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Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders

Note by the Secretariat

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law") (A/49/17 and Corr.1, annex I) is set out in paragraphs 5 to 70 of document A/CN.9/WG.I/WP.53, which is before the Working Group at its twelfth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments, including the use of electronic communications and technologies, in public procurement.

2. The regulation of such use, including in the context of the submission and opening of tenders, holding meetings, storing information and publicising procurement-related information, was included in the topics before the Working Group at its sixth to eleventh sessions. At its eleventh session, the Working Group requested the Secretariat to revise the draft provisions on the use of electronic communications in public procurement that it had considered at the session.[1] This note has been prepared pursuant to that request, and sets out the relevant draft provisions that reflect the Working Group's deliberations at its eleventh session, accompanied in some cases by suggested provisions for the Guide (see paragraphs 4-25 below).

3. This note also contains draft provisions for the Model Law addressing abnormally low tenders ("ALTs"), revised pursuant to the Working Group's request at its eleventh session[2] (see paragraphs 26-28 below).

II. Draft provisions addressing the use of electronic communications in public procurement

A. Communications in procurement

1. Proposed draft text for the revised Model Law

4. The following draft article reflects the suggestions made at the Working Group's eleventh session to draft article 5 bis that was before the Working Group at that session:[3]

> **"Article [5 bis]. Communications in procurement**
>
> (1) Any document, notification, decision and other information generated in the course of a procurement and communicated as required by this Law, including in connection with review proceedings under chapter VI or in the course of a meeting, or forming part of the record of procurement proceedings under article [11], shall be in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

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[1] A/CN.9/623, para. 13.

[2] Ibid.

[3] Ibid., paras. 15-18.

(2) Communication of information between suppliers or contractors and the procuring entity referred to in articles [*7 (4) and (6), 31 (2)(a), 32 (1)(d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1), to update for revisions to Model Law*] [and any other information generated in the course of a procurement under this Law other than information referred to in paragraph (1) of this article] may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall[, for the purpose of procurement covered by this Law,] specify:

(a) Any requirement of form in compliance with paragraph (1) of this article;

(b) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf;

(c) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(d) The means to be used to hold any meeting of suppliers or contractors.

(4) The means referred to in the preceding paragraph shall be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. The means to be used to hold any meeting of suppliers or contractors shall in addition ensure that suppliers or contractors can fully and contemporaneously participate in the meeting.

(5) Appropriate measures shall be put in place to secure the authenticity, integrity and confidentiality of information concerned."

Commentary

Paragraph (2)

5. At its eleventh session, the Working Group agreed to delete the reference to article 12 (3) from the list of the referred articles.[4] Accordingly, the form requirement prescribed by paragraph (1) of the article will be applicable to notices of the rejection of all tenders, proposals, offers or quotations to be given under article 12 (3) to all suppliers or contractors that submitted tenders, proposals, offers or quotations. All other references taken from the existing article 9 (2) of the Model Law have been kept.

6. At the same session, the Working Group noted the interdependence of paragraphs (1) and (2) of the draft article and the suggestion that paragraph (2) should be expanded to cover any communication of information in a procurement

[4] Ibid., para. 16.

that was generated other than pursuant to a requirement of the Model Law. Final agreement on this suggestion was not reached.[5] The Working Group may wish to consider the new text in the second set of square brackets in paragraph (2).

Paragraph (3)

7. At the Working Group's eleventh session, it was suggested to add the words that appear in the square brackets in the chapeau of the paragraph, to make it clear that the provisions do not intend to apply to the procurement contract administration phase. The view was expressed that these words might be superfluous in the light of the clearly-defined scope of the Model Law. Final agreement was not reached on whether the words should be retained.[6] The Working Group may wish to consider this point.

2. Guide to Enactment text

8. The text following paragraph 10 below is proposed for the Guide to accompany the provisions of the Model Law on communications in procurement. It should be read with the understanding that it does not purport to discuss all issues relevant to electronic procurement that should be addressed in the Guide, but only those relevant in the context of the article; general matters of electronic procurement would be addressed elsewhere in the Guide, such as in its introductory section (see paragraph 25 below). The Working Group may wish to consider how to refer to other functional guidance that enacting States may need.

9. As requested by the Working Group, the provisions were drafted in technologically neutral terms so as to avoid giving prominence to any particular means or forms of communications and to envisage essentially equal requirements on both the paper-based and non paper-based procurement environment.[7] Furthermore, following the Working Group's instructions at its tenth session,[8] at this stage, in preparing accompanying provisions for the Guide, the Secretariat has focused on formulating the guidance to legislators and regulators only.

10. A number of documents were used in preparation of the draft Guide text below, including commentaries and guides to UNCITRAL legal texts on electronic commerce, the relevant provisions of the European Commission Staff Working Document (SEC(2005) 959)[9] and guidance provided on relevant issues by multilateral development banks and other regional and international organizations active in the field.

