



# General Assembly

Distr.: General  
22 July 2011

Original: English

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

### Summary record of the 932nd meeting

Held at the Vienna International Centre, Vienna, on Thursday, 30 June 2011, at 2 p.m.

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

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*The meeting was called to order at 2.10 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. Fruhmenn** (Austria), reporting again on the work of the drafting group, said that the group had agreed that article 41 (2) should read “All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to participate in the opening of tenders.” The Guide to Enactment should explain that such participation could be either physical or virtual.

2. In article 46 (2)(b), the word “detailed” should be inserted before the word “description”, in order to bring the provision into line with the wording of article 10. In article (4)(d), “formulated or expressed” should be replaced by “formulated and expressed”.

3. In order to prohibit modification of the subject matter of the procurement, article 47 (4)(b) should read as follows:

“(b) In revising the relevant terms and conditions of the procurement, the procuring entity may not modify the subject matter of the procurement but may refine aspects of the description of the subject matter of the procurement by:

(i) deleting or modifying any aspect of the technical or quality characteristics of the subject matter of the procurement initially provided, and adding any new characteristic that conforms to the requirements of this Law;

(ii) deleting or modifying any criterion for examining or evaluating tenders initially provided, and adding any new criterion that conforms to the requirements of this Law, to the extent only that the deletion or modification is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement;”.

4. **Ms. Nicholas** (Secretariat) said that “deletion or modification” in the second part of subparagraph (b)(ii) should read “deletion,

modification or addition” in order to ensure consistency with the first part of the subparagraph.

5. **Mr. Fruhmenn** (Austria) said that in article 47 (4)(e) the phrase “as defined in article 42 (4)(b)” should read “as defined in article 42 (3)(b)” in order to reflect the fact that article 42 (1) had been deleted.

6. In article 48 (5)(d), the phrase “formulated or expressed” should read “formulated and expressed”, as elsewhere in the text.

7. The title of article 52 should read “Electronic reverse auction as a stand-alone method of procurement” and that of article 53 should read “Electronic reverse auction as a phase preceding the award of the procurement contract”.

8. A paragraph (3) should be added to article 53, containing the text found in article 52 (4)(c): “Where an evaluation of initial bids has taken place, each invitation to the auction shall also be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed.”

9. In article 57 (2), the words “pre-qualification and” should be added after the word “regulating”. The paragraph would thus begin “The provisions of this Law regulating pre-qualification and the contents ...”.

10. In article 58, a subparagraph (f) should be inserted after subparagraph (1)(e), to read “The manner in which the procurement contract will be awarded.”

11. In article 59 (2), the words “in accordance with” should be replaced with the words “following the requirements of”. It was proposed that subparagraph (3)(c) of article 59 be deleted, since the information contained in that subparagraph was already set out in subparagraph (3)(b), the numbering of subparagraphs (d) to (h) would have to be adjusted. In the new subparagraph (3)(d)(ii), the old subparagraph (3)(e)(ii), the phrase “in conformity with this Law” should be replaced with the phrase “in conformity with paragraph (7) of this article”.

12. In article 59 (7), the phrase “and shall select suppliers or contractors to be parties to the closed framework agreement in a non-discriminatory manner” should be added at the end of the first sentence, with equivalent wording in relation to electronic reverse auctions in article 52.

13. **Ms. Nicholas** (Secretariat) confirmed that in article 52 (Procedures for soliciting participation in procurement by means of an electronic reverse auction) the phrase “the provisions of this Law” in subparagraph (1)(k) should be replaced with the phrase “paragraph (2) of this article” and the phrase “and shall select the suppliers or contractors to be so registered in a non-discriminatory manner” should be added at the end of the first sentence of paragraph 2.

14. **Mr. Fruhmann** (Austria), referring to article 62, said that the title should be amended to read “Changes during the operation of a framework agreement”.

