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Summary record of the 931st meeting

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

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The meeting was called to order at 11.30 a.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** said he understood that the drafting group had completed its consideration of the draft revised Model Law.
2. Proposals made by the drafting group regarding which no suggestions for amendment were made in the Commission would be considered to have been accepted by the Commission.
3. He invited the representative of Austria to present the drafting group's proposals.
4. **Mr. Fruhmann** (Austria) said that he was grateful to his colleagues in the drafting group for the constructive spirit displayed by them.
5. Regarding article 10 (3), the drafting group proposed that the expression "inter alia" be inserted between "may include" and "specifications" and that the words "including concerning" be deleted, with the addition in the Guide to Enactment of comments regarding "description of the subject matter of the procurement".
6. The drafting group proposed that article 13 be left unchanged, but that a comment regarding the language(s) used in documents be added in the Guide to Enactment.
7. The drafting group proposed a new article — article 15 bis — reading as follows:

"Clarification of qualification information and of submissions

- "1. At any stage of the procurement proceedings, the procuring entity may ask a supplier or contractor for clarifications of its qualification information or of its submission, in order to assist in the ascertainment of qualifications or the examination and evaluation of submissions.
- "2. The procuring entity shall correct purely arithmetical errors that are discovered during the examination of submissions. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that presented the submission concerned.

"3. No substantive change to qualification information, and no substantive change to a submission (including changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive) shall be sought, offered or permitted.

"4. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to qualification information or submissions, nor shall any change in price be made, pursuant to a clarification that is sought under this article.

"5. Paragraph (4) of this article shall not apply to proposals submitted under articles 48, 49, 50 or 51.

"6. All communications generated under this article shall be included in the record."

8. The proposed article 15 bis, which had originated with the delegation of the United States of America, dealt with the same issues as article 42 (1), which would therefore be deleted, with consequential renumbering of the subsequent paragraphs of article 42, with consequential changes in the numbers of the articles referred to in the present paragraphs (5) and (6) of that article and with the reference "paragraph (1)(b) of this article" in the present article 42 (3)(b) amended to read "article 15 bis (2)". The drafting group also proposed that, in connection with article 15 bis, the Guide to Enactment elaborate on the difference between the expressions "change in price" and "correction of price".

9. **The acting Chairperson** took it that the proposed article 15 bis was acceptable to the Commission.

10. **Mr. Fruhmann** (Austria) said that the drafting group proposed that article 17 (2) be amended to read "If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published internationally, so as to be widely accessible to international suppliers and contractors."

11. In that connection, the drafting group proposed that article 32 (2) be amended to read "The invitation shall also be published internationally, so as to be widely accessible to international suppliers and contractors."

12. **Ms. Miller** (Observer for the World Bank) expressed concern about the proposed change to

article 32 (2). The proposed new wording was less specific and could make it easier for procuring entities to discriminate against foreign bidders.

13. If the Commission accepted the proposed change, she hoped that the Guide to Enactment would state clearly why more specific language and publication medium requirements might be desirable.

14. **Ms. Robert** (Observer for the International Development Law Organization), expressing support for the intervention of the Observer for the World Bank, said that it would be useful if the Guide to Enactment provided information on the options available to countries that could not afford to publish invitations to tender internationally.

15. **The acting Chairperson** said that the reason for the proposed change was that the present wording of article 32 (2) might be taken to imply that the language used in invitations to tender should always be English, even though the procuring entity found it more practical to use another language.

16. **Mr. Grand d'Esnon** (France) said that the underlying issue had been thoroughly considered and should not be reopened given the time constraints under which the Commission was working.

17. **Mr. D'Allaire** (Canada) suggested that, if there was enough time, the Observers' concerns be addressed after all the proposals of the drafting group had been considered.

18. **The acting Chairperson** agreed with that suggestion.

19. **Mr. Phua** (Singapore), supported by **Mr. Li** (China), proposed that the Guide to Enactment include a reference to article XVII (Transparency) of the WTO Government Procurement Agreement of 1994.

20. **The acting Chairperson** welcomed that proposal.

21. **Mr. Loken** (United States of America), recalling discussions in the drafting group, said that the Guide should include a reference to the use of electronic publication media.

22. **Mr. Li** (China) said that Working Group I should perhaps consider the role of the Internet in relation to the issue of transparency.

23. **Mr. Fruhmenn** (Austria), continuing with the proposals of the drafting group, said that it proposed that article 24 (3) be amended to read "Subject to paragraph (4) of this article, or except as disclosed pursuant to article 41 (3) of this Law, the portion of the record referred to in subparagraphs (p) to (t) of paragraph (1) of this article shall, after the decision on acceptance of the successful submission has become known to them, be made available, on request, to suppliers or contractors that presented submissions."

24. The drafting group proposed that the second sentence of the present text be included in the Guide to Enactment, which would also state that the procuring entity should inform suppliers or contractors of the disclosure to others of the information provided by them.

25. In connection with the proposed changes to article 24 (3), he recalled that it had already been decided that the words "and submission prices" would be deleted from article 24 (4)(b).

26. **Ms. Nicholas** (Secretariat), in response to a request for clarification made by **Ms. González Lozano** (Mexico), said that in the Secretariat's view the two qualifications referred to in the proposed wording "Subject to paragraph (4) of this article, or except as disclosed pursuant to article 41 (3) of this Law" were not cumulative — either one qualification or the other might apply. The Secretariat believed that the appropriate conjunction should be "and", not "or", so that the phrase would read "Subject to paragraph (4) of this article and except as disclosed ...".

27. **Mr. Fruhmenn** (Austria), continuing with the proposals of the drafting group, said that it proposed that the words "and precise" be deleted from article 30 (1)(a), as there was agreement that article 10 would refer to only a "detailed description" and not to a "detailed and precise description" of the subject matter of the procurement.

28. The drafting group proposed that the beginning of article 36 (c) be changed to "A summary of the criteria and procedures ...".

29. In response to a question asked in that connection by **Ms. Nicholas** (Secretariat), he said that the drafting group had not discussed whether in article 36 (c) the summary would relate to only "the criteria and procedures" or also to "the documentary evidence", but in his view it related to both.

30. **The acting Chairperson** said that, if the intention was that there should also be a summary of the documentary evidence, the word “of” should be added, so that the phrase would read “A summary of the criteria and procedures ... and of any documentary evidence ...”.

The meeting rose at 12.30 p.m.