> "1. Article 5 bis seeks to provide certainty as regards the form of information to be generated and communicated in the course of the procurement conducted under the Model Law and the means to be used to communicate such information, to satisfy all requirements for information to be in writing or for a signature, and to hold any meeting of suppliers or contractors (collectively referred to as "form and means of communications").

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[5] Ibid.
[6] Ibid., para. 17.
[7] Ibid., para. 14.
[8] A/CN.9/615, para. 14.
[9] Available as of the date of this note at http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/sec2005-959_en.pdf.

The position under the Model Law is that, in relation to the procuring entity's interaction with suppliers and contractors and the public at large, the paramount objective should be to seek to foster and encourage participation in procurement proceedings by suppliers and contractors and at the same time to support the evolution of technology and processes. The provisions contained in the article therefore do not depend on or presuppose the use of particular types of technology. They set a legal regime that is open to technological developments. While intended to be interpreted broadly, dealing with all communications in the course of procurement proceedings covered by the Model Law, the provisions are not intended to regulate communications that are subject to regulation by other branches of law, such as tender securities, or communications in the course of judicial proceedings or administrative review proceedings.

2. Paragraph (1) of the article requires that information is to be in a form that provides a record of the content of the information and is accessible so as to be usable for subsequent reference. The use of the word "accessible" in the paragraph is meant to imply that information should be readable and capable of interpretation and retention. The word "usable" is intended to cover both human use and automatic processing. These provisions aim at providing, on the one hand, sufficient flexibility in the use of various forms of information as technology evolves and, on the other, sufficient safeguards that information in whatever form it is generated and communicated will be reliably usable, traceable and verifiable. These requirements of reliability, traceability and verification are essential for the normal operation of the procurement process, for effective control and audit and in review proceedings. The wording found in the article is compatible with form requirements found in UNCITRAL texts regulating electronic commerce, such as article 9 (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts. Like these latter documents, the Model Law does not confer permanence on one particular form of information, nor does it interfere with the operation of rules of law that may require a specific form. For the purposes of the Model Law, as long as a record of the content of the information is provided and information is accessible so as to be usable for subsequent reference, any form of information may be used. To ensure transparency and predictability, any specific requirements as to the form acceptable to the procuring entity have to be specified by the procuring entity at the beginning of the procurement proceedings, in accordance with paragraph 3 (a) of the article.

3. Paragraph (2) of the article contains an exception to the general form requirement contained in paragraph (1) of the article. It permits certain types of information to be communicated on a preliminary basis in a form that does not leave a record of the content of the information, for example if information is communicated orally by telephone or in a personal meeting, in order to allow the procuring entity and suppliers and contractors to avoid unnecessary delays. The paragraph enumerates, by cross-reference to the relevant provisions of the Model Law, the instances when this exception may be used. They involve communication of information to any single supplier or contractor participating in the procurement proceedings (for example, when the procuring entity has to provide clarifications about solicitation documents

in response to a request by a supplier or contractor, or asks suppliers or contractors for clarifications of their tenders). However, the use of the exception is conditional: immediately after information is so communicated, confirmation of the communication must be given to its recipient in a form prescribed in paragraph (1) of the article (i.e., that provides a record of the content of the information and that is accessible and usable). This requirement is essential to ensure transparency, integrity and the fair and equitable treatment of all suppliers and contractors in procurement proceedings. However, practical difficulties may exist to verify and enforce compliance with this requirement. Therefore, the enacting State may wish to allow the use of the exception under paragraph (2) only in strictly necessary situations. Overuse of this exception might create conditions for abuse, including corruption and favouritism.

4. Paragraph (3) of the article gives the right to the procuring entity to insist on the use of a particular form and means of communications or combination thereof in the course of the procurement, without having to justify its choice. No such right is given to suppliers or contractors [but, in accordance with article 52 of the Model Law, they may challenge the procuring entity's decision in this respect]. Exercise of this right by the procuring entity is subject to a number of conditions that aim at ensuring that procuring entities do not use technology and processes for discriminatory or otherwise exclusionary purposes, such as to prevent access by some suppliers and contractors to the procurement or create barriers for access.

5. To ensure predictability and proper review, control and audit, paragraph (3) of the article requires the procuring entity to specify, when first soliciting the participation of suppliers or contractors in the procurement proceedings, all requirements of form and means of communications for a given procurement. The procuring entity has to make it clear whether one or more form and means of communication can be used and, if more than one form and means can be used, which form and means is/are to be used at which stage of the procurement proceedings and with respect to which types of information or classes of information or actions. For example, special arrangements may be justifiable for submission of complex technical drawings or samples or for a proper backup when a risk exists that data may be lost if submitted only by one form or means.

