to article 29 (4)(a) in article 33 (6).

68. **Mr. D'Allaire** (Canada), referring to article 45, said that it should provide for a procuring entity to seek clarification from suppliers and contractors even though no negotiations were permitted. Perhaps the drafting group could agree on a way of amending article 45 so that it provided for that.

69. Referring to article 46, he said that paragraphs (5) and (9) related to two different points in time when the procuring entity might need to seek clarifications from a supplier or contractor. The drafting group should bear that in mind when considering article 46.

70. **Mr. Wallace** (United States of America) said that it would be difficult to provide separately for every situation where the procuring entity might need to seek clarifications. The general provision on seeking

<sup>1</sup> See document A/CN.9/730.

clarifications would therefore have to be drafted with great care.

71. **Mr. Fruhmann** (Austria), referring to article 47, asked whether he understood correctly that, in two-stage tendering the procuring entity could not make a material change to characteristics of the subject matter of the procurement between the first and the second stage.

72. **Ms. Nicholas** (Secretariat) said that Working Group I had decided that “material change” was not a useful concept.

73. From article 47 (4) it was clear that the procuring entity could revise procurement terms and conditions, but only the suppliers or contractors that had participated in the first stage and whose tenders had not been rejected would be allowed to present final tenders in response to the revised set of terms and conditions. Tenders from other suppliers or contractors would not be considered, as they had not participated successfully in the first stage.

74. The aim, as the Secretariat understood it, was to exclude from the second stage the suppliers or contractors that had not bothered to participate in the first stage.

75. **Mr. Yukins** (United States of America) said that the expression “material change” might be open to differences of interpretation, and it could give rise to translation problems, but the concept of “material change” was widely accepted in the world of procurement and there should be a general provision relating to it in the revised Model Law.

76. **The acting** Chairperson said that, according to his understanding, a material change could be made as long as the subject matter of the procurement was not modified.

77. **Ms. Nicholas** (Secretariat) suggested that the words “the procuring entity shall not modify the subject matter of the procurement” in article 48 (9) be included also in article 47.

78. **Mr. Yukins** (United States of America) said that the problem would be to determine what “modify the subject matter” meant in the Guide to Enactment.

79. **The acting Chairperson** expressed support for the suggestion made by the representative of the Secretariat.

80. **Mr. Wallace** (United States of America) said that the definition of “subject matter” in article 2 (h) was not very precise. That should be borne in mind in any attempt to determine what “modify the subject matter” meant.

*The meeting rose at 12.30 p.m.*