



**United Nations Commission
on International Trade Law**
Working Group I (Procurement)
Twelfth session
 Vienna, 3-7 September 2007

**Revisions to the UNCITRAL Model Law on Procurement of
Goods, Construction and Services – drafting materials for
the use of electronic reverse auctions in public procurement**

Note by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-2	3
II. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law	3-37	3
A. Conditions for the use of electronic reverse auctions: draft article 22 bis ...	3-9	3
1. Proposed draft text for the revised Model Law	3	3
Commentary	4-6	4
2. Proposed draft text for the revised Guide	7-9	4
B. Procedures in the pre-auction and auction stages: draft articles 51 bis to sexies	10-33	9
1. Draft article 51 bis	10-13	8
(a) Proposed draft text for the revised Model Law	10	9
Commentary	11-12	11
(b) Points for reflection in an accompanying Guide text	13	12



2.	Draft article 51 ter	14-17	13
	(a) Proposed draft text for the revised Model Law	14	13
	Commentary	15	13
	(b) Points for reflection in an accompanying Guide text	16-17	13
3.	Draft article 51 quater	18-20	14
	(a) Proposed draft text for the revised Model Law	18	14
	Commentary	19	14
	(b) Points for reflection in an accompanying Guide text	20	14
4.	Draft article 51 quinquies	21-28	15
	(a) Proposed draft text for the revised Model Law	21	15
	Commentary	22-24	15
	(b) Points for reflection in an accompanying Guide text	25-28	16
5.	Draft article 51 sexies	29-33	17
	(a) Proposed draft text for the revised Model Law	29	17
	Commentary	30-31	18
	(b) Points for reflection in an accompanying Guide text	32-33	18
C.	Consequential changes to provisions of the Model Law: record of procurement proceedings (article 11 of the Model Law)	34-37	18

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 reverse auctions (“ERAs”), in public procurement.
2. Such use 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 drafting materials on ERAs that it had considered at the session.¹ This note has been prepared pursuant to that request.

II. Draft provisions to enable the use of electronic reverse auctions in public procurement under the Model Law

A. Conditions for the use of electronic reverse auctions: draft article 22 bis

1. Proposed draft text for the revised Model Law

3. Draft article 22 bis below draws on the text of a draft article on conditions for the use of ERAs that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto:²

“Article 22 bis. Conditions for use of electronic reverse auctions

(1) A procuring entity may engage in procurement by means of an electronic reverse auction in accordance with articles [51 bis to 51 sexies] under the following conditions:

(a) Where it is feasible for the procuring entity to formulate detailed and precise specifications for the goods [or construction or, in the case of services, to identify their detailed and precise characteristics]; and

(b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction such that effective competition is ensured.

(2) The electronic reverse auctions shall be based on:

(a) Prices where the procurement contract is awarded to the lowest price; or

(b) Where the procurement contract is awarded to the lowest evaluated bid, prices and other evaluation criteria specified in the notice of the electronic reverse auction, provided that such other criteria are quantifiable and can be expressed in monetary terms.

¹ A/CN.9/623, para. 13.

² Ibid., paras. 53, 62 (b) and 69.

(3) Where the procurement contract is awarded to the lowest evaluated bid, the electronic reverse auction shall be preceded by a full initial evaluation of bids in accordance with the award criteria and the relative weight of such criteria specified in the notice of the electronic reverse auction.”

Commentary

4. At the Working Group’s eleventh session, the prevailing view was that both price and non-price criteria could be used in ERAs under the Model Law in such a manner that enacting States could select any or both alternatives. It was also observed that a better approach would be not to separate the alternatives and to provide for conditions for the use of price only and price and non-price based ERAs in one place.³ Accordingly, the Working Group agreed at that session that the conditions in draft article 22 bis (d) for use of ERAs should be revised, to provide that ERAs could involve either the price as the only evaluation criterion or price and other criteria.⁴

5. In addition, the prevailing view at the same session was that the use of any ERA involving both price and non-price criteria should be subject to the condition that initial bids should be submitted and fully evaluated, and the results should be communicated to each supplier or contractor concerned. The Working Group therefore decided that conditions in draft article 22 bis (d) should also contain this requirement.⁵

6. Previous paragraph (d) has therefore been revised to reflect these suggestions. It has been presented as new paragraphs (2) and (3) of the draft article.

Proposed draft text for the revised Guide

7. At its eleventh session, the Working Group did not reach agreement on whether the Guide should recommend exclusively the use of ERAs where price was the only award criterion. No consensus on this point being reached at that session, the Working Group agreed to reconsider the question at its next session.⁶ The Working Group may therefore wish to formulate its position on this issue in order that the guidance on the relevant provisions of article 22 bis can be completed.

