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

**Summary record of the 928th meeting**
Held at the Vienna International Centre, Vienna, on Tuesday, 28 June 2011, at 2 p.m.

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

# Contents





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*The meeting was called to order at 2.15 p.m.*

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

1. **Mr. Fruhmann** (Austria), referring to article 10 said that the drafting group proposed that paragraph (1) be split into two subparagraphs.

2. Subparagraph (1)(a) would read "The pre-qualification or pre-selection documents, if any, shall set out a description of the subject matter of the procurement". Subparagraph (1)(b) would read "The procuring entity shall set out in the solicitation documents the detailed description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied". The sentence whose addition at the end of article 9 (4) had been proposed at the previous meeting should, naturally, be deleted.

3. Also, the drafting group had agreed on language for the Guide to Enactment setting out the general rules and exceptions in relation to article 10, which would include reference to article 29 (1)(a) and (2)(a). In that connection, it was proposed to add at the beginning of article 29 (1)(a) the first part of article 29 (2)(a), with a view to aligning the two provisions. Article 29 (1)(a) would thus read "It is not feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement in accordance with article 10 of this Law, and the procuring entity assesses that ... its procurement needs;".

4. **Mr. Wallace** (United States of America) said that the proposed wording of article 29 (1)(a) would misrepresent the procedure for two-stage tendering, which presupposed a detailed description at the start of the procurement proceedings.

5. **Mr. Fruhmann** (Austria) said that the issue raised by the representative of the United States of America was not one for the drafting group to resolve.

6. **Ms. Miller** (Observer for the World Bank) said that, under World Bank guidelines, two-stage tendering could be used where it was undesirable and impracticable to prepare a complete technical specification in advance. Although the present wording of article 29 (1)(a) was not ideal, the World Bank had come to terms with it.

7. **Ms. Nicholas** (Secretariat) said that Working Group I, when considering two-stage tendering, had decided that such tendering could start either with a detailed technical specification that could be amended or with broad terms of reference that could be refined. A suggestion made by Working Group I had been that one condition for the use of two-stage tendering might read "The procuring entity assesses that there may be a need for a stage in the process to refine the technical and policy characteristics of the subject matter of the procurement, which may include discussions with suppliers and contractors in order for the procuring entity to formulate them in accordance with the procedures required under article 10 and so as to allow the procuring entity to obtain the most satisfactory solution to its needs."

8. **Mr. Wallace** (United States of America) said that two-stage tendering was unpopular with many, including the Secretariat, but it was used in some countries.

9. When the 1994 text of the Model Law was being drafted, the Commission had known there were different kinds of two-stage tendering, and that had been reflected in the text. His delegation was, however, in favour of tightening up that text.

10. **The acting Chairperson** said that the text should also be aligned with that of article 47 (2) and (3).

11. **Mr. Fruhmann** (Austria), referring to article 14 (1), said that the drafting group proposed that the word "in" be inserted before the words "the pre-qualification or pre-selection documents". Referring to article 36 (c), he said that the drafting group proposed that the words "A summary of" be added at the beginning, so that the text would read "A summary of the criteria and ...".

12. **Mr. D'Allaire** (Canada), referring to article 52 (1)(k), said that the footnote to it stated the obvious and should be deleted.

13. **Ms. Nicholas** (Secretariat) said that parenthetical article 52 (1)(k) reflected the fact that, when electronic auctions had first been discussed by Working Group I, some years earlier, there had been a fear that computer systems might not be able to cope with them. As new

computer technology emerged, that risk was clearly decreasing. Working Group I had not wished to delete subparagraph (1)(k), however, even though it might come to have little relevance.

14. **Mr. Grand d'Esnon** (France), expressing support for the deletion of the footnote, said that footnotes would in most cases be made redundant by the Guide to Enactment. Thus, the footnotes to articles 26 (1) and 29 (2) should be deleted — especially the latter.

15. **Mr. Fruhmann** (Austria) said that he had no strong opinion about the footnote to parenthetical subparagraph (1)(k), although, if retained, it should logically become a footnote to paragraph (2). The Commission should, however, decide on how to deal with the text in parenthesis.