6. To fulfil the requirements specified by the procuring entity under paragraph (3) of the article, suppliers or contractors may have to use their own information systems or procuring entity may have to make available to the interested suppliers or contractors information systems for such purpose. (The term "information system" or the "system" in this context is intended to address the entire range of technical means used for communications. Depending on the factual situation, it could refer to a communications network, applications and standards, and in other instances to technologies, equipment, mailboxes or tools.) To make the right of access to procurement proceedings under the Model Law a meaningful right, paragraph (4) of the article requires that means specified in accordance with paragraph (3) of the article must be readily capable of being utilized with those in common use by suppliers or contractors in the relevant context. As regards the means to be

used to hold meetings, it in addition requires ensuring that suppliers or contractors can fully and contemporaneously participate in the meeting. "Fully and contemporaneously" in this context means that suppliers and contractors participating in the meeting have the possibility, in real time, to follow all proceedings of the meeting and to interact with other participants when necessary. The requirement of "capable of being utilized with those in common use by suppliers or contractors" found in paragraph (4) of the article implies efficient and affordable connectivity and interoperability (i.e., capability effectively to operate together) so that to ensure unrestricted access to procurement. In other words, each and every potential supplier or contractor should be able to participate, with simple and commonly used equipment and basic technical know-how, in the procurement proceedings in question. This however should not be construed as implying that procuring entities' information systems have to be interoperable with those of each single supplier or contractor. If, however, the means chosen by the procuring entity implies using information systems that are not generally available, easy to install (if need be) and reasonably easy to use and/or the costs of which are unreasonably high for the use envisaged, the means cannot be deemed to satisfy the requirement of "commonly used means" in the context of a specific procurement under paragraph (4) of the article.

7. The paragraph does not purport to ensure readily available access to public procurement in general but rather to a specific procurement. The procuring entity has to decide, on a case-by-case basis, which means of communication might be appropriate in which type of procurement. For example, the level of penetration of certain technologies, applications and associated means of communication may vary from sector to sector of a given economy. In addition, the procuring entity has to take into account such factors as the intended geographic coverage of the procurement and coverage and capacity of the country's information system infrastructure, the number of formalities and procedures needed to be fulfilled for communications to take place, the level of complexity of those formalities and procedures, the expected information technology literacy of potential suppliers or contractors, and the costs and time involved. In cases where no limitation is imposed on participation in procurement proceedings on the basis of nationality, the procuring entity has also to assess the impact of specified means on access to procurement by foreign suppliers or contractors. Any relevant requirements of international agreements would also have to be taken into account. A pragmatic approach, focusing on its obligation not to restrict access to the procurement in question by potential suppliers and contractors, will help the procuring entity to determine if the chosen means is indeed "commonly used" in the context of a specific procurement and thus whether it satisfies the requirement of the paragraph.

8. In a time of rapid technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible or usable (whether for technical reasons, reasons of cost or otherwise). The procuring entity must seek to avoid situations when the use of any particular means of communication in procurement proceedings could result in discrimination among suppliers or contractors. For example, the exclusive choice of one means could benefit some suppliers or contractors who are more accustomed

to use it to the detriment of others. Measures should be designed to prevent any possible discriminatory effect (e.g., by providing training or longer time limits for suppliers to become accustomed to new systems). The enacting State may consider that the old processes, such as paper-based ones, need to be retained initially when new processes are introduced, which can then be phased out, to allow a take-up of new processes.

9. The provisions of the Model Law do not distinguish between proprietary or non-proprietary information systems that may be used by procuring entities. As long as they are interoperable with those in common use, their use would comply with the conditions of paragraph (4). The enacting State may however wish to ensure that procuring entities should carefully consider to what extent proprietary systems, devised uniquely for the use by the procuring entity, may contain technical solutions different and incompatible with those in common use. Such systems may require suppliers or contractors to adopt or convert their data into a certain format. This can render access of potential suppliers and contractors, especially smaller companies, to procurement impossible or discourage their participation because of additional difficulties or increased costs. Effectively, suppliers or contractors not using the same information systems as the procuring entity would be excluded, with the risk of discrimination among suppliers and contractors, and higher risks of improprieties. The use of the systems that would have a significantly negative effect on participation of suppliers and contractors in procurement would be incompatible with the objectives, and article 5 bis (4), of the Model Law.

10. On the other hand, the recourse to off-the-shelf information systems, being readily available to the public, easy to install and reasonably easy to use and providing maximal choice, may foster and encourage participation by suppliers or contractors in the procurement process and reduce risks of discrimination among suppliers and contractors. They are also more user-friendly for the public sector itself as they allow public purchasers to utilize information systems proven in day-to-day use in the commercial market, to harmonize their systems with a wider net of potential trading partners and to eliminate proprietary lock-in to particular third-party information system providers, which may involve inflexible licences or royalties. They are also easily adaptable to user profiles, which may be important for example in order to adapt systems to local languages or to accommodate multilingual solutions, and scalable through all government agencies' information systems at low cost. This latter consideration may be especially important in the broader context of public governance reforms involving integration of internal information systems of different government agencies.

