UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/CN.9/SR.525
26 October 1994
ENGLISH
ORIGINAL: SPANISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 525th MEETING

Held at Headquarters, New York,
on Thursday, 2 June 1994, at 3 p.m.

Chairman: Mr. MORAN (Spain)

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The meeting was called to order at 3.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

Article 41 bis (continued)

1. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 41 bis, paragraph 3 (c), should be deleted because it was dangerous to provide for a broad exception to a single method of procurement. He recalled the comments by the representative of Saudi Arabia and said that such an exception could be replaced and provision made for the specific case of an emergency. The words "that are known to the procuring entity" were deliberately used; to avoid any possibility of abuse, it would suffice to amend the wording slightly.

2. Mr. CHATURVEDI (India) said that he was in favour of maintaining paragraphs 2 and 3 without any changes, particularly paragraph 3 (c). It was not necessary to include in paragraph 3 (c) a reference to approval by a higher authority, since that was usually the practice. Moreover, there was no need to discuss the phrase "the price that the procuring entity may charge" in paragraph 4, although he had no serious objections to it.

3. Mr. WALLACE (United States of America) recalled that there had been no discussion of what would happen in the absence of the notice provided for in paragraph 4.

4. Mr. TUVAYANOND (Thailand) said that the reference to "suppliers or contractors that are known to the procuring entity" in paragraph 3 (a) lent itself to possible abuses. He suggested instead the words "widely known", since those words, together with the requirement to keep a record of the procurement transaction, were sufficient guarantee against any abuse. With regard to paragraph 3 (c), he saw no reason for its deletion since, if economy and efficiency were applicable to the procurement of goods and construction, they should also be applicable to services. There were already sufficient guarantees of effective competition, and it was not a question of elaborating a model law which favoured only suppliers, since it was also necessary to safeguard the interests of customers. The countries of the third world accounted for the majority of consumers of the goods and services provided by the developed countries, but had very few defenders. It was necessary to reconcile the interests of the two parties, or else the instruments adopted would remain a dead letter. As the representative of the United States of America had suggested, the requirement to publish in the local press could perhaps be included in that paragraph.

5. Mr. LEVY (Canada) wondered whether it was felt that the chapeau of paragraph 3 retained the requirement of approval by a higher authority, and whether the requirement to maintain a record of the procurement proceedings had to be included in article 11 and not only in the article under discussion. He shared the views so eloquently expressed by the representative of Thailand, since it was a position which he himself had reiterated on several occasions. A

balance must be maintained so that the document that was ultimately elaborated would not be acceptable only to supplier countries. In his view, there was no consensus on deleting paragraph 3 (c) and it would be wrong to try to impose the views of those who represented a certain sector of the world which, at a given moment, had achieved a higher level of development. It must be remembered that the document under consideration was intended more for procuring entities than for suppliers, who did not need much assistance. While some might think that paragraph 3 (c) was unnecessary, from a legal point of view, that was not reason enough to delete it, since it contained valid elements, particularly those concerning "economy and efficiency" in procurement.

6. Mr. JAMES (United Kingdom) said that he was unaware of any provision in the Model Law on Procurement of Goods and Construction to which paragraph 3 (c) was related. The chapeau of paragraph 3 reflected certain principles, namely, the emphasis on economy and efficiency, which would be applied to the new article 41 bis and to other provisions relating to procurement. It was important to emphasize, however, that that provision was not contained in the Model Law. More particularly, since the method under consideration was deemed to be the preferred method for the procurement of services, it should be as open and as competitive as possible.

7. Ms. SABO (Canada) said that, in preparing the provisions under consideration, the Working Group had begun by adapting article 38 to services. Later on, the Commission had considered it necessary to adapt other provisions on the whole process of tendering, on the basis of which chapter IV bis, whose contents were a hybrid, had been prepared. For example, article 41 bis, paragraph 3 (c), contained a hybrid of the provisions of article 38 (2) and of article 18. Paragraph 3 (c) permitted the direct solicitation of proposals, provided that they were solicited from a sufficient number of suppliers or contractors to ensure effective competition. That provision did not differ significantly from article 38. The Working Group had tried to retain the content of article 38 for services even though it had amended the wording. Canada was therefore of the view that article 41 bis, paragraph 3 (c), should be retained.