16. **The acting Chairperson** suggested, following comments by **Mr. Fruhmann** (Austria) and **Ms. Nicholas** (Secretariat), that the final phrase in article 52 (1)(c) — "and the contract form, if any, to be signed by the parties" — be deleted.

17. **Mr. Wallace** (United States of America) said that, if the footnote to subparagraph (1)(k) of article 52 was deleted, that subparagraph should appear without parenthesis and the footnote should be replaced by an explanation in the Guide to Enactment, if necessary.

18. He asked whether, in countries where electronic auctions were used, such as Brazil and Singapore, procuring entities had been swamped by suppliers or contractors.

19. **Ms. González Lozano** (Mexico) said that she would not welcome the deletion of the reference to "the contract form" in article 52 (1)(c). Suppliers and contractors needed to know in advance the "small print" in the document that they would have to sign if the contract was awarded to them.

20. **The acting Chairperson** said that perhaps the phrase "and the contract form, if any, to be signed by the parties" could be retained and the meaning of "contract form" explained in the Guide to Enactment.

21. **Mr. Phua** (Singapore) said, in response to the question asked by the representative of the United States, that procuring entities in Singapore had not been swamped by suppliers or contractors even though it did not place limits on the numbers that might participate in electronic reverse auctions. However, it required that, before participating in electronic reverse auctions, suppliers and contractors be trained in the use of the electronic reverse auction system.

22. **The acting Chairperson** suggested, following an explanation by **Ms. Nicholas** (Secretariat) of how parentheses were used in the draft revised Model Law, that the parentheses around subparagraph (1)(k) and paragraph (2) of article 52 be retained but the footnote to subparagraph (1)(k) be deleted.

23. **Mr. Grand d'Esnon** (France) said that all parentheses in the draft revised Model Law should be deleted and, where necessary, explanations given in the Guide to Enactment.

24. **Mr. Fruhmann** (Austria) said that article 57 should, for consistency's sake, contain a reference to article 8 similar to that in article 59 (3)(e)(i).

25. **Ms. Nicholas** (Secretariat) said that the award of a closed framework agreement was conducted through procurement methods that already required a declaration pursuant to article 8. There was therefore no need for a reference to article 8 in article 57.

26. **The acting Chairperson** took it that article 57 should remain unchanged.

27. **Mr. D'Allaire** (Canada), referring to the parenthetical subparagraph (3)(e)(ii) of article 59, said that it should remain in parentheses but the footnote to it should be deleted. The issue was particularly sensitive, while the footnote added nothing of significance.

28. **Mr. Fruhmann** (Austria) said that, in article 59 (3), subparagraphs (b) and (c) seemed to say the same thing in slightly different words. One of the subparagraphs should therefore be deleted.

29. **Ms. González Lozano** (Mexico) said that the phrase ", or only to each of those parties of the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement" in article 61 (4)(a) would open the way to subjective judgements on the part of the procuring entity, and that could give rise to complaints. Written invitations to present submissions should be issued to all suppliers or contractors party to the framework agreement.

30. **The acting Chairperson** said that in his view it would do no harm if that phrase were deleted.

31. **Mr. Yukins** (United States of America) said that, if the phrase were deleted, the procuring entity might have to issue hundreds of written invitations.

32. **Ms. González Lozano** (Mexico) said that, if the phrase were retained, the procuring entity might arbitrarily decide not to issue a written invitation to a supplier or contractor that would with time quite possibly become capable of meeting its needs. For example, could one be certain in January whether a supplier or contractor would be capable of meeting one's needs in September?

33. **Mr. Yukins** (United States of America) said that the ideal would be for all suppliers or contractors party to a framework agreement to receive a written invitation. The problem was that, in the case of closed framework agreements, the prices were already set, and the parties could not refuse to tender on the basis of those prices if invited to do so.

*The meeting was suspended at 3.30 p.m. and resumed at 4.00 p.m.*

34. **Mr. Cachapuz de Medeiros** (Brazil) said that the phrase ", or only to each of those parties ... the subject matter of the procurement" in article 61 (4)(a) was unnecessary, and it created uncertainty and could lead to challenges in the courts.