15. With regard to article 61, subparagraph (4)(a), he said that the drafting group had been unable to agree on the wording and was therefore referring the matter back to the Commission. However, a provisional text had been drafted:

“(a) The procuring entity shall issue a written invitation to present submissions simultaneously:

(i) to each supplier or contractor party to the framework agreement, or

(ii) only to each of those parties to the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement, provided that, at the same time, notice of the second-stage competition is given to all parties to the framework agreement so that they have the opportunity to participate in the second-stage competition;”

16. **Mr. Grand d’Esnon** (France), calling for deletion of the proposed subparagraph (a)(ii), said that the phrase “only to each of those parties to the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement” would allow the procuring entity too much discretion in selecting “capable” suppliers or contractors; consequently, the parties to the framework agreement would have no assurance that they would be invited to present submissions.

17. **Ms. González Lozano** (Mexico) said that her delegation understood the concern of the delegation of France. However, it also understood the concern of the United States delegation, expressed in the drafting group, regarding the possible presentation of

submissions by large numbers of suppliers and contractors incapable of meeting the procuring entity’s needs. The text proposed by the drafting group sought to address both concerns, and it was in line with the Model Law’s provisions relating to restricted tendering proceedings. Perhaps the concern of the delegation of France could be addressed in the Guide to Enactment.

18. **Mr. Yukins** (United States of America), expressing support for the text just read out, said it was important that framework agreements function efficiently. To that end, the procuring entity should be permitted to identify in advance those suppliers or contractors party to the framework agreement which it considered to be capable of meeting its needs and to issue the written invitation to present submissions only to them. That applied particularly in the case of central purchasing agencies, which might otherwise have to deal with many submissions from suppliers or contractors incapable of meeting their needs.

19. In the opinion of his delegation, the text just read out, which would provide for the participation of all parties to the framework agreement in the second-stage competition, effectively addressed the risk of corruption in the form of “cronyism”.

20. **The acting Chairperson** said that there seemed to be agreement that all parties to a framework agreement would receive notices of the second-stage competition.

21. **Mr. Fruhmann** (Austria), agreeing with the acting Chairperson, wondered whether the provisional version of subparagraph (4)(a) that he had read out was necessary.

22. **Mr. Yukins** (United States of America) said that the provisional text reflected the compromise approach that had been adopted in his country, where the procuring entity issued two types of notice: the notice sent to those suppliers or contractors party to the framework agreement which were considered to be “capable” took the form of an e-mail addressed to them, while the notice intended for the other parties to the framework agreement was posted on the procuring entity’s website. Thus, it was clear which suppliers or contractors were being invited to present submissions.

23. **Mr. Grand d’Esnon** (France) said that suppliers or contractors not considered to be “capable” should not have to check a website for notices.

24. **The acting Chairperson**, drawing attention to the phrase “provided that, at the same time, notice of the second-stage competition is given to all parties to the framework agreement so that they have the opportunity to participate in the second-stage competition” in the provisional version of subparagraph (4)(a), said it was clear from that phrase that notices of second-stage competitions would be communicated directly to suppliers or contractors and not simply posted on websites. The means by which such notices might be communicated could be dealt with in the Guide.

25. **Ms. Nicholas** (Secretariat) said that, regardless of the solution adopted, the Guide would note that framework agreements should spell out the criteria and procedures for identifying “capable” suppliers or contractors.

26. **Mr. Yukins** (United States of America) suggested framework agreements contain, for specification purposes, product or service codes, so that only the suppliers or contractors able to offer exactly the products or services indicated would receive invitations to present submissions. That would avoid subjective assessments of the ability of suppliers or contractors to meet the procuring entity’s needs.

27. **Mr. Grand d’Esnon** (France) said that the simplest solution would be to use only the first part of subparagraph (4)(a) as originally drafted: “The procuring entity shall issue a written invitation to present submissions simultaneously to each supplier or contractor party to the framework agreement;”. His delegation could go along with the provisional text that had been read out, although subparagraph (4)(a)(ii) appeared to be unnecessary and somewhat complicated.