8. At the Working Group’s eleventh session, it was stressed that in the ERAs involving non-price criteria, price would always remain one of the determining criteria, so that ERAs could never be based on other criteria alone and the price would always be subject to the auction.⁷ The Working Group’s attention is drawn to a different approach to the issue taken in the revised December 2006 version of an agreement on government procurement of the World Trade Organization (the “revised GPA”)⁸ and the European Union procurement directives.⁹ For the ease of reference, the relevant extracts from these instruments are reproduced below:

³ Ibid., para. 66.

⁴ Ibid., para. 69.

⁵ Ibid., para. 72.

⁶ Ibid., para. 66.

⁷ Ibid., para. 68.

⁸ Document GPA/W/297, available as of the date of this note at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

⁹ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and Directive 2004/18/EC of the European Parliament and of the

The revised GPA (article I (e))	“ Electronic auction means an interactive process that involves the use of electronic means for the presentation by suppliers of either new prices, or new values for quantifiable non-price elements of the tender related to the evaluation criteria, or both, resulting in a ranking or re-ranking of tenders.”
European Union procurement directives (article 1 (6) of 2004/17/EC and article 1 (7) of 2004/18/EC) (the same provision appears in both directives)	“An ‘electronic auction’ is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.”

9. Pending completion of the Working Group’s consideration of these issues, the following text is proposed for the Guide to accompany provisions of the Model Law on the conditions for use of ERAs. It incorporates the relevant suggestions made at the Working Group’s previous sessions and also draws on the relevant provisions of the European Commission Staff Working Document (SEC(2005) 959)¹⁰ and guidance provided on relevant issues by multilateral development banks and other regional and international organizations active in the field.¹¹ Providing detailed guidance on some points may be considered premature in the light of the ongoing relevant discussions in the Working Group, and given limitations imposed on the length of Secretariat documents, it has not been possible to provide full guidance on all necessary points. The Secretariat has therefore focussed on the main issues that have been settled to date. The Working Group may wish to consider any additional points that would be desirable to reflect in the Guide in relation to provisions of article 22 bis, such as the position that the Guide should take on non-electronic auctions (see below paragraph 3 of the Guide).

“(1) Article [22 bis] sets out the conditions for the use of electronic reverse auctions, defined as a repetitive process that involves the use of electronic means for the presentation by bidders of either new prices, revised downwards, or [in addition]¹² new values for quantifiable non-price elements related to the evaluation criteria, resulting in a ranking or re-ranking of bidders using automatic evaluation methods and a mathematical formula.¹³ This electronic purchasing process has been introduced in the Model Law in order to allow procuring entities in enacting States to take advantage of its benefits

Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, both available as of the date of this note at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm

¹⁰ Available as of the date of this note at

http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/sec2005-959_en.pdf

¹¹ These documents were also used in preparing points for reflection in a Guide text that would accompany other provisions of the Model Law on ERA. See the relevant paragraphs of this note.

¹² The words were put in square brackets pending the Working Group consideration of the issue referred to in paragraph 8 of this note.

¹³ At the Working Group’s eleventh session, the issue of the definition of the ERA was raised. The Working Group recalled at that session the consensus reached at its previous session that no such definition should be included in the Model Law. (A/CN.9/623, para. 68). The Working Group may wish to consider including the definition of the ERA in the Guide.

but subject to safeguards for its appropriate use. Electronic reverse auctions can improve value for money as a result of increased competition among bidders in a dynamic and real-time setting. They can also improve transparency in the procurement process since information on successive results of evaluation of bids at every stage of the auction and the final result of the auction are made known to all bidders instantaneously and simultaneously. Furthermore, they are characterised by an evaluation process that is fully automated or with limited human intervention and therefore can discourage abuse and corruption.

(2) On the other hand, electronic reverse auctions can encourage an excessive focus on price, and their ease of operation can lead to their overuse and use in inappropriate situations. They may also have an anti-competitive impact in the medium and longer-term. In particular, they are more vulnerable than other procurement processes to collusive behaviour by bidders, especially in projects characterized by a small number of bidders, or in repeated bidding in which the same group of bidders participate.¹⁴ Furthermore, in an auction setting, the risk of bidders' gaining access to commercially sensitive information of competitors may be higher. Procuring entities should also be aware of the possible negative implications of outsourcing of decision-making beyond government, such as to third-party software and service providers, typically involved when electronic reverse auctions are held (it is common for third-party agencies to set up and administer the auction for procuring entities, and to advise on purchasing strategies). These agencies may represent and have access to both procuring entities and bidders and these potential organizational conflicts may pose a serious threat to competition. All these factors in turn may negatively affect the confidence of suppliers and contractors in procurement proceedings involving electronic reverse auctions. As a result, the procuring entity may face opportunity costs arising from the use of electronic reverse auctions (costs such as those arising should suppliers or contractors abandon the government market if required to bid through electronic reverse auctions) and higher prices than those they would have obtained if other procurement methods were used.