8. Mr. CHATURVEDI (India) agreed with the arguments put forward by the representative of Canada. The criteria of economy and efficiency which were mentioned in article 41 bis, paragraph 3 (c), could not be ignored. Paragraph 3 (c) should therefore be retained, even though it did not fall within the context of the procurement of goods and construction.

9. Mr. WALLACE (United States of America) said that the wording of article 38, paragraph 2, was acceptable, primarily because the Commission had decided to accept it as an alternative to the other methods provided for in the Model Law. The Commission had considered that article 38 was not sufficient and had therefore prepared chapter IV bis, which was more open than that article. He agreed with the representative of Thailand that it was necessary to improve article 41 bis, paragraph 3 (a). The text should be more objective, which would permit the Commission to move forward in its work.

10. The CHAIRMAN said that a compromise must be reached between those who favoured maintaining paragraph 3 (c) of article 41 bis and those who believed that it should be deleted.

11. Mr. TUVAYANOND (Thailand), referring to the argument of some delegations that the terms "economy" and "efficiency" were already contained in the Model Law, said that those delegations were focusing only on those terms and not on the provision currently under consideration. If the terms were considered sufficient to prevent abuses in the procurement of goods and construction, they should also be considered appropriate with respect to services. A compromise ought to be possible in that regard.

12. It was true that the Model Law provided guidance to legislators. Nevertheless, it must reflect international public opinion, which Thailand wished to accommodate without losing sight of its own interests.

13. Mr. WALLACE (United States of America) said that the reference to paragraph 1 in the chapeau of paragraph 3 of article 41 bis could be deleted so that paragraphs 3 (a), (b) and (c) would constitute exceptions to paragraph 2. In that way, all notices would be published in the official gazette.

14. Since the terms "economy" and "efficiency" were contained in the chapeau of article 18, his delegation would not object to their appearance in the chapeau of article 41 bis, paragraph 3.

15. Mr. SHI Zhaoyu (China) said that article 41 bis, paragraph 3 (c), should be retained. The Commission’s objective was to establish a general, uniform and detailed framework for countries for the purposes of procurement. However, that objective could only be achieved through broad application of the Model Law. Consequently, it was necessary to take a country’s specific situation into account when referring to the legislative development of the norms governing procurement. If those differences were not taken into account, it would be difficult for the Law to be broadly accepted. If China adopted a law containing a provision that was consistent with article 41 bis, it would have to publicize its request for proposals of services in an international newspaper of wide circulation, which would be very difficult, since it had no newspaper of that kind. That meant that the notice would have to be published in a foreign newspaper, which would be contrary to the principles of economy and efficiency. It was for those reasons that China believed that article 41 bis, paragraph 3 (c), should be retained.

16. Mr. LEVY (Canada) said that he agreed with the proposal by the United States delegation to delete the reference to paragraph 1 in the chapeau of article 41 bis, paragraph 3. However, he disagreed with that delegation’s other proposal to include the terms "economy and efficiency" in the chapeau of paragraph 3, since they would then also apply to subparagraphs (a) and (b). In order to solve that problem, it would be necessary to establish the criteria of previous approval by a higher authority and the preparation of records, and the requirement of publication in an international newspaper would have to be dropped.

17. Mr. UEMURA (Japan) supported the United States position, adding that the wording of paragraph 3 should track article 18 in order to maintain the logical structure of the Model Law.

18. Mr. CHATURVEDI (India) said that he was opposed to deleting the reference to paragraph 1 from paragraph 3, as the substantive questions concerned were too vital. On the other hand, he saw no problem in moving the words "economy and efficiency" to the chapeau of the paragraph; in fact, his delegation preferred that wording.

19. Mr. JAMES (United Kingdom) supported the compromise wording proposed by the United States delegation. He did not believe it was as impossible or as illogical as the Canadian delegation maintained for, if it was, article 18 of the Model Law, whose text the Commission had adopted in 1993, would be illogical too, and he did not believe it was. On the contrary, he believed that the right wording would capture the spirit of the norm embodied in the introductory paragraph of article 18.

