United Nations A/CN.9/SR.891

General Assembly

Distr.: General
27 July 2009

Original: English

United Nations Commission on International Trade Law
Forty-second session

Summary record of the 891st meeting
Held at the Vienna International Centre, Vienna, on Thursday, 2 July 2009, at 9.30 a.m.

Chairperson: Mr. Soogeun Oh.....(Republic of Korea)

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V.09-85152 (E)

The meeting was called to order at 10.15 a.m.

Draft UNCITRAL Model Law on Public Procurement (A/CN.9/664, 668 and 672; A/CN.9/WG.I/WP.68 and Add.1; A/CN.9/WG.I/WP.69 and Add.1-5; A/CN.9/XLII/CRP.2 and A/CN.9/WG.I/XV/CRP.2)

1. **The Chairperson** invited the Secretariat to review the work undertaken by Working Group I (Procurement) on the updating of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the Model Law) since its thirty-seventh session in 2004.

2. **Ms. Nicholas** (Secretariat) said that the Working Group's mandate was to update the Model Law to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform. An important aspect of the mandate was that the review should not depart from the basic principles of the Model Law. A draft revised text of the Model Law was being presented to the Commission at its current session (A/CN.9/WG.1/WP.69 and Add.1-5).

3. Following the entry into force of the United Nations Convention against Corruption (UNCAC) in December 2005, the Commission had requested the Working Group to consider the consistency of the Model Law with the provisions of the Convention. In particular, it was asked to take up the question of conflicts of interest and declarations of interest, which had not been addressed in the Model Law. The Working Group had also considered defence procurement and the broad use of socio-economic criteria in procurement in its deliberations. While the main parameters of most of the issues had been settled, further debate on some aspects was required.

4. The Working Group had begun to discuss possible revisions to the Model Law at its sixth session on 30 August 2004 and had continued its work at ten subsequent sessions. The early sessions had focused on three key subjects in respect of which the Working Group was recommending entirely new provisions or substantial amendments: the use of electronic communications in public procurement, electronic reverse auctions and framework agreements. While it had reached agreement in principle on most of those provisions, some drafting issues were outstanding. Later sessions had focused on procurement of services, alternative procurement methods and simplification and standardization of the Model Law, and new provisions and substantial amendments were being considered.

5. She proposed to review progress on the various issues that the Working Group had identified, beginning with electronic communications. The Working Group had recommended new provisions to allow for the use of electronic communications in the procurement process in a new article 8 of the draft revised Model Law, which would address the form and means of communications together, replacing article 9 of the 1994 text which addressed only form. Article 8 had been drafted to provide certainty as regards the form and means of communications that could be used. It would not distinguish between paper-based and electronic means of communication and would not refer to any particular medium. All means of communication would operate on the basis of functional equivalence. Hence, information should be in a form that provided a record of its content and was accessible for subsequent reference. In other words, communications recorded in writing might be required, but whether the writing was on paper or on screen was not prescribed. Draft article 8 allowed for electronic tendering, and it would also ensure equality for electronic and traditional publication of procurement notices.

6. To address possible concerns regarding the use of electronic commerce techniques, safeguards addressing confidentiality, traceability and integrity had been included. Most importantly, the standards that had previously been applicable to paper-based communications were equally applicable to electronic communications under the draft revised Model Law. In particular, no means or form of communication should be used to restrict access to procurement. The provisions would also ensure transparency and predictability by requiring the procuring entity to specify any particular requirements as to the form of communications and the means to be used at the beginning of the procurement proceedings.

7. Electronic reverse auctions (ERAs) involved online, real-time competition between the procuring entity and a number of suppliers. The term "reverse" referred to the fact that the suppliers bid prices

downwards to win the procuring entity's contract. In view of the enormous potential benefits in terms of price savings, the Working Group was recommending that provision for such auctions in electronic form should be included in the draft revised Model Law. Auctions in a non-electronic form, on the other hand, presented risks of collusion. The use of ERAs would be subject to certain conditions, and procedural rules would be applicable both to those that were a phase in other procurement methods and to those that were a stand-alone procurement method. The Working Group's recommendations were applicable only to the type of auction in which the best bid according to the award criteria was identified automatically at the end of the auction process. Other types that required subsequent assessment were deemed to involve unacceptable risks. The system operating the electronic reverse auction was thus required to provide for automatic re-evaluation of bids as they were revised during the auction, so that bidders knew at all times whether or not their bid was the winning one. With regard to non-price factors, the Working Group had concluded that they might complicate the process, make it less reflective of costs and render it less transparent.