35. **Mr. Yukins** (United States of America) said that, during the suspension, there had been informal discussions regarding possible new language for article 61 (4)(a), but further informal discussions were required.

36. **Mr. Fruhmann** (Austria), referring to article 62, proposed that the title be amended to read "[Possible] Changes during the operation of a framework agreement".

37. **Mr. Yukins** (United States of America), calling for retention of the title as it stood, said that the principle of "no material change" applied at every stage of procurement proceedings. Disallowing change of any kind would constitute a straitjacket.

38. **Mr. Maradiaga Maradiaga** (Honduras) said that the title should be left as it stood.

39. **The acting Chairperson** said that, given the problems raised by the word "material", the Commission should perhaps accept the proposal made by the representative of Austria or refer the matter to the drafting group.

40. **Mr. D'Allaire** (Canada), referring to article 63, said that it was not clear as to what suppliers or contractors should do if they wanted to challenge a decision or action of the procuring entity. Was it compulsory, for example, to begin by submitting an application for review to an administrative body, or could an appeal be made direct to a court? It would be a pity if a State spent money on setting up an administrative body specializing in procurement matters only for it to be bypassed. It was essential that the Model Law provide guidance on what challenge possibilities were available and in what sequence.

41. **Mr. Yukins** (United States of America) said that in his country a complainant could apply either to an administrative body or to a court.

42. **Mr. Grand d'Esnon** (France) said that greater clarity was needed. The article could not list all possible scenarios; that was a matter for the Guide to Enactment. The drafting group should take a close look at the article.

43. **Mr. D'Allaire** (Canada) said that one solution might be for the article to indicate — say — three possible scenarios, with a proviso that States could opt for something else if they wished. Another solution might be to delete the article and let States decide for themselves, with help from the Guide to Enactment, what challenge system they should have.

44. **Ms. Anchishkina** (Russian Federation) said that, in her delegation's view, the present wording of article 63 was well balanced.

45. **Mr. Wallace** (United States of America) said that the present wording of article 63 reflected the fact that it was hard to generalize about challenge systems. There should be room for experimentation, so that challenge systems might evolve.

46. **Mr. Xiao** (China) said that article 63 should allow as far as possible for different challenge systems.

47. **Mr. Jezewski** (Poland) said that, while his country's challenge system worked well, with challenge proceedings taking no more than two months, his delegation was in favour of the solutions suggested by the representative of Canada.

48. He suggested attaching to article 63 a footnote similar to footnote 7 to article 66. That might meet the concerns of States lacking an independent arbitration body.

49. **Mr. Phua** (Singapore) said that article 63 was not intended as an invitation to pick and choose; it was simply an introduction to chapter VIII, making it clear that suppliers or contractors that challenged a decision or action of the procuring entity would have to demonstrate that they had suffered loss or injury.

50. **The acting Chairperson** suggested that paragraph (1) of article 63 end at the phrase "... challenge the decision or action concerned" and that there be a paragraph for enabling the enacting State to indicate the challenge options that it wished to offer.

51. **Mr. Grand d'Esnon** (France), urging that article 63 be left as it stood, said that the main question seemed to be whether the three challenge options indicated in it should be available in parallel or sequentially. The whole point of chapter VIII as a whole was that there was no one solution; any given challenge system would suit some States and not others.

52. **Mr. Yukins** (United States of America) said that his delegation was in favour of an explanation in the Guide to Enactment to the effect that States could adopt either a parallel approach or a sequential hierarchical approach, together with a reference to some of the problems that should be taken into consideration. For example, if a hierarchical approach was adopted, suppliers or contractors might be forced to apply to a corrupt or weak body at a lower level before they could seek a remedy at the judicial level, the intention being to deter potential remedy-seekers.

53. **Mr. Fruhmann** (Austria) said that, at its forty-second session, the Commission had decided not to pronounce on how an enacting State should choose which challenge system to use. It was up to States to choose, so long as certain standards were met.

54. **Mr. Yukins** (United States of America) said that there was a good case for deleting the second half of paragraph (1) of article 63 and all of paragraph (2), thus leaving States free to choose, with the addition of a footnote saying that States could adopt either a parallel or a hierarchical approach.

*The meeting rose at 5 p.m.*