28. **Mr. Yukins** (United States of America) requested clarification regarding the form that notices sent to “incapable” suppliers or contractors would take. His delegation did not interpret the provisional text as meaning that individual notices would have to be sent to all parties to the framework agreement.

29. **Mr. Grand d’Esnon** (France) said that the provisional text was unclear on that point. In order to avoid a reopening of the discussion on article 61 (4)(a) during work on the Guide, the Commission should decide whether the Model Law should provide for different types of notice.

30. **Mr. Fruhmenn** (Austria) said that electronic means of communication made it possible to communicate individual notices automatically to all parties to framework agreements at relatively little cost, even when the number of notices was very large.

31. **The acting Chairperson** said that the issue of the nature and content of notices to parties to framework agreements was a complicated one that should not be addressed in the Model Law, particularly since such notices might be handled in different ways in years to come. Possible solutions to that issue would have to be developed in light of implementation of the Model Law.

32. **Mr. Yukins** (United States of America) said it was important that the procuring entity be allowed to send notices to a restricted category of suppliers or contractors that was defined on the basis of clear criteria, so that both the procuring entity and suppliers or contractors did not incur excessive costs.

33. **The acting Chairperson** said that the Guide should indicate: that there might be a number of possible ways in which to communicate notices; that consideration should be given to the potential costs of communication; and that it was for the procuring entity to decide on the form that the notice would take.

34. **Mr. Fruhmenn** (Austria) said that the drafting group proposed that the title of chapter VIII be “Challenge proceedings” and that the title of article 63 be “Right to challenge”.

35. It proposed that paragraph (1) of article 63 end with the words “decision or action concerned”, thus reading “A supplier or contractor that claims to have suffered or claims that it may suffer, loss or injury because of alleged non-compliance of a decision or action of the procuring entity with the provisions of this Law may challenge the decision or action concerned.”

36. Paragraph (2) would then read “Challenge proceedings may be made by way of an application for reconsideration to the procuring entity under article 65 of this Law, an application for review to the independent body under article 66 of this Law, or an appeal to [...]”. The drafting group had felt that it should not consider the content of the square brackets, which related to judicial review, until the Commission decided whether or not to retain article 69. It proposed that the Guide include a sentence along the following

lines: “The enacting State may add provisions addressing the sequence of applications, if desired, and to allow an independent body or court to hear an appeal from an application for review; the application for reconsideration can be followed by an application for review or for judicial review, according to the domestic enactment of the Model Law.” It would thus be left to the enacting State to decide on the sequence of applications and on the review body or bodies to which appeals should be made.

37. **Mr. D’Allaire** (Canada) said that if paragraph (2) as originally drafted were deleted it would be difficult to delete article 69. It might be logical to incorporate article 69 into article 63.

38. He asked whether the proposed paragraph (2) would be in square brackets.

39. **Mr. Fruhmenn** (Austria) said that, in view of the content of articles 64 to 69, it might be wise to place part of the proposed paragraph (2) in square brackets in order to indicate the optional nature of the provision and of the decisions that the enacting State would need to make when implementing the Model Law. He suggested that square brackets be placed around the part of paragraph (2) following the words “Challenge proceedings may be made by way of”.

40. Regarding article 64, the drafting group proposed that the title be “Effect of a challenge” and that the chapeau of paragraph 1 be amended to read “The procuring entity shall not take any step that would bring a procurement contract or framework agreement in the procurement proceedings concerned into force”.

41. It proposed that subparagraph (1)(b) be split into two subparagraphs reading as follows:

“(b) Where it receives notice of an application for review from the [name of independent body] under article 66 (5)(b); or

“(c) Where it receives notice of an application or of an appeal from the [name of court or courts].”