8. Studies of electronic reverse auctions had shown that ERAs might induce bids at prices that were unsustainably low, entailing a performance risk. The Working Group had concluded, however, that the risk could arise in any procurement procedure and was probably no greater in electronic reverse auctions than in any other procurement procedure, at least in the long term. It was therefore recommending provisions in the draft revised Model Law that would require the procuring entity to examine the risk of an abnormally low submission, both when evaluating the submission and when examining the qualifications of suppliers. Only if there had been such an investigation, and the procuring entity had indeed concluded that the submission was abnormally low and that there was a performance risk, could the procuring entity reject the submission on that ground. It constituted a very limited and rigorous exemption from the general principle that individual bids or other offers could not be rejected because of the risk of corruption that such rejection might entail.

9. The Working Group had also considered framework agreements in great detail. They were two-stage procurements in which one or more suppliers concluded a framework agreement with the procuring entity at the first stage and procurement contracts in the form of orders at the second stage. Framework agreements had not been addressed in the 1994 Model Law but they were now widely used in practice and had several advantages, such as reductions in administrative and transaction costs and transaction times because certain steps in the procurement process were conducted once for what would otherwise be a series of procurements, and security of supply.

10. The Working Group was recommending provisions in the draft revised Model Law for three types of framework agreement. The first was a "closed" framework agreement, in which the specification and all terms and conditions of the procurement were set out in the framework and there was no further opening of competition between the suppliers at the second stage. It might be concluded with one or more suppliers. The second was a "closed" framework agreement, which set out the specification and the main terms and conditions of the procurement but involved a further competition among the supplier-parties to the framework agreement before the procuring entity awarded procurement contracts. It was always concluded with more than one supplier. The third was an "open" framework agreement, which was a framework agreement concluded with more than one supplier and involving a second-stage competition between all the supplier-parties. It was envisaged that the open framework agreement would be operated electronically and would be used for simple procurement. As in the case of ERAs, framework agreements would be subject to general conditions, and specific procedures would be applicable to each type. Some issues in that regard had not yet been resolved.

11. Certain risks arose in framework agreements, particularly those that were concluded between a defined group of suppliers and the procuring entity. As the market was effectively closed for the duration of the agreement, effective competition might be undermined. There was also some risk of collusion between suppliers during the currency of a framework agreement and it could be difficult to ensure effective monitoring of agreements. The Working Group therefore recommended that States should be required to impose a maximum duration for closed frameworks so that they could not be used to exclude suppliers from competition for long periods. The Working Group had also given careful attention to ensuring

transparency by requiring a series of public notices throughout the process.

12. An alternative to framework agreements was suppliers' lists. The Working Group had initially agreed that, whether or not they were viewed as consistent with the basic principles, aims and objectives of the Model Law, such lists were used in practice and their operation should therefore be subject to minimum standards. However, the Working Group had later concluded that the topic need not be addressed in the draft revised Model Law because the flexible provisions addressing framework agreements (particularly open framework agreements) would be sufficient to allow for the benefits that suppliers' lists were reputed to provide and would avert some of the risks. As that point was not universally accepted in the procurement community, the reasons for the Working Group's conclusion would be set out in some detail in the Guide to Enactment, which would also address the well-documented concerns associated with lists, such as their use in a non-transparent and sometimes inappropriate way to restrict market access, even where controls such as permanently open lists and simple registration procedures had been put in place, and even where lists were intended to be optional.

13. The Working Group had agreed at its sixth session that the draft revised Model Law should retain the various options for the procurement of services but that the Guide to Enactment should be more expansive in addressing the type of services and relevant circumstances in which the different methods should be used. The Working Group had also agreed to reconsider the use of alternative methods, the conditions governing their use and whether the whole set of methods should be retained. An overall review of such procurement methods had therefore become a core element of the simplification and standardization exercise.

14. The Working Group had noted some overlap between two of the services selection procedures and the request for proposals procedure in the Model Law. Moreover, all of the procedures that could be used for goods and construction could also be used for services, so that separate provisions might be superfluous. The common features were: there could be open solicitation starting with a public advertisement or direct solicitation starting with suppliers; proposals were submitted against a single set of specifications that could not be changed; evaluation criteria could concern the relative managerial and technical competence of the supplier or contractor; and price was considered separately and after completion of the technical evaluation. The only procedure that was distinct from the others in the Model Law was the services selection procedure with consecutive negotiations.

15. Some delegations had accordingly proposed a single negotiated procurement method for any type of procurement, to be called a "Request for proposals with competitive dialogue", which had been considered in detail at the Working Group's fifteenth and sixteenth sessions. The outcome was presented to the Commission as a new procurement method in document A/CN.9/XLII/CRP.2. The main challenges in negotiated procurement consisted in: striking a balance between discretion or flexibility (designed to achieve the best value for money) and regulated procedures aimed at preventing abuse of the discretion conferred; ensuring sufficient transparency (disclosing the rules of the game in advance) while leaving scope for negotiation; and allowing the procuring entity some measure of control over the number of suppliers with which it negotiated. The latter aim could be achieved through pre-qualification, pre-selection, assessment of responsiveness or exclusion of technical solutions. Another issue was which aspects of the potential procurement were to be negotiated during the dialogue phase.