11. The Model Law does not address the issue of charges for accessing and using the procuring entity's information systems. This issue is left to the enacting State to decide taking into account local circumstances. These circumstances may evolve over time with the effect on the enacting State's policy as regards charging fees. The enacting State should carefully assess the implications of charging fees for suppliers and contractors to access the procurement, in order to preserve the objectives of the Model Law, such as those of fostering and encouraging participation of suppliers and contractors in procurement proceedings, and promoting competition. Fees should be

transparent, justified, reasonable and proportionate and not discriminate or restrict access to the procurement proceedings. [The Working Group may wish to consider recommending in the Guide that ideally no fees should be charged for access to, and use of, the procuring entity's information systems].

12. The objective of paragraph (5) of the article (which requires appropriate measures to secure the authenticity, integrity and confidentiality of information) is to enhance the confidence of suppliers and contractors in reliability of procurement proceedings, including in relation to the treatment of commercial information. Confidence will be contingent upon users perceiving appropriate assurances of security of the information system used, of preserving authenticity and integrity of information transmitted through it, and of other factors, each of which is the subject of various regulations and technical solutions. Other aspects and relevant branches of law are relevant, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality, intellectual property and copyright. The Model Law and procurement regulations that may be enacted in accordance with article 4 of the Model Law are therefore only a narrow part of the relevant legislative framework. In addition, reliability of procurement proceedings should be addressed as part of a comprehensive good governance framework dealing with personnel, management and administration issues in the procuring entity and public sector as a whole.

13. Legal and technical solutions aimed at securing the authenticity, integrity and confidentiality may vary in accordance with prevailing circumstances and contexts. In designing them, consideration should be given both to their efficacy and to any possible discriminatory or anti-competitive effect, including in the cross-border context. The enacting State has to ensure at a minimum that the systems are set up in a way that leaves trails for independent scrutiny and audit and in particular verifies what information has been transmitted or made available, by whom, to whom, and when, including the duration of the communication, and that the system can reconstitute the sequence of events. The system should provide adequate protection against unauthorized actions aimed at disrupting normal operation of public procurement process. Technologies[, such as virus-scanning software,] to mitigate the risk of human and non-human disruptions must be in place. So as to enhance confidence and transparency in the procurement process, any protective measures that might affect the rights and obligations of potential suppliers and contractors should be specified to suppliers and contractors at the outset of procurement proceedings or should be made generally known to public. The system has to guarantee to suppliers and contractors the integrity and security of the data that they submit to the procuring entity, the confidentiality of information that should be treated as confidential and that information that they submit will not be used in any inappropriate manner. A further issue in relation to confidence is that of systems' ownership and support. Any involvement of third parties need to be carefully addressed to ensure that the arrangements concerned do not undermine the confidence of suppliers and contractors in procurement proceedings.

14. [Cross-reference to other relevant provisions, such as commentary to article 30 (5)]."

B. Electronic submission of tenders

1. Proposed draft text for the revised Model Law

11. The following draft article reflects the suggestions made at the Working Group's eleventh session to draft article 30 (5) that was before the Working Group at that session:[10]

"Article 30. Submission of tenders

(5) (a) A tender shall be submitted in writing, and signed, and:

(i) if in paper form, in a sealed envelope; or

(ii) if in any other form, according to requirements specified by the procuring entity, which ensure at least a similar degree of authenticity, security, integrity and confidentiality;

(b) The procuring entity shall provide to the supplier or contractor receipt showing the date and time when its tender was received;

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law."

2. Guide to Enactment text

12. The following text is proposed for the Guide to accompany revised article 30 (5) of the Model Law (replacing the current paragraph 3 of the Guide commentary to article 30). In considering the text below, the Working Group should take into account the points raised in paragraphs 8-10 of this note, which are also relevant here:

"3. Paragraph (5) (a) of the article contains specific requirements as regards the form and means of submission of tenders that complement general requirements of form and means found in article 5 bis (see the commentary to article 5 bis in paragraphs [cross-reference] above). The paragraph provides that tenders have to be submitted in writing and signed, and that their authenticity, security, integrity and confidentiality have to be preserved. The requirement of "writing" seeks to ensure the compliance with the form requirement found in article 5 bis (1) (tenders have to be submitted in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference). The requirement of "signature" seeks to ensure that suppliers or contractors submitting a tender identify themselves and confirm their approval of the content of their submitted tenders, with sufficient credibility. The requirement of "authenticity" seeks to ensure the appropriate level of assurance that a tender submitted by a supplier or contractor to the procuring entity is final and authoritative, cannot be repudiated and is traceable to the supplier or contractor submitting it. Together with the requirements of "writing" and "signature", it thus seeks to ensure that there would be tangible evidence of the existence and nature of the intent by the suppliers or contractors submitting the tenders to be bound by the

[10] A/CN.9/623, paras. 21-23.

information contained in the tenders submitted and that evidence would be preserved for record-keeping, control and audit. Requirements of "security", "integrity" and "confidentiality" of tenders seek to ensure that the information in submitted tenders cannot be altered, added to or manipulated ("security" and "integrity"), and that it cannot be accessed until the time specified for public opening and thereafter only by authorized persons and only for prescribed purposes, and according to the rules ("confidentiality").