42. It proposed that paragraph (2) be amended to read “The prohibition referred to in paragraph (1) shall lapse ... working days (the enacting State specifies the period) after the decision of the procuring entity, the [name of independent body] or the [name of court or courts] has been communicated to the applicant or appellant, as the case may be, to the procuring entity

where applicable, and to all other participants in the challenge proceedings.” The Guide should explain the term “participants in the challenge proceedings” and note that the enacting State might wish to use another term when referring to parties with an interest necessary in order to participate in challenge proceedings.

43. The drafting group proposed that in subparagraph 3 (b) the phrases “or appellant, as the case may be” and “or appeal” be deleted.

44. In paragraphs (4) and (7) of article 65, the words “in the [name of independent body] under article 66 of this Law or in the [name of court or courts]” should be in square brackets, in order to indicate optionals.

45. The drafting group proposed that in the title of article 66 and throughout that article all references to appeals and all instances of the wording “or appellant, as the case may be” be deleted, since that article dealt only with reviews before independent bodies, not with appeals. The footnote to the title of the article should be incorporated into the Guide, with improvements made in the wording.

46. In paragraph (1), the phrase “and may also file an appeal to that body against a decision of the procuring entity taken under article 65 of this Law” should be deleted.

47. The drafting group proposed that in subparagraph (2)(d) the words “Appeals against decisions of the procuring entity taken under article 65 of this Law, or” be deleted; consequently, the subparagraph would begin with the words “Applications for review of a failure”. In addition, the phrase “after the decision of the procuring entity was communicated or should have been communicated to the appellant in accordance with” should be amended to read “after the decision of the procuring entity should have been communicated to the applicant in accordance with”.

48. Footnotes 8 and 9 should be moved to the Guide, with improvements in the wording.

49. At the end of subparagraph (5)(a), the words “in accordance with paragraphs (3) and (4) of this article” should be added.

50. Paragraph (8) should be amended to read “Promptly upon receipt of a notice under paragraph (5)(b) of this article, the procuring entity

shall provide the [name of the independent body] with effective access to all documents relating to the procurement proceedings in its possession, in a manner appropriate to the circumstances.” The Guide should explain how physical or virtual access to documents could be granted and that the relevant documents could be provided in steps; for example, the procuring entity could provide the review body with a list of documents from which that body could choose the documents it needed.

51. In paragraph (9), subparagraphs (a) and (b) should be amended to read as follows:

“(a) Prohibit the procuring entity from acting, taking a decision or following a procedure that is not in compliance with the provisions of this Law;

“(b) Require the procuring entity that has acted or proceeded in a manner that is not in compliance with the provisions of this Law to act, take a decision or proceed in a manner that is in compliance with the provisions of this law;”.

52. It was proposed that subparagraph (9)(c) be amended to read “Overturn in whole or in part an act or a decision of the procuring entity that is not in compliance with the provisions of this Law (other than any act or decision bringing the procurement contract or the framework agreement into force);”.

53. Subparagraph (9)(d) should read “Revise a decision by the procuring entity that is not in compliance with the provisions of this Law (other than any act or decision bringing the procurement contract or the framework agreement into force);”.

54. There should be an additional subparagraph, subparagraph (9)(e), reading: “Confirm a decision by the procuring entity;”, with subparagraphs (e) to (i) as set out in document A/CN.9/729/Add.8 becoming subparagraphs (f) to (j). In the renumbered subparagraph (f), the word “unlawfully” would be replaced with the phrase “in a manner that is not in compliance with the provisions of this Law”.

55. The entire text of subparagraphs (c) to (f) should be in square brackets in order to indicate that those subparagraphs contained optional provisions.

56. The renumbered subparagraph (i) should read as follows: “Require the payment of compensation for any reasonable costs incurred by the supplier or

contractor submitting an application as a result of an act or decision of, or procedure followed by, the procuring entity in the procurement proceedings, which is not in compliance with the provisions of this Law, and for any loss or damages suffered [, which shall be limited to costs for the preparation of the submission, or the costs relating to the application, or both];”.