20. As the representative of Japan had said, the Commission would have to look into the origin of the text of article 18. Perhaps the original draft prepared by the Secretariat had contained subparagraph (c) only and not subparagraphs (a) and (b). Perhaps it had then been pointed out that the text was neither satisfactory nor sufficiently specific and that the appropriate model was article 18 and not article 38. Thus a decision might have been taken to include the examples contained in article 18. At that point someone had probably suggested that the provisions of article 38 could not be omitted. It was thus conceivable that all of those provisions had ended up as article 41 bis.

21. According to the report of the deliberations of the Working Group contained in document A/CN.9/392, at no time had there been an explicit agreement to retain subparagraphs (a), (b) and (c). Perhaps that reflected a tendency - carried to the extreme - to accommodate all points of view. Since the Commission seemed to be nearing a consensus, it would be preferable to stick to the original draft of article 18 and include the reference to "economy and efficiency" in the chapeau of paragraph 3.

22. The CHAIRMAN said that the words "for reasons of economy and efficiency" or similar language to be determined by the drafting group would be incorporated into the chapeau of paragraph 3 of article 41 bis. That would allay the concerns of delegations which insisted on retaining subparagraph (c), basically because it afforded the procuring entity greater flexibility.

23. Ms. SABO (Canada) sought clarification of the proposal. It was her understanding that the reference to paragraph 1 would be retained and that subparagraph (c) would be deleted. What concerned her was the fact that the intent of subparagraph (c) was much broader than achieving economy and efficiency through direct solicitation. The subparagraph also provided a means of taking into account the particular nature of the services solicited. She therefore wished to know if it would be possible to retain subparagraph (c). The Working Group had made an exhaustive study of the wide range of services that could be solicited, which was too vital a factor to be omitted.

24. The CHAIRMAN pointed out that the concept of services of a particular nature which required specific proceedings was already contained, at least implicitly, in other provisions. While it might possibly be incorporated into the chapeau of paragraph 3, the text might then be overloaded.

25. Mr. LEVY (Canada) said that the provision's raison d'etre lay in the fact that the range of services was so vast and expanding so rapidly that the Working Group had felt it was impossible to foresee every contingency and attempt to describe it. It had therefore included the norm on direct solicitation so that when an unforeseen situation arose, a method more akin to tendering could be utilized - even if it was not widely publicized - which would make the other provisions of article 41 bis applicable in such cases.

26. Mr. HUNJA (International Trade Law Branch) recalled another question which had been raised when the Commission had considered the Model Law. In practice, there was generally a slight difference between the procurement of goods and construction and the procurement of services, with direct solicitation much more common in the latter than in the former. The Working Group had sought to recognize the fact that, while some of the practices currently followed might not be consistent with the Model Law's objectives of transparency and competitiveness, it might be useful to accept them in an area in which most States did not have broad experience and such practices were not well developed. An example of such a situation was requests for proposals for intellectual services; that practice might not be covered by paragraph 3 (a) or in paragraph 3 (b). Paragraph 3 (c), on the other hand, would give States an opportunity to employ direct solicitation.

27. Mr. WALLACE (United States of America) said that the difficulties seemed to stem from the fact that the meaning of subparagraph (c) was not clear, since the nature of the services was not known. The practice referred to by Mr. Hunja could be interpreted as being included in subparagraph (b), and the difficulty might be resolved by combining subparagraphs (c) and (b); the two subparagraphs, however, dealt with different things. Another solution might be to make subparagraph (c) clearer by indicating that it referred to services of a professional nature, as the representative of Canada had suggested. He did not believe that the use of the words "economy and efficiency" would be sufficient to clarify the meaning of the text.

28. To improve existing practice, which Mr. Hunja had said would be desirable, the degree of arbitrariness in selecting the parties to be solicited would have to be reduced in the future by limiting the breadth of the current version of subparagraph (c).

29. Mr. LEVY (Canada) supported the view expressed by the representative of the United States of America that, in order to clarify the text further, an express reference to the nature of the services was essential as a matter of principle.

30. Mr. TUVAYANOND (Thailand) said that he wished to reiterate his firm support for retaining subparagraph (c) for several reasons. In the case of certain services, it was necessary to limit the number of potential bidders and employ proceedings that were completely different from tendering proceedings or requests for proposals for services. For example, Thailand currently needed to

procure the services of legal advisers in order to settle border disputes. The country should therefore have the right to select advisers it deemed competent not only in terms of their knowledge but also in terms of their trustworthiness. It was not only a question of obtaining services at the lowest possible price but also of ensuring that the advisers treated such a delicate matter with the utmost discretion.