16. Although the proponents of the negotiated procurement method had intended that it should replace other methods involving negotiations, a number of delegations were in favour of retaining the other methods (including competitive negotiations, two-stage tendering and perhaps consecutive negotiations) for specific circumstances such as urgent procurement following a catastrophe. As the introduction of additional procurement methods was contrary to the principle of simplification and standardization, the Working Group had left it to the Commission to determine which methods should be retained.

17. The conditions governing the use of alternative methods had been reconsidered. Under the 1994 text, two-stage tendering, requests for proposals and competitive negotiation could be used under the same conditions. Restricted tendering or direct solicitation in the case of services could be used when the goods,

construction or services were available from only a limited number of suppliers or contractors. The transparency provisions applicable to those methods were not fully consistent or practicable. Some of the conditions in question could also justify the use of single-source procurement, which was the least beneficial method as it completely eliminated competition. The Working Group had decided to reformulate the provisions to require the procuring entity to use the most competitive method available so that single-source procurement would be permissible only in an emergency. Open international solicitation should thus take place by default unless restricted or domestic tendering was justified. The reformulated provisions would need to be finally settled once the various procurement methods and their normal uses had been finalized.

18. Although the Working Group had agreed to simplify and streamline the Model Law by removing repetitions, inconsistencies and unnecessarily detailed provisions, current indications were that there might be more methods than previously, and the Commission was invited to consider how to deal with that situation.

19. To promote simplification and a harmonized legal regime under the Model Law, the Working Group had agreed to remove the defence and national security blanket exemptions because not all procurement in those sectors was sensitive. As some defence procurement could be highly sensitive, however, it might be necessary to allow for the preservation of confidentiality through the suspension of some transparency requirements.

20. Tendering proceedings had been addressed in the 1994 text in far greater detail than other procurement methods. As many of the rules addressing tendering proceedings were of general application, the Working Group had combined all such principles and procedures in chapter I of the revised Model Law. They included: standard rules governing the choice of procurement method and open or direct solicitation; description of procurement; evaluation criteria; optional recourse to tender securities in all procurement methods; pre-qualification proceedings; confidentiality; and acceptance of tender and entry into force of the procurement contract.

21. The Commission was invited to consider whether chapter I should include other provisions relating, for example, to requests for expression of interest and general rules governing clarifications and modifications during the procurement process.

22. The draft revised Model Law no longer distinguished between procurement methods pertaining to goods or construction, on the one hand, and services, on the other. The focus was now on complexity and the ease or otherwise of identifying and evaluating what needed to be procured. If detailed specifications or characteristics could be formulated at the outset and evaluated through quantifiable and transparent criteria, the procurement would not need to involve negotiations. In addition to the normal tendering method, the relevant methods were open or restricted tendering (one-envelope system), open or restricted request for proposals without negotiation (two-envelope system), a request for quotations or an ERA procedure. At the other end of the spectrum, where specifications or characteristics could not be evaluated through quantifiable criteria, the procurement methods would involve negotiations such as competitive dialogue. While a slightly different approach was being adopted to the identification of procurement methods, the basic principles from 1994 would not change, with tendering remaining the default method and with the conditions governing the use of single-source procurement remaining robust.

23. The Working Group had also formulated a single set of criteria for the evaluation and comparison of tenders. Draft article 12 required such criteria to be relevant to the subject matter of the procurement and, as far as possible, to be objective and quantifiable. They were to be disclosed at the outset of the procurement together with any margins of preference, relative weights, thresholds and the manner in which the latter would be applied. The principles had been agreed by the Working Group but the details had not yet been finalized.

24. The Working Group had indicated that it would review the manner in which the use of procurement to promote industrial, social and environmental policies was addressed in the Model Law, for example by formulating additional guidance as to how transparency and objectivity might be enhanced. The issues were set out in document A/CN.9/WG.I/XV/CRP.2. As the aim in many cases was to allow the enacting State to protect its domestic economy, non-objective factors could be taken into account by the procuring entity in determining the

successful tender. The Commission would be invited to consider merging some of the provisions of the Model Law. A particularly important question was whether all socio-economic factors should be treated as evaluation criteria.

25. Some systems, such as the Government Procurement Agreement of the World Trade Organization, addressed socio-economic criteria as qualification issues, i.e. as eligibility conditions for participation. Informal consultations had revealed that there was little support for the idea, particularly in the context of a provision under the draft revised Model Law that would allow the exclusion of foreign competition from domestic procurement in some circumstances. Some national systems included set-asides for minorities which might have an impact on competition.

26. The United Nations Convention against Corruption required procurement systems to have an effective system of domestic review to ensure the availability of remedies. The provisions regarding review under the 1994 Model Law were optional, administrative and limited, and made no provision for the independence of the review. The Working Group considered that the provisions were insufficiently robust to comply with UNCAC, and recommended, inter alia, that they be made mandatory, that the list of exceptions be deleted, and that any decision regarding the procurement method should be open to challenge. The Working Group also recommended the introduction of a standstill period before a procurement contract came into force to provide a window for an effective review procedure. The extent of the relief that might be granted where a problem arose had not been finalized, and the provisions on relief in the Government Procurement Agreement appeared to differ from those in the 1994 text of the Model Law.

27. The issues raised by community participation in procurement related primarily to the planning and implementation phases of a project. Given the growing importance of such participation and the possible need for enabling legislation, the provisions of the Model Law had been reviewed to ensure that they presented no impediment to the inclusion of a community participation requirement in project-related procurement. The Guide to Enactment would provide further guidance.

28. The Model Law permitted procuring entities to call for the legalization of documents from all participants, which could be time-consuming and expensive for suppliers. In addition to the deterrent effect, all or part of the increased overheads for suppliers might be passed on to procuring entities. The Working Group therefore recommended amending the provisions of the Model Law to allow the procuring entity to require legalization of documentation from a successful supplier alone.

29. Finally, with regard to conflicts of interest, UNCAC required enacting States to provide, where appropriate, for measures to regulate matters regarding personnel responsible for procurement, such as a declaration of interest in particular public procurements, screening procedures and training requirements. There were no equivalent provisions in the 1994 Model Law and the Working Group considered that the revised text should include an appropriate reference thereto.

30. It was the Secretariat's understanding that the Commission might wish to consider setting up a committee of the whole to consider the revised text in detail.

31. **Mr. Marca Paco** (Plurinational State of Bolivia) asked whether the provisions of the draft revised Model Law would allow for single-source procurement by a Government as a means of expanding public investment and promoting growth and efficiency in specific economic sectors, such as municipalities and local communities. While the monetary value of such procurement was not very great in absolute terms, the economic opportunities provided were of great importance to the sectors concerned. Where the aim was to provide immediate benefit in a given sector, standard procurement procedures were too time-consuming. His delegation hoped that such considerations could be reflected in the draft revised Model Law, so that certain categories of suppliers could be used more intensively as a means of pursuing specific social policy objectives.

32. **Ms. Nicholas** (Secretariat) said that draft article 7 set out the conditions to be met if a procuring entity wished to resort to single-source procurement. Subject to the conditions laid down in that article, a relevant condition being that the procuring entity should give public notice and adequate opportunity for comment, single-source procurement could be used to promote

the socio-economic policies referred to elsewhere in the draft revised Model Law. In theory, therefore, a socio-economic goal such as public investment would be covered. The matter could be discussed in greater detail when the committee of the whole took up document A/CN.9/WG.I/XV/CRP.2.

The meeting was suspended at 11 a.m. and resumed at 11.40 a.m.

33. **The Chairperson** invited the Commission to comment on the proposal to extend the mandate of Working Group I to include socio-economic considerations and the defence industry exemption.

34. **Mr. Frühmann** (Austria) said that his delegation supported the proposal.

35. **Mr. Ekedede** (Nigeria) said that his delegation supported the inclusion of socio-economic issues in the Working Group's mandate. He took it that such issues encompassed the concepts of best value for money, transparency, flexibility and accountability. The procurement of goods, construction and services was of primary importance for developing countries, where it often accounted for more than 50 per cent of the budget. It was also an area that was riddled with unconventional practices, not to say corruption. The Model Law was intended to guide developing countries and encourage best practices. Its provisions should empower domestic suppliers in developing countries by protecting them from undue competition.

36. **The Chairperson** said that, if he heard no objection he would take it that the Commission endorsed the inclusion of socio-economic considerations and the defence industry exemption in the Working Group's mandate.

37. *It was so decided.*

38. **The Chairperson** said that, if he heard no objections, he would take it that the Commission wished to establish a committee of the whole to carry out a second reading of the draft revised Model Law on procurement.

39. *It was so decided.*

40. **The Chairperson** invited the Commission to proceed to the election of a Chairperson of the Committee of the Whole.

41. **Mr. Frühmann** (Austria) nominated Ms. Blanchard (Canada) for the office of Chairperson of the Committee of the Whole.

42. **Mr. Denison Cross** (United Kingdom) and **Ms. Smejkalová** (Czech Republic) seconded the nomination.

43. *Ms. Blanchard (Canada) was elected Chairperson by acclamation.*

44. **The Chairperson** said that the Committee of the Whole would convene immediately after the adjournment of the Commission's meeting in order to begin the second reading of the revised text of the Model Law.

The meeting rose at 11.50 a.m.