3 bis. In the paper-based environment, all the requirements described in the preceding paragraph of this Guide are met by suppliers or contractors submitting to the procuring entity, in a sealed envelope, tenders or parts thereof presumed to be duly signed and authenticated (at a risk of being rejected at the time of the opening of tenders if otherwise), and by the procuring entity keeping the sealed envelopes unopened until the time of their public opening. In the non-paper environment, the same requirements may be fulfilled by various standards and methods as long as such standards and methods provide at least a similar degree of assurances that tenders submitted are indeed in writing, signed and authenticated and that their security, integrity and confidentiality are preserved. The procurement or other appropriate regulations should establish clear rules as regards the relevant requirements, and when necessary develop functional equivalents for the non-paper based environment. Caution should be exercised not to tie legal requirements to a given state of technical development. The system, at a minimum, has to guarantee that no person can have access to the content of tenders after their receipt by the procuring entity prior to the time set up for formal opening of tenders. It must also guarantee that only authorized persons clearly identified to the system will have the right to open tenders at the time of formal opening of tenders and will have access to the content of tenders at subsequent stages of the procurement proceedings. The system must also be set up in a way that allows traceability of all operations in relation to submitted tenders, including the exact time and date of receipt of tenders, verification of who accessed tenders and when, and whether tenders supposed to be inaccessible have been compromised or tampered with. Appropriate measures should be in place to verify that tenders would not be deleted or damaged or affected in other unauthorized ways when they are opened and subsequently used. Standards and methods used should be commensurate with risk. A strong level of authentication and security can be achieved through, for example, public key infrastructure with accredited digital certificate service providers, but this will not be appropriate for low risk small value procurement. [The Working Group may wish to consider further references to cost-benefit analysis.]

3 ter. Paragraph 5 (b) requires the procuring entity to provide to the suppliers or contractors a receipt showing the date and time when their tender was received. In the non paper-based environment, this should be done automatically. [In situations where the system of receipt of tenders makes it impossible to establish the time of receipt with precision, the procuring entity may need to have an element of discretion to establish the degree of precision to which the time of receipt of tenders submitted would be recorded. However, this element of discretion should be strictly regulated [by reference to applicable legal norms of electronic commerce], in order to prevent abuses.] When the submission of a tender fails, particularly due to protective measures

taken by the procuring entity to prevent the system from being damaged as a result of a receipt of a tender, it shall be considered that no submission was made. Suppliers or contractors whose tenders cannot be received by the procuring entity's system should be instantaneously informed about the event in order to allow them where possible to resubmit tenders before the deadline for submission has expired. No resubmission after the expiry of the deadline shall be allowed.

3 quater. Paragraph 5 (c) raises issues of security, integrity and confidentiality of submitted tenders, discussed above. Unlike subparagraph 5 (a)(ii), it does not refer to the requirement of authenticity of tenders since issues of authenticity are relevant at the stage of submission of tenders only. It is presumed that upon receipt of a tender by the procuring entity at the date and time to be recorded in accordance with paragraph 5 (b) of the article, adequate authenticity has already been assured."

C. Publication of procurement-related information

1. Proposed revisions to article 5

13. The following draft text of article 5 incorporates drafting suggestions made at the Working Group's eleventh session:[11]

"Article 5. Publicity of legal texts and information on forthcoming procurement opportunities

(1) The text of this Law, procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

(2) Notwithstanding the provisions of paragraph (1) of this article, judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public and updated if need be.

(3) As promptly as possible after beginning of a fiscal year, procuring entities may publish information of the expected procurement opportunities for the following [the enacting State specifies the period]. The information published shall not constitute the solicitation of the participation of suppliers or contractors in the procurement proceedings and shall not be binding upon the procuring entity."

Commentary

Paragraph (3)

14. At its eleventh session, the Working Group agreed to split the provisions on publication of information on forthcoming procurement opportunities contained in paragraph 37 of document A/CN.9/WG.I/WP.50 into two sentences. The understanding was that the Secretariat should propose a wording for the second

[11] Ibid., paras. 26, 27, 30 and 31.

sentence that issuing such a notice did not obligate the procuring entity to solicit tenders, proposals or bids for such procurement opportunities.[12] The Working Group may wish to consider the suggested wording to that effect in the second sentence of the paragraph.