57. In paragraph (10), the words “challenge or appeal proceedings” should be replaced with the words “application for review”.

58. In article 67, all references to “appeal” in the title and throughout the article should be deleted. In paragraph (3) of the article, the words “relevant challenge or appeal” should also be deleted.

59. In article 68, the words “and appeal” should be deleted from the title and the words “or appeal” from the text of the article.

60. All footnotes in document A/CN.9/729/Add.8 should be deleted, and a new footnote, which would refer to the chapter as a whole, would direct enacting States to consider the various options that were explained in the Guide.

61. Article 69 remained to be discussed by the Commission, since it had been felt that the issue raised by that article was substantive.

62. **Mr. Yukins** (United States of America), referring to the proposed wording of article 66 (9)(d), said that he was not aware of any conclusion to the effect that the words “or substitute its own decision for such a decision” appearing in document A/CN.9/729/Add.8 should be deleted.

63. **Ms. Nicholas** (Secretariat) said it was the Secretariat’s understanding of the drafting group’s discussions that, in the drafting group’s view, the revision by the independent body of a decision made by the procuring entity would involve the replacement of that decision by a decision of the independent body to the extent that such replacement was required.

64. **The acting Chairperson** took it that the Commission agreed to the deletion of the words in question and thus accepted the proposed wording of article 66 (9)(d).

65. **Mr. Grand d’Esnon** (France) said that the drafting group had considered deleting article 69 if article 63 provided for the possibility of an appeal and

hence of judicial review. As the proposed wording of paragraph (2) of article 63 seemed to provide for that possibility, his delegation was in favour of the deletion of article 69.

66. **Mr. D’Allaire** (Canada) said that article 69 should not be deleted unless article 63 required that the enacting State allow not only challenges but also appeals.

67. He proposed the retention of the original wording of paragraph (2), as contained in document A/CN.9/729/Add.8, and the addition of the proposed paragraph (2) as paragraph (3), with the insertion of the words “name of court or courts” in the square brackets.

68. **The acting Chairperson** said that, while chapter VIII should reflect the need to provide for appeals by including references to “court or courts” in square brackets, it should not itself deal with appeals. For that reason, he considered that article 69 and the original wording of article 63 (2) should be deleted.

69. **Ms. Nicholas** (Secretariat) said it was her understanding of the proposal just made by the representative of Canada that the options available to the supplier or contractor by virtue of article 63 should include a first-instance application to a court.

70. She proposed that paragraph (2) of that article read “Challenge proceedings may be made by way of [an application for reconsideration to the procuring entity under article 65 of this Law, an application for review to the independent body under article 66 of this Law, or an application or appeal to [name of court]]”. It would then be up to the enacting State to decide on the sequence of applications and whether both an application and an appeal could be made to a court. It was the Secretariat’s understanding that the Commission wished the Model Law to provide for both those possibilities.

71. **The acting Chairperson** took it that the Commission wished to accept the Secretariat’s proposal and to delete article 69, with the Commission’s discussion reflected in the Guide.

72. **Ms. Miller** (Observer for the World Bank) said that, if the Model Law contained a reference to the right to judicial review but no provision expressly acknowledging that right, that might cause confusion. It was important that the Model Law contain such a provision; the issue was too important to be left to the

Guide to explain. She was therefore in favour of retaining article 69.

73. **Ms. Nicholas** (Secretariat) said that, in the wording of article 63 (2) just proposed by her, the options available to the supplier or contractor would appear in square brackets, thus indicating that enacting States should refer to the Guide for an explanation of those options. The Guide would clarify that challenge proceedings included both first-instance applications and appeals.

74. **The acting Chairperson** said that it was important that the Model Law not dictate to enacting States which review system they should adopt. However, the Guide should make it clear that the possibility of appeal must be available, in line with international requirements.