(3) Recognizing potential benefits of electronic reverse auctions as well as concerns over their use, the Model Law enables, but does not require or encourage, their use. Such use is subject to conditions of article [22 bis] and procedural requirements in articles [51 bis to sexies] of the Model Law. Electronic reverse auctions may be used either as procurement method in itself or as a phase in other procurement methods, as and where appropriate, preceding the award of the procurement contract. The Model Law allows auctions only with automatic evaluation processes, where the anonymity of bidders, and the confidentiality and traceability of the proceedings, can be preserved. [The Working Group may wish to consider whether anything about conventional auctions should be stated here.]¹⁵

¹⁴ Collusion can occur when two or more bidders work in tandem to manipulate and influence the price of an auction keeping it artificially high or share the market by artificially losing bids or not presenting bids. This point is expected to be elaborated in a revised introductory part of the Guide.

¹⁵ See, for example, points raised in A/CN.9/575, paras. 63-65.

(4) Under the conditions for the use of electronic reverse auctions set out in article [22 bis], electronic reverse auctions are primarily intended to satisfy the repeated needs of a procuring entity for standardized, simple and generally available goods, such as off-the-shelf products (e.g., office supplies), commodities, standard information technology equipment, and primary building products. In these types of procurement, the determining factor is price or quantity; a complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated. The types of procurement involving multiple variables and where qualitative factors prevail over price and quantity considerations should not normally be subject to the electronic reverse auctions.

(5) The requirement for detailed and precise specifications found in paragraph (1)(a) will preclude the use of this purchasing technique in procurement of most services and construction, unless they are of a highly simple nature (for example, straightforward road maintenance works). It would be inappropriate, for example to use auctions in procurement of works or services entailing intellectual performance, such as design works. [Concerns about the use of ERAs beyond procurement of simple standardized goods are to be elaborated.] Depending on the circumstances prevailing in an enacting State, including the level of experience with electronic reverse auctions, an enacting State may choose to restrict the use of electronic reverse auctions to procurement of goods by excluding references to construction and services in the article.

(6) Some jurisdictions maintain lists identifying specific goods, construction or services that may suitably be procured through electronic reverse auctions. Enacting States should be aware that maintaining such lists could prove cumbersome in practice, since it requires periodic updating as new commodities or other relevant items appear. If lists are intended to be used, it is preferable to develop lists of items not suitable for acquisition through electronic reverse auctions or, alternatively, to list generic characteristics that render a particular item suitable for acquisition through this purchasing technique.

(7) In formulating detailed and precise specifications, procuring entities have to take special care in referring to objective technical and quality characteristics of the goods, construction and services procured, as required in article 16 (2) of the Model Law, so that to ensure that bidders will bid on a common basis. The use of a common procurement vocabulary to identify goods, construction or services by codes or by reference to general market-defined standards is therefore desirable.

(8) Paragraph (1)(b) aims at mitigating risks of collusion and ensuring acceptable auction outcomes for the procuring entity. It requires that there must be a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction. This provision is included to recognize that higher risks of collusion are present in the auction setting than in other procurement methods and electronic reverse auctions are therefore not suitable in markets with only a limited number of potentially qualified and independent bidders, or in markets dominated by one or two

major players since such markets are especially vulnerable to price manipulation or other anti-competitive behaviour. Paragraph 1(b) is supplemented by article [51 quater] that requires procuring entities in inviting suppliers or contractors to the auction to keep in mind the need to ensure effective competition during the auction. It also gives the right to the procuring entity to cancel the auction if the number of suppliers or contractors registered to participate in the auction is, in the opinion of the procuring entity, insufficient to ensure effective competition during the auction. [Appropriate cross-reference to a Guide text that would accompany article 51 quater]

(9) The reference in subparagraph (b) to potential suppliers anticipated to be qualified to participate in the electronic reverse auction should not be interpreted as implying that pre-qualification will necessarily be involved in procurement through electronic reverse auctions. It may be the case that, in order to expedite the process and save costs, qualifications of only the supplier or contractor that submitted the accepted bid are checked. [Appropriate cross-reference to a Guide text that would discuss the relevant options]

(10) The article is intended to apply to procurement where the award of contracts is based on either price or price and other criteria to be specified in the beginning of the procurement proceedings. When non-price award criteria are involved, the Model Law require that such criteria should be transparent and objective, and thus quantifiable and expressed in monetary terms (e.g., figures, percentages). They must also be transparently and objectively applied (through a pre-disclosed procedures and mathematical formula). [To be elaborated, including as regards pre-auction evaluation and its results.] The enacting States and procuring entities should be aware however of potential dangers of allowing such other criteria in electronic reverse auctions. In particular, when quantifying such criteria, subjectivity may inevitably be introduced (such as through a points system), and the simplicity and transparency of the process could be undermined. Evaluation of non-price criteria may also leave room for manipulation and biased assessments. [To be elaborated.]¹⁶