15. In addition, it was suggested that provisions on publication of information on forthcoming procurement opportunities should be placed as paragraph (3) of article 5, and that the Secretariat would change the title of article 5 to reflect the addition of a new paragraph.[13] The Working Group may wish to consider the amendments made to reflect these suggestions.

2. Proposed draft text for the revised Guide

16. The following text is proposed to be included in the Guide to accompany revised article 5 (first two paragraphs have been taken from the current Guide commentary to article 5 and have been revised to reflect the suggested amendments to the article):

> "1. Paragraph (1) of this article is intended to promote transparency in the laws, regulations and other legal texts of general application relating to procurement by requiring that those legal texts be promptly made accessible and systematically maintained. Inclusion of this provision may be considered especially important in States in which such a requirement is not found in existing administrative law. It may also be considered important in States in which such a requirement is already found in existing administrative law since a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers or contractors on the requirement for adequate public disclosure of legal texts referred to in the paragraph.
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> 2. In many countries, there exist official publications in which legal texts referred to in the paragraph are routinely published. The texts concerned could be published in those publications. Otherwise, the texts should be promptly made accessible to the public, including foreign suppliers or contractors, in another appropriate medium and manner that will ensure the required level of outreach of relevant information to intended recipients and the public at large. An enacting State may wish to specify a manner and medium of publication in procurement or any other appropriate regulations that address publicity of statutes, regulations and other public acts, with the goal of ensuring easy and prompt public access to the relevant legal texts. This should provide certainty to the public at large as regards the source of the relevant information, which is especially important in the light of proliferation of media and sources of information as a result of the use of non-paper means of publishing information. Transparency may be impeded considerably if abundant information is available from many sources, whose authenticity and authority may not be certain.
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> 3. The procurement or any other appropriate regulations should envisage the provision of relevant information in a centralized manner at a common place (the "official gazette" or equivalent) and establish rules defining

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[12] Ibid., para. 30.
[13] Ibid., para. 31.

relations of that single centralized medium with other possible media where such information may appear. Information posted in the single centralized medium should be authentic and authoritative and have primacy over information that may appear in other media. Regulations may explicitly prohibit publication in different media before information is published in a specifically designated central medium, and require that the same information published in different media must contain the same data. The single centralized medium should be readily and widely accessible [without charge]. Regulations should also spell out what the requirement of "systematic maintenance" entails, including timely posting and updating of all relevant and essential information in a manner easy to use and understand by the average user.

4. Paragraph (2) of the article deals with a distinct category of legal texts – judicial decisions and administrative rulings with precedent value. The opening phrase in the paragraph intends to make it clear that publicity requirements in paragraph (1) do not apply to legal texts dealt with in paragraph (2). Due to the nature and characteristics of the legal texts dealt with in paragraph (2), including the procedure for their adoption and maintenance, application of the publicity requirements found in paragraph (1) to them may not be justifiable. For example, it may not be feasible to comply with the requirement to make these legal texts promptly accessible. In addition, the requirement of "systematic maintenance" may not be applicable to them in the light of the relatively static nature of these texts. Paragraph (2) of the article therefore requires that these texts are to be made available to the public and updated if need be. The objective is to achieve the necessary level of publicity of these texts and accuracy of publicised texts with sufficient flexibility.

5. Depending on legal traditions and procurement practices in an enacting State, interpretative texts of legal value and importance to suppliers and contractors may already be covered by either paragraph (1) or (2) of the article. The enacting State may wish to consider making necessary amendments to the article to ensure that they are covered. In addition, taking into account that non-paper means of publishing information diminish costs, time and effort of making information public and its maintenance, it may be desirable to publish other legal texts of relevance and practical use and importance to suppliers and contractors not covered by article 5 of the Model Law, in order to achieve transparency and predictability, and to foster and encourage participation of suppliers and contractors, in procurement. These additional legal texts may include, for example, procurement guidelines or manuals and other documents that provide information about important aspects of domestic procurement practices and procedures and may affect general rights and obligations of suppliers and contractors. The Model Law, while not explicitly addressing the publication of these legal texts, does not preclude an enacting State from expanding the list of legal texts covered by article 5 according to its domestic context. If such an option is exercised, an enacting State should consider which additional legal texts are to be made public and which conditions of publication should apply to them. Enacting States may in this regard assess costs and efforts to fulfil such conditions in proportion to benefits that potential recipients are expected to derive from

published information. In the paper-based environment, costs may be disproportionately high if, for example, it would be required that information of marginal or occasional interest to suppliers or contractors is to be made promptly accessible to the public and systematically maintained. In the non-paper environment, although costs of publishing information may become insignificant, costs of maintaining such information, so as to ensure easy public access to the relevant and accurate information, may still be high.