31. If subparagraph (c) was deleted from paragraph 3, the method of direct solicitation could not be utilized once the law was adopted. On no grounds could he defend the deletion of subparagraph (c) to the Thai Parliament when it took up the question, and his delegation therefore vigorously opposed such a deletion.

32. Mr. JAMES (United Kingdom) said that there seemed to be a consensus to move the reference to "economy and efficiency" in subparagraph (c) to the chapeau of paragraph 3 of article 41 bis. There also seemed to be a consensus that, in certain cases, the nature of the services must be borne in mind and that the content of subparagraph (c) as currently drafted was too broad. Therefore, the Commission should use more precise wording. Specifically, reference should be made to "services of a specialized nature" or "complex services", and the drafting group should be instructed to be guided by article 18 when it redrafted the subparagraph.

The meeting was suspended at 4.45 p.m. and resumed at 5.20 p.m.

33. Mr. TUVAYANOND (Thailand) said that, while he could cite many examples of situations in which direct solicitation was necessary, he would mention only the case of a country which needed to hire attorneys to represent its interests. Obviously, it could not hire just any attorney but had to hire one whom it could trust sufficiently. That was an example that was not covered by the exception based on national security and which, like other examples, required confidentiality. Thus in the absence of a provision which dealt with direct solicitation, a State which employed that method and which acted with due discretion would be violating the law, a situation that was unacceptable. The Government of Thailand would have difficulty in defending in Parliament a bill based on a model which did not include direct solicitation. He was therefore of the view that the drafting group should seek a compromise formula, based on the proposal of the United Kingdom.

34. Mr. LEVY (Canada) agreed with the representative of Thailand that a compromise formula must be found and made the following proposal. In the chapeau of the paragraph, the reference to paragraphs 1 and 2 would be retained, the words "with the approval of ..." would be added and reference would also be made to economy and efficiency. The article would also include a requirement to maintain records. In subparagraph (a), the wording proposed by the United Kingdom would be adopted and the word "well" would be added before the phrase "known by the procuring entity", which would end the sentence. Subparagraph (b) would be retained. Lastly, subparagraph (c) would contain no reference to economy and efficiency, but there would be a reference to the highly complex or specialized nature of the services and to direct solicitation, which would be made subject to the procuring entity's obligation to solicit proposals from a

sufficient number of suppliers and contractors in order to guarantee effective competition.

35. Mr. HERRMANN (Secretary of the Commission) recalled that the proposal designed to achieve a compromise solution by moving the reference to economy and efficiency to the chapeau of paragraph 3 rested on the assumption that subparagraph (c) would be deleted. He wondered whether that approach made sense. For one thing, subparagraph (a) had nothing at all to do with economy and efficiency; furthermore, subparagraph (b) indicated that the number of proposals must be proportionate to the value of the services to be procured. Thus, the reference to economy and efficiency would be out of place in subparagraph (a) and redundant in subparagraph (b). Perhaps the Commission ought to reconsider the question.

36. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the solution to the problem lay in finding more appropriate wording than that used in the current version, which was too broad. The matter was critical, for the precision of the wording used would determine which services would be excluded from the competition. Any exception must be worded very carefully. In the current instance, lack of precision would be very dangerous to countries. The Model Law must give the procuring entity guidance on the scope of the exceptions.

37. Mr. JAMES (United Kingdom) said that the Canadian proposal could not form the basis for a compromise solution, since it was satisfactory only to the delegations of Canada and Thailand. It was unfortunate that the Secretary of the Commission felt that his proposal to delete paragraph 3 (c) and to move the reference to economy and efficiency to the chapeau of paragraph 3 made no sense. In fact, if the proposal was adopted, the wording of the paragraph would be identical to that of article 18 of the draft Model Law, which the Commission had already approved, and that of article 18 of the Model Law on Procurement of Goods and Construction, adopted by the General Assembly. The wisest course, then, might be to go back and reconsider the chapeau of article 18, for it was not clear that, in accepting it, delegations had realized what they were adopting. In any event, it was important to state clearly that public tendering was not being replaced by restricted tendering, but merely that the requirement of giving notice was being eliminated. In that respect, the proposal put forward by the Thai delegation was quite useful, since the discussion was in fact about international notice. In the matter of direct solicitation, two points must be considered: the exception to the requirement of giving notice (para. 3) and the need to specify how and to whom the documents should be sent (para. 4). The second point could be settled on the basis of the United States proposal.