75. **Mr. D’Allaire** (Canada) said that, in his view, the wording in square brackets in the proposed article 63 (2) did not give a clear indication that the enacting State was required to provide both for first-instance applications and for appeals. However, his delegation had no objection to the idea that the matter should be addressed in the Guide.

76. **Mr. Grand d’Esnon** (France) said that article 63 should make it clear that enacting States must provide for an appeal system; the proposed text did not do that.

77. **The acting Chairperson** said that, if article 63 did not make it clear, the references to appeals and appellants that the Commission apparently had decided to delete throughout chapter VIII would have to be reinstated.

78. **Mr. Loken** (United States of America) said that, if challenge proceedings were understood to include the possibility of an application to a court, reinstatement of the original language of paragraph (2) of article 63 would mean that the Model Law provided for appeals against court judgements. The Model Law should not provide for that.

79. **The acting Chairperson** proposed that, in order to clarify the distinction between the right to challenge and the right to appeal while also avoiding the problem pointed out by the representative of the United States, the wording of paragraph 2 of article 63 proposed by the Secretariat be retained and the original wording of paragraph (2) as set out in document A/CN.9/729/Add.8 appear in square brackets as

paragraph (3). The original wording of paragraph (2) could not be interpreted as providing for the right to appeal against a court judgement, since articles 65 and 66 dealt only with applications to the procuring entity and to an independent body.

80. **Mr. Yukins** (United States of America) said that that solution would be acceptable provided that the Guide addressed the fact that the steps that a supplier or contractor could take would vary depending on the jurisdiction concerned; for example, the supplier or contractor might be able to appeal directly against a decision of the procuring entity, or it might be required to apply for review by an independent body before being able to appeal; in other cases, it might be able to apply to a court without any administrative review.

81. **The acting Chairperson** took it that the proposed solution was acceptable to the Commission.

82. Recalling that there had been some discussion as to whether footnotes should be retained in the revised Model Law, he said that, since other Model Laws adopted by the Commission typically contained footnotes, those footnotes in the revised Model Law which had not been deleted would remain.

83. Turning to editorial matters, he said it had been suggested that all optional provisions be in square brackets. He took it that the Commission wished the Secretariat to deal with the relevant provisions accordingly and also to deal with the numbering in cases of “bis” provisions.

84. **Ms. Nicholas** (Secretariat) said that the Secretariat would make as few editorial changes as possible. One consideration would be consistency of language — to be achieved by, for example, the replacement of the word “aspects”, used in a number of provisions to refer to technical or quality characteristics, with the word “characteristics”.

85. **Mr. Piedra** (Observer for Ecuador) said that he wished to make a number of general comments and would like those comments to be duly reflected in the Guide to Enactment.

86. Ecuador recognized the enormous efforts made during the past several years in revising the Model Law and welcomed the fact that the revised Model Law reflected the experience and concerns of many countries. Ecuador was of the view that, when engaging in public procurement, States should take into

account the different levels of development of other States and bear in mind the principles of environmental and social responsibility. The international community should respect the fact that, for less advanced countries, public investment continued to be important for promoting economic development, and particularly the development of the production sector and of small and medium-sized enterprises. For such countries, public procurement was not simply a means of promoting international trade.

87. The revised Model Law should be understood as a tool that could be adapted to the circumstances and the level of development of each country, and it should be implemented in accordance with the social and economic situation of each country in order to avoid negative consequences for less advanced countries.

88. Ecuador would like UNCITRAL to take account of its concerns and not attempt, at either the bilateral or the multilateral level, to seek wholesale incorporation of the revised Model Law into the national legislation of every country, particularly within the framework of international trade negotiations in which less advanced countries engaged.

89. Despite its concerns, Ecuador fully endorsed the principles of transparency, efficiency and quality in the field of public procurement.

90. **The acting Chairperson** said that the Secretariat had taken note of the comments just made.

*The meeting rose at 5.05 p.m.*