6. Paragraph (3) of the article deals with the publication of information on forthcoming procurement opportunities. Publication of such information may not be advisable in all cases and, if imposed, may be burdensome, and may interfere in the budgeting process and procuring entity's flexibility to handle its procurement needs. The position under the Model Law is that the procuring entity should have flexibility to decide on a case-by-case basis on whether such information should be published. Accordingly, the provisions of the paragraph do not require but enable the publication of this information. They give to the enacting State the option to set a time frame that such publication should cover, which may be a half-year or a year or other period. When published, such information is not intended to bind the procuring entity in any way in connection with publicised information, including as regards future solicitations. Suppliers or contractors would not be entitled to any remedy if the procurement did not take place subsequent to its pre-advertisement or takes place on terms different from those pre-advertised. The inclusion of such an enabling provision in the procurement law may be considered important by the legislature to highlight benefits of publishing such information. In particular, publication of such information may discipline procuring entities in procurement planning, and diminish cases of "ad hoc" and "emergency" procurements and, consequently, recourses to less competitive methods of procurement. It may also enhance competition as it would enable more suppliers to learn about procurement opportunities, assess their interest in participation and plan their participation in advance accordingly. Publication of such information may also have a positive impact in the broader governance context, in particular in opening up procurement to general public review and local community participation. It is therefore envisaged that the enacting State might provide incentives for publication of such information, as is done in some jurisdictions, such as a possibility of shortening a period for submission of tenders in pre-advertised procurements. The enacting States, in procurement regulations, may also refer to cases when publication of such information would in particular be desirable, such as when complex construction procurements are expected or when procurement value exceeds a certain threshold. They may also recommend the desirable content of information to be published and other conditions for publication."

D. Other provisions of the Model Law and the Guide

17. At its previous sessions, the Working Group considered other revisions to the Model Law and the Guide that would be required to accommodate the use of electronic procurement. They related to articles 11 (1) (b) bis (Record of procurement proceedings) and 33 (2) (Opening of tenders), a Guide text that would

accompany articles 11 and 36 (Acceptance of tender and entry into force of procurement contract) and Guide introductory remarks on the use of electronic procurement under the Model Law in general. The sections below set up issues arising from those revisions as well as other issues, for consideration by the Working Group.

1. Article 11 and the text for the Guide to accompany the article

18. At its ninth session, the Working Group considered additional paragraph 1 (b) bis to be included in article 11, which read as follows:

> **"Article 11. Record of procurement proceedings**
>
> (1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:
>
> …
>
> (b) bis. The procuring entity's decision as to the means of communication to be used in the procurement proceedings."[14]

19. At the same session, suggestions were made as regards the draft Guide text proposed to accompany this provision.[15] In the light of the Working Group ongoing work on the revision of the Model Law and the Guide, which will affect provisions of article 11 and an accompanying Guide text, the Working Group may wish to defer consideration of any revisions to article 11 and related provisions for the Guide.

2. Article 33 (2) and the text for the Guide to accompany the relevant provisions

20. The Working Group may wish to consider the proposed provisions for revised article 33 (2). They are based on provisions that the Working Group approved at its eleventh session.[16] Amendments were made to reflect changes in the relevant provisions of draft article 5 bis (4) (see paragraph 4 above):

> **"Article 33. Opening of tenders**
>
> (2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are fully and contemporaneously apprised of the opening of the tenders."

21. It is proposed that a Guide text that would accompany these provisions, which would be included after paragraph (2) of the current Guide commentary to article 33, would cross-refer to the discussion in the Guide addressing article 5 bis as it relates to means of holding meetings. With reference to automated opening of tenders, the Guide would refer to the "four eyes" principle, meaning that at least two persons should by simultaneous action perform opening of tenders and that data opened should remain accessible only to those persons. "Simultaneous action" in this context means that the designate authorized persons within almost the same

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[14] A/CN.9/WG.I/WP.42, para. 31.

[15] A/CN.9/595, paras. 49-51, A/CN.9/WG.I/WP.42, para. 32 and A/CN.9/WG.I/WP.42/Add.1, para. 7.

[16] A/CN.9/623, para. 25 and A/CN.9/WG.I/WP.50, para. 30.

time span shall produce logs of what components have been opened and when. This principle is consistently referred to in regional and international instruments addressing the subject. The Guide would also alert that the information system used should also allow the deferred opening of the separate files of the tender in the required sequence in the same way as with sealed envelopes (for example, when technical and economic offers of a tender are submitted separately), without compromising the security for the unopened parts. The need to ensure traceability of all operations would be reiterated in the context of the opening of tenders. The Working Group may wish to consider these and any additional points for reflection in the Guide in relation to revised article 33 (2).

22. At the Working Group's eleventh session, the suggestion was made that the Guide should highlight that provisions of amended article 33 (2) were consistent with other international instruments in this regard and a specific reference was made to World Bank procurement guideline 2.45.[17] The Working Group may wish to consider that, while a general statement of this kind might be appropriate in the Guide, references to specific provisions in instruments of other international organizations to substantiate such a statement should be avoided since they may soon become obsolete.

3. Liability for failures of procuring entities' systems

23. The Working Group may wish to formulate its position as regards liability of procuring entities for failures of their systems in the course of the procurement proceedings in general (e.g., with reference to article 5 bis) and in the specific contexts, such as in the context of submission of tenders under article 30 (5). As regards approaching this issue in the context of submission of tenders under article 30 (5), depending on the Working Group's position on whether the procuring entity should be required or have discretion to extend the deadline for submission of tenders in such a case, the issue will have to be addressed in paragraphs (2) or (3) of article 30 and/or in the accompanying Guide. The issue is also relevant in the context of submission of bids in electronic reverse auctions. The Working Group may wish to consider therefore whether the approach that would be taken in the context of article 30 should consistently apply in other applicable contexts.

4. Revisions to the text for the Guide accompanying article 36

24. As regards the text for the Guide to accompany article 36, the Working Group, at its ninth session, considered the revised text that incorporated suggestions made at its eighth session.[18] At that session, further drafting suggestions to the revised text were made.[19] In the light of the Working Group's ongoing work, in particular as regards simplification and standardization of some provisions of the Model Law, including article 36,[20] the Working Group may wish to defer its consideration of any revised Guide text that would accompany article 36.

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[17] A/CN.9/623, para. 25.
[18] A/CN.9/WG.I/WP.42, para. 29, and A/CN.9/WG.I/WP.42/Add.1, para. 6.
[19] A/CN.9/595, paras. 47 and 48.
[20] A/CN.9/623, para. 102.

5. Guide introductory remarks on the use of electronic procurement under the Model Law in general

25. The Working Group considered, most recently at its ninth session, sections addressing benefits and concerns arising from electronic procurement, interaction between electronic procurement and electronic commerce legislation, and general approach of the revised Model Law towards regulating electronic procurement.[21] In the light of a general nature of those provisions, it was suggested that they should be incorporated in parts of the Guide preceding article-by-article remarks. These introductory parts of the Guide will have to be significantly revised at a later stage in the light of all revisions made to the Model Law. The revised text will be presented to the Working Group for consideration in due course.

III. Draft provisions addressing abnormally low tenders

1. Proposed draft text for the revised Model Law

26. The following draft article reflects the suggestions made to draft article 12 bis that was before the Working Group at its eleventh session:[22]

> **"Article [12 bis]. Rejection of abnormally low tenders, proposals, offers, quotations or bids**
>
> (1) The procuring entity may reject a tender, proposal, offer, quotation or bid if a price submitted therein is abnormally low in relation to the goods, construction or services to be procured, provided that:
>
> (a) [The procuring entity has specified the right to do so in the solicitation documents or in any other documents for the solicitation of proposals, offers, quotations or bids;]
>
> (b) The procuring entity has requested in writing from the supplier or contractor concerned details of constituent elements of a tender, proposal, offer, quotation or bid that give rise to concerns as to the ability of the supplier or contractor that submitted such a tender, proposal, offer, quotation or bid to perform the procurement contract;
>
> (c) The procuring entity has taken account of the information supplied, if any, but continues, on a reasonable basis, to hold those concerns; and
>
> (d) The procuring entity has recorded those concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.
>
> (2) [The solicitation documents or other documents for solicitation of proposals, offers, quotations or bids [may] [should] include an explicit statement that a procuring entity may carry out analyses of potential performance risks and prices submitted.]

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[21] A/CN.9/595, paras. 18-22, A/CN.9/WG.I/WP.42, para. 13, and A/CN.9/WG.I/WP.42/Add.1, para. 2.

[22] A/CN.9/623, paras. 33-41.

(3) The decision of the procuring entity to reject a tender, proposal, offer, quotation or bid in accordance with this article and grounds for the decision shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned."

Commentary

27. At the Working Group's eleventh session, no agreement was reached on whether the right to reject an ALT under article 12 bis should be expressly reserved in the solicitation or equivalent documents.[23] The Working Group decided to consider the issue at its next session with reference to the drafting suggestions[24] made, as reflected in new subparagraph (1) (a) and new paragraph (2), put in square brackets, above.

2. Proposed draft text for the revised Guide

28. The Working Group considered the accompanying provisions of the Guide at its eleventh session. The revised text incorporating the suggestions made to the text at that session[25] and any other suggestions that may be made will be presented for consideration by the Working Group in due course.

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[23] Ibid., paras. 33- 39.
[24] Ibid., para.39.
[25] Ibid., paras. 42, 48 and 49.