38. Mr. FRIS (United States of America) agreed that the reference to economy and efficiency should be moved to the chapeau and that subparagraphs (a) and (b), with the appropriate editorial changes, and subparagraph (c), with the exception of the reference to economy and efficiency, but with a detailed reference to the more specialized nature of the services to be procured, should be retained. Perhaps the content of article 18 should not merely be repeated for the issue now was services, but a reference to the technical and confidential nature of those services added to reflect the concerns expressed in

the Commission. He agreed with the proposal put forward by the representative of the United Kingdom concerning direct solicitation and notice. On the latter issue, the requirement of giving notice locally should be retained and the text should be drafted so that the provisions on exceptions referred only to the need for notice at the international level.

39. Mr. KLEIN (Observer for the Inter-American Development Bank) asked whether the existence of single-source procurement was envisaged in the case of services. If so, that would address the special case brought up by the representative of Thailand. Such cases did not involve competition, and an expert could be hired directly. That was a generally accepted practice.

40. Mr. CHATURVEDI (India) agreed that the concepts of economy and efficiency should be moved to the chapeau of the paragraph, but only if the reference to paragraphs 1 and 2 of the article was not deleted.

41. Mr. SHI Zhaoyu (China) said he did not believe it would be appropriate to move the concepts of economy and efficiency to the chapeau of paragraph 3. As the Secretary of the Commission had indicated, such a move was not consistent with the content of subparagraphs (a) and (b). Moreover, if that change was made, countries which applied subparagraph (a) would have to satisfy the requirements of economy and efficiency in addition to the requirement concerning the nature of the services, which would be in contradiction with the preceding provisions. He therefore supported the second proposal formulated by the representative of the United States of America.

42. Mr. CHATURVEDI (India) said that the inclusion of the concepts of economy and efficiency in the chapeau of paragraph 3 did not contradict the provisions of subparagraphs (a) and (b), even though those concepts were partially covered in the two subparagraphs.

43. The CHAIRMAN requested those delegations which had submitted proposals to draft a text that might help the drafting group.

44. Mr. TUVAYANOND (Thailand) asked whether that meant that the concepts of economy and efficiency should be applied also to subparagraph (a). If so, such a provision might prove difficult to implement in practice, even though article 18 had already been approved. The Secretary had put it well in stating that subparagraph (a) was an exception to the general rule. If cost-effectiveness must also be taken into account, then it was irrelevant to consider the concept of economy because exceptions must be interpreted stricto sensu, and he did not believe it was advisable to move concepts around. It was appropriate to include them in subparagraph (c) because all three elements should be considered in connection with services. He was inclined to accept the suggestion by the representative of the United States of America regarding the utilization of expressions such as "professional and confidential nature of the services", etc. He asked how the provisions should be implemented when the necessary services could be rendered only by a limited number of suppliers and the criteria of economy could not be applied.

45. Mr. LEVY (Canada) said that the reference to "economy and efficiency" could be included in the chapeau of paragraph 3 of article 41 bis, since it would be neither economical nor efficient to publish notice in a newspaper with an international circulation in the cases set forth in subparagraphs (a) and (b) of that paragraph, namely, when the services to be procured could be rendered by only a limited number of suppliers or contractors or when the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services.

46. He proposed the following text for paragraph 3 (c) of article 41 bis: "Where the services to be procured are of a very complex, specialized, intellectual, technical or confidential nature, provided that proposals are solicited from a sufficient number of suppliers or contractors to ensure effective competition". He agreed with the representative of the United Kingdom that a reference to direct solicitation was not necessary, as it was implicit in the text.

47. Mr. TUVAYANOND (Thailand) said that reference should be made to direct solicitation as publicity should be avoided in cases where the nature of the services might be confidential. As the conditions established in paragraph 3 (c) of article 41 bis were very strict, it would be preferable to leave the text intact.

The meeting rose at 6.05 p.m