(11) Whether price only or other award criteria are factored into procurement by electronic reverse auctions is to be decided by an enacting State in accordance with the prevailing circumstances on the ground, including its level of experience with electronic reverse auctions, and in which sector of the economy the use of electronic reverse auctions is envisaged. It is recommended that enacting States lacking experience with the use of electronic reverse auctions should introduce their use in a staged fashion as experience with the technique evolves; that is, to commence by allowing simple auctions, where price only is to be used in determining the successful bid, and then if appropriate proceeding to the use of more complex auctions, where award criteria include non-price criteria. The latter type of auctions would require an advanced level of expertise and experience in procuring entities, for example, the capacity properly to factor any non-price criteria to a mathematical formula so as to avoid introducing subjectivity into the evaluation process. Such experience and expertise in the procuring entity

¹⁶ See, in particular, points raised in A/CN.9/623, para. 67.

would be necessary even if handling electronic reverse auctions on behalf of the procuring entity is outsourced to private third-party service providers, in order to enable the procuring entity to properly supervise activities of such third-party providers.

(12) Provisions of the Model Law should not be interpreted as implying that electronic reverse auctions will be appropriate and should always be used even if all conditions of article [22 bis] are met. Enacting States may wish to specify in regulations further conditions for the use of electronic reverse auctions, such as advisability of consolidated purchases to amortize costs of setting a system for holding an electronic reverse auction, including costs of third-party software and service providers.

(13) [Cross-references to provisions of the Guide providing functional guidance on the use of ERAs.]”

B. Procedures in the pre-auction and auction stages: draft articles 51 bis to sexies

1. Draft article 51 bis

(a) Proposed draft text for the revised Model Law

10. The following text is proposed for consideration by the Working Group:

“Article 51 bis. Pre-auction procedures in stand-alone electronic reverse auctions

(1) The procuring entity shall cause a notice of the electronic reverse auction to be published in accordance with procedures of article 24 of this Law.

(2) The notice shall include, at a minimum, the following:

(a) Information referred to in article 25 (1)(a), (d) and (e), and article 27 (d), (f), (h) to (j) and (t) to (y);

(b) The criteria to be used by the procuring entity in determining the successful bid, including any criteria other than price to be used, the relative weight of such criteria, the mathematical formula to be used in the evaluation procedure and indication of any criteria that cannot be varied during the auction;

(c) Whether any limitation on the number of suppliers or contractors to be invited to the auction is imposed, and if so, such number and the criteria and procedure that will be followed in selecting that number of suppliers or contractors;

(d) Whether prequalification is required and, if so, information referred to in article 25 (2)(a) to (e);

(e) Whether submission of initial bids is required and, if so:

(i) Information referred to in articles 25 (f) to (j);

- (ii) Whether initial bids are to be submitted for assessment of their responsiveness to the requirements specified in the notice of the auction or in addition for their evaluation; and
 - (iii) If evaluation of initial bids is involved, procedures to be used in such evaluation;
 - (f) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;
 - (g) The manner and, if already determined, deadline by which the suppliers and contractors shall register to participate in the auction;
 - (h) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;
 - (i) Whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage); and
 - (j) The rules for the conduct of the electronic reverse auction, including the information that will be made available to the bidders in the course of the auction and the conditions under which the bidders will be able to bid.
- (3) Except as provided for in paragraphs (4) to (6) of this article, the notice of the electronic reverse auction shall serve as an invitation to participate in the auction and shall be complete in all respects, including as regards information specified in paragraph (7) of this article.
- (4) Where a limitation on the number of suppliers or contractors to be invited to the auction is imposed, the procuring entity shall:
- (a) Select suppliers or contractors corresponding to the number and in accordance with the criteria and procedure specified in the notice of the electronic reverse auction; and
 - (b) Send an invitation to prequalify or to submit initial bids or to participate in the auction, as the case may be, individually and simultaneously to each selected supplier or contractor.
- (5) Where prequalification is required, the procuring entity shall:
- (a) Prequalify suppliers or contractors in accordance with article 7; and
 - (b) Send an invitation to submit initial bids or to participate in the auction, as the case may be, individually and simultaneously to each prequalified supplier or contractor.
- (6) Where submission of the initial bids is required, the procuring entity shall:
- (a) Include in the solicitation documents information referred to in article 27 (a), (k) to (s) and (z) of this Law;
 - (b) Solicit and examine initial bids in accordance with articles 26, 28 to 32, 33 (1) and 34 (1) of this Law;

(c) As specified in the notice of the electronic reverse auction, assess responsiveness of initial bids to all requirements set out in the notice of the electronic reverse auction in accordance with article 34 (2) or in addition carry out evaluation of initial bids in accordance with the procedures and criteria set out in the notice of the electronic reverse auction; and

(d) Send an invitation to participate in the auction individually and simultaneously to each supplier or contractor except for those whose bid has been rejected in accordance with article 34 (3). Where evaluation of initial bids took place, the invitation shall be accompanied by the information on the outcome of such evaluation.

(7) Unless already provided in the notice of the electronic reverse auction, the invitation to participate in the auction shall set out:

(a) The deadline by which the invited suppliers and contractors shall register to participate in the auction;

(b) The date and time of the opening of the auction;

(c) The requirements for registration and identification of bidders at the opening of the auction;

(d) Information concerning individual connection to the electronic equipment being used; and

(e) All other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction.

(8) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.

(9) The auction shall not take place before expiry of adequate time after the notice of the electronic reverse auction has been issued or, where invitations to participate in the auction are sent, from the date of sending the invitations to all suppliers or contractors concerned. This time shall be sufficiently long to allow suppliers or contractors to prepare for the auction.”

Commentary

11. Draft article 51 bis above draws on the text of draft article 51 ter that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto¹⁷ and consequential changes resulting from changes in other draft articles on ERAs.

12. At the Working Group’s eleventh session, it was recalled that a critical anti-abuse feature of ERAs was that the anonymity of bidders should be preserved throughout the process, and therefore the results of the evaluation of each bid would be communicated only to the bidder concerned.¹⁸ The Working Group may wish to consider whether the requirement in paragraph (6)(d) of the draft article provides sufficient safeguards in this respect..

¹⁷ Ibid., paras. 62 and 73.

¹⁸ Ibid., para. 72.

(b) Points for reflection in an accompanying Guide text

13. A Guide text that would accompany the relevant provisions of the Model Law will be submitted to the Working Group at a later stage. At the Working Group's previous sessions,¹⁹ the following points were proposed to be reflected:

(a) With reference to paragraph (1) of the article, to stress the benefits of ensuring as wide solicitation of participation in an ERA as possible, especially in the light of the requirements of effective competition in articles 22 bis and 51 quater;

(b) With reference to paragraph (2), to highlight that the Model Law lists only the minimum general requirements for the content of the notice of ERA that are crucial for the proper handling of ERAs and for the fair and equitable treatment of all suppliers and contractors. These general requirements are to be supplemented by detailed regulations. As an example, regulations must spell out criteria governing the closing of the auction referred to in subparagraph 2 (h) of the article. Criteria may include: (i) when the date and time specified for the closing of the auction has passed; (ii) when the procuring entity, within a specified period of time, receives no more new prices or new values that improve on the top-ranked bid subject to any imposed minimum differences in price or other values; or (iii) when the number of stages in the auction, fixed in the notice of the ERA, has been completed. The regulations should also make it clear that each of these criteria may entail pre-disclosure of additional specific information (for example, the criterion in item (ii) requires specification of the time that will be allowed to elapse after receiving the last submission before closing the auction). Regulations should also require disclosure of: (i) procedures to be followed in the case of any failure, malfunction, or breakdown of the system used during the auction process; (ii) how and when the information that will be made available to the bidders in the course of the auction will be made available (the minimum requirement should be to ensure equal treatment by providing the same information simultaneously to all bidders); and (iii) as regards the conditions under which the bidders will be able to bid, any minimum differences in price or other values that must be improved in any new submission during the auction, and whether there are any limits on the new values which may be submitted during the auction and, if so, what those limits are (limitations are inherent in the technical characteristics of goods, construction and services procured). This level of detail may be provided in the notice of the ERA itself or by reference in the rules for the conduct of the auction as long as all relevant information is made known to all suppliers or contractors sufficiently in advance before the auction to enable interested suppliers or contractors properly to prepare for participation in the auction and ensure transparency and predictability in the process;

(c) As regards subparagraph 2 (b), to note the importance of disclosing to potential bidders in the beginning of the procurement proceedings all information about evaluation criteria, processes and formula that would allow bidders to transparently establish their status at any stage of the procurement process. A link would be made to supplementary provisions of paragraph 6 (d) of the article that require the procuring entity to transmit the outcome of the pre-auction evaluation, where this takes place, individually and simultaneously to each supplier or contractor invited to the auction, as well as to provisions of article 51 quinquies (1)(c) that require keeping bidders informed on a regular basis on successive results of the auction during the auction itself.

¹⁹ A/CN.9/590, para. 66, and A/CN.9/595, para. 101, A/CN.9/615, paras. 46 and 68.

2. Draft article 51 ter

(a) Proposed draft text for the revised Model Law

14. The following text is proposed for consideration by the Working Group:

“Article 51 ter. Pre-auction procedures in auctions used as a phase preceding the award of the procurement contract in procurement proceedings under this Law

(1) The award of the procurement contract in procurement proceedings under this Law may be preceded by an electronic reverse auction[, provided that conditions for use of the relevant procurement proceedings and electronic reverse auctions are met and their procedures are compatible].

(2) The procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings shall state that the award of the procurement contract will be preceded by an electronic reverse auction and provide information referred to in article 51 bis (2)(b) and (f) to (j).

(3) Before proceeding to the auction, the procuring entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor admitted to participate in the auction and comply with the provisions of article 51 bis (7) to (9).”

Commentary

15. Draft article 51 ter above draws on the text of a draft article 51 quater that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto.²⁰ It retains cross-references to the applicable provisions of draft article 51 bis that contain essential safeguards specific to ERAs. It was also considered important to refer explicitly in article 51 ter to the requirement that the procuring entity must send the invitation to participate in the auction individually and simultaneously to each supplier or contractor admitted to participate in the auction. This requirement is found in several provisions of article 51 bis (subparagraphs (4)(b), (5)(b) and (6)(d)).

(b) Points for reflection in an accompanying Guide text

16. The Guide text that would accompany the relevant provisions of the Model Law will be submitted to the Working Group at a later stage. As suggested at the Working Group’s eleventh session,²¹ the guidance would recognize difficulties with introducing and regulating ERAs as a phase in some procurement methods and alert enacting States about the lack of practical experience with regulation and use of ERAs in this manner. It would explain whether and if so how ERAs might be incorporated in various procurement methods envisaged by the Model Law, and which modifications of traditional characteristics of those procurement methods where ERAs might be incorporated would be needed. The Guide would note, with relevant cross-references, that ERAs could in particular appropriately be used upon the reopening of competition in framework agreements. The Working Group may wish to consider whether the guidance should note that the use of ERAs in tendering proceedings would be inappropriate due to the particular

²⁰ A/CN.9/623, paras. 74-76.

²¹ Ibid., paras. 57 and 76.

characteristics of the latter (such as prohibition of substantive modification of tenders after their submission) and whether, in other procurement methods, provisions of the current Model Law would have to be amended to allow repetitive submission of offers or quotations so that to accommodate the use of ERAs in them.

17. The Guide text would also highlight that procuring entities must announce, when soliciting the participation of suppliers or contractors in the procurement proceedings, their intention to hold an ERA and provide, in addition to information usually required to be provided in the relevant procurement method, all essential information specific to the ERA. Once announced, it becomes mandatory to hold the ERA unless the number of suppliers or contractors participating in the procurement proceedings is insufficient to ensure effective competition. In such case, in accordance with article 51 quater, the procuring entity would have the right to cancel the ERA. The Guide would also explain the importance of complying with procedural requirements of paragraph (3) of the article. The Working Group may wish to formulate additional points for reflection in the Guide in relation to the provisions of article 51 ter, in particular as regards anonymity of bidders in ERAs used as a phase in some procurement methods and framework agreements (see article 51 quinques and paragraph 24 below).

3. Draft article 51 quater

(a) Proposed draft text for the revised Model Law

18. The following text is proposed for consideration by the Working Group:

“Article 51 quater. Requirement of sufficient number of bidders to ensure effective competition

(1) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction in accordance with articles 51 bis (4) to (6) and article 51 ter (3) is sufficient to secure effective competition.

(2) If the number of suppliers or contractors registered to participate in the auction is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity may cancel the electronic reverse auction.”

Commentary

19. Draft article 51 quater above draws on the text of a draft article 51 quinques on requirement of effective competition that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto.²²

(b) Points for reflection in an accompanying Guide text

20. The Guide text that would accompany the relevant provisions of the Model Law will be submitted to the Working Group at a later stage. As agreed at the Working Group’s ninth session,²³ the Guide text would elaborate on the importance of a sufficient number of bidders to ensure competition. As suggested at the Working Group’s eleventh session,²⁴

²² Ibid., paras. 78, 81 and 82.

²³ A/CN.9/595, para. 101.

²⁴ A/CN.9/623, para. 83.

the Guide would also illustrate some options on how a procuring entity should proceed if the ERA was cancelled as a result of insufficient number of registered bidders to ensure effective competition. It should also mention that solicitation or equivalent documents might set out any steps that the procuring entity intended to take should the situation arise.

4. Draft article 51 quinquies

(a) Proposed draft text for the revised Model Law

21. The following text is proposed for consideration by the Working Group:

“Article 51 quinquies. Requirements during the auction

(1) During an electronic reverse auction:

(a) All bidders shall have an equal and continuous opportunity to submit their bids;

(b) There shall be automatic evaluation of all bids;

(c) The successive results of the auction established according to the evaluation criteria specified in the notice of the electronic reverse auction must instantaneously be communicated on a continuous basis to all bidders;

(d) There shall be no communication between the procuring entity and the bidders, other than as provided for in paragraphs 1 (a) and (c) above.

(2) The procuring entity shall not disclose the identity of any bidder during the auction.

(3) The auction shall be closed in accordance with the criteria specified in the notice of the electronic reverse auction.

(4) The procuring entity may suspend or terminate the electronic reverse auction in the case of system or communication failures [that prevent holding the auction] [or for other reasons stipulated in the rules for the conduct of the electronic reverse auction]. The provisions of paragraph (2) of this article shall apply in the case of suspension or termination of the auction”

Commentary

22. Draft article 51 quinquies above draws on the text of a draft article 51 sexies on requirements during the auction that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto.²⁵

23. At its eleventh session, the Working Group requested to the Secretariat to redraft paragraph (4) taking into account practical observations that suspension might be desirable in the case of suspected abnormally low bids. Such a suspension, it was observed, would allow the procuring entity instantaneously to intervene to the process to prevent any disruptive effect that the abnormally low bid might have on the auction (such a bid might have the effect of preventing other bidders from continuing to participate). The Working Group also took note that complaints from bidders about irregularities in the process might be made, which might also justify suspension of the auction. It was also suggested that the provisions should make it clear that the suspension of the ERA would not be justifiable in

²⁵ Ibid., paras. 84, 85 and 89.

the case of failures in communications or systems of any single bidder.²⁶ The Working Group may wish to consider whether the texts in square brackets in paragraph (4) sufficiently reflect these suggestions.

24. The last sentence was added in paragraph (4) to reflect the understanding in the Working Group that the anonymity of bidders has to be preserved during the auction, and in the case of suspension or termination of the auction.²⁷ However, the anonymity of bidders may be compromised already at a stage preceding the auction, especially in ERAs used as a phase in some procurement methods or framework agreements. The Working Group may therefore wish to consider which safeguards should be built in to mitigate such risks.

(b) Points for reflection in an accompanying Guide text

25. The Guide text that would accompany the relevant provisions of the Model Law will be submitted to the Working Group at a later stage. With reference to paragraph 1 (b) of the article, it would elaborate that the auction must be based on pre-disclosed award criteria (and their relative weighting where applicable) that cannot be varied during the auction. What can be varied during the auction are prices and modifiable elements. Each such modifiable element is assigned a value, expressed in figures or percentages, in a pre-disclosed mathematical formula. With reference to paragraph 1 (c), the Guide would highlight that the purpose of the provisions is to ensure that all bidders can ascertain their status vis-à-vis other bidders at any moment of the auction. With reference to paragraph 1 (d), the Guide should highlight the importance of avoiding any human intervention during the running of the auction. The auction device shall collect, electronically, anonymous bids which will be automatically evaluated according to the criteria and processes disclosed in the notice of the ERA. On-line capacities should also exist for automatic rejection of invalid bids with immediate notification of rejection and explanation of reasons for rejection. A contact point for urgent communications concerning possible technical problems may be offered to bidders. Such a contact point has to be external to the auction device and the procurement proceedings in question.

26. As regards paragraphs (2) and (4), the Guide would underline that under no circumstances shall the identities of the bidders be able to be disclosed or identified by other bidders during the auction, including in the case of its suspension or termination (see however the concern raised in paragraph 24 above). As regards paragraph (3), the Guide would cross-refer to article 51 bis (2)(h) and related discussion in the Guide. It would also stress that under no circumstances may the auction be closed before the established deadline. As agreed at the Working Group's ninth session,²⁸ the Guide would elaborate on how suppliers might withdraw from the ERA process before its closure and the effect of such withdrawal.

27. As regards paragraph (4), subject to the Working Group's final position on the relevant issues (see paragraph 23 above), the Guide would elaborate on all cases that would justify termination or suspension of the ERA and procedural safeguards that should be in place to protect interests of bidders (such as immediate and simultaneous notification of all bidders about suspension, new time for the reopening of the auction and new deadlines). The Guide would also highlight the importance of carefully monitoring the

²⁶ Ibid., para. 89.

²⁷ Ibid., para. 85.

²⁸ A/CN.9/595, para. 111.

auction proceedings for market manipulation and, in this respect, the need in the procuring entity for good intelligence on past similar transactions, the relevant marketplace and market structure.²⁹ The Guide would alert enacting States that while mechanisms may be put in place to interfere into and prevent possible collusive behaviour, practical difficulties may exist in distinguishing justifiable from collusive behaviour and therefore any discretion given to procuring entities in this respect should be carefully regulated in order to prevent abuses and unjustifiable disruptions.

28. The Working Group may wish to formulate additional points for reflection in the Guide in relation to provisions of article 51 quinquies, in particular whether it should be possible during the auction to (i) extend deadlines for submission of bids, other than in the situations referred in paragraph (4) of the article, and (ii) change the rules of the auction.³⁰

5. Draft article 51 sexies

(a) Proposed draft text for the revised Model Law

29. The following text is proposed for consideration by the Working Group:

“Article 51 sexies. Award of the procurement contract on the basis of the results of the electronic reverse auction

(1) The procurement contract shall be awarded to the bidder that, at the closure of the auction, submitted the bid with the lowest price or the lowest evaluated bid, as applicable, unless such bid is rejected in accordance with articles 12, 12 bis, 15 and [36 (...)]. In such case, the procuring entity may:

(a) Award the procurement contract to the bidder that, at the closure of the auction, submitted the bid with the next lowest price or next lowest evaluated bid, as applicable; or

(b) Reject all remaining bids in accordance with article 12 (1) of this Law, and hold another auction under the same procurement proceedings or announce new procurement proceedings.

(2) Notice of acceptance of the bid shall be given promptly to the bidder that submitted the bid that the procuring entity is prepared to accept.

(3) The name and address of the bidder with whom the procurement contract is entered into and the contract price shall be promptly communicated to other bidders.”

²⁹ These issues are expected to be discussed in more detail in a revised introductory part of the Guide. A cross-reference may therefore be introduced to the relevant provisions.

³⁰ Both possibilities, i.e., as regards changing deadlines and auction rules during the auction, are envisaged in the European Commission Staff Working Document (SEC(2005) 959, section 5.4, available as of the date of this note at http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/sec2005-959_en.pdf. A possibility to adjust a deadline during the auction is also envisaged in the E-reverse Auction Guidelines for MDBs financed procurement, para. 4.5 (December 2005), available as of the date of this note at <http://www.mdb-egp.org/>.

Commentary

30. Draft article 51 *sexies* above draws on the text of draft article 51 *septies* that was before the Working Group at its eleventh session, and reflects amendments suggested to be made thereto.³¹

31. Paragraphs (1) and (2) have been merged and streamlined by the use of cross-references, as suggested at the Working Group's eleventh session. Cross-references will be finalised once the Working Group has approved content and location of current article 36 of the Model Law.³² What was paragraph (3) has been split into two paragraphs: the first, paragraph (2), addressing the notification of the bidder with whom the procurement contract is concluded, and the second, paragraph (3), addressing notification of other bidders about the winning bidder and the contract price. The wording of the latter paragraph has been aligned with article 11 (1)(b) of the Model Law.

(b) Points for reflection in an accompanying Guide text

32. The Guide text that would accompany the relevant provisions of the Model Law will be submitted to the Working Group at a later stage. As suggested at the Working Group's ninth session,³³ the Guide would point out that the results of the auction are intended to be the final results of the procurement proceedings and the winning price would figure in the procurement contract, including in the case of framework agreements. Exceptions to this rule (i.e., each cross-reference in paragraph (1)) would be explained. No further evaluation should be allowed to take place after the auction has been held to avoid improprieties, such as corruption and favouritism.

33. As agreed at the Working Group's eleventh session,³⁴ the Guide would emphasize the need for prompt action after the auction, whether as regards any post-auction checking of qualifications of the successful bidder or reviewing a possible abnormally low bid, so as to ensure that the final outcome should be determined as soon as reasonably practical. It was also agreed that the Guide should elaborate on practical implications of each option described in subparagraphs (1)(a) and (b).

C. Consequential changes to provisions of the Model Law: record of procurement proceedings (article 11 of the Model Law)

34. The proposed addition to article 11 (1) of the Model Law below replaces the wording that was before the Working Group at its previous sessions.³⁵ It reflects the agreement reached at the Working Group's eleventh session that the text should be expanded to refer to all information that would have to be included in the record of procurement proceedings in the context of an ERA, which was not expressly mentioned in article 11 (1) of the Model Law.³⁶ It was suggested in particular that records should contain information about the grounds and circumstances on which the procuring entity relied to justify recourse to the ERA, and the date and time of the ERA.

³¹ A/CN.9/623, paras. 91-93 and 95.

³² *Ibid.*, para. 102.

³³ A/CN.9/595, para. 101.

³⁴ A/CN.9/623, para. 94.

³⁵ A/CN.9/WG.I/WP.40/Add.1, para. 3, A/CN.9/WG.I/WP.43, para. 59, and A/CN.9/WG.I/WP.51, para. 68.

³⁶ A/CN.9/623, para. 100.

“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:

...

(i bis) “In procurement proceedings involving the use of electronic reverse auctions, information about the grounds and circumstances on which the procuring entity relied to justify recourse to the auction, the date and time of the auction and [any other information that the Working Group decides to add].”

35. In addition, at the Working Group’s eleventh session, it was considered appropriate to provide exceptions to disclosure of some type of information under article 11 in the light of the specific characteristics of the ERA.³⁷ It was considered in particular that the names of all bidders could be disclosed only if the procurