United Nations A/CN.9/533/Add.4

General Assembly

Distr.: Restricted
7 May 2003

English
Original: Spanish

United Nations Commission on International Trade Law
Thirty-sixth session
Vienna, 30 June-11 July 2003*

Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

Note by the Secretariat

Compilation of comments by Governments and international organizations

Addendum

Contents

* Revised dates.

II. Compilation of comments

A. States

Mexico

[Original: Spanish]

General comments

1. With reference to the model provisions and the legislative recommendations contained in the Legislative Guide, we would like to comment on whether (a) to retain the model provisions and legislative recommendations as two parallel texts; (b) to replace the legislative recommendations in their entirety with the model legislative provisions; or (c) to replace only those legislative recommendations in respect of which the Commission adopted model legislative provisions.

2. We think that the first option would create confusion and unnecessary repetitions, while the second option would exclude legislative recommendations in respect of which no model provision has been drafted. Therefore, the third option is the most acceptable.

3. It should be remembered that the success of any UNCITRAL document depends to a large extent on the "users" of the document. The Legislative Guide adopted in 2000 would be enriched by the model legislative provisions, which are easier to implement than the legislative recommendations that the Legislative Guide originally contained.

Specific comments

4. Model provision 13 should specify that there is no need for the contracting authority to inform the participants who the other bidders are. (This is not stated in model provision 24 either.) In cases where the identities of the bidders are known, it is easier to prepare a technical and commercial bid. It is also not specified whether clarifications and modifications necessarily go together or whether they must be made in writing with a reference to the person who made the request. There is no provision stating whether bidders must refrain from contacting the authority orally or in writing during the evaluation process.

5. Model provision 16 states that "the contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications …". We think it is necessary to clarify whether this also applies to consortia, or whether it is sufficient for one member of a consortium to have the required qualifications.

6. With regard to model provision 17, when a contractual term has been "clarified", it may have been modified; this should be noted in the final contract, without the need to use the "format" that the authority usually uses for other transactions. Sometimes the authority may argue that the "authorized format" does not allow it to take the clarification into account in the selection procedure; however, the clarification should be reflected somewhere so that it is binding on both parties.

7. In model provision 17, paragraph 2, there is a risk that any term "imposed" by the authority could lead to termination of the negotiations, which would allow the authority to conduct negotiations in "bad faith". For example, agreement may not be

reached on a term which is regarded as "fundamental" for the concessionaire but which is of little relevance to the authority. This raises the question of what would happen if the authority did not obtain the required authorizations in time and this caused the start of the work to be delayed; and who, in that case, would have to absorb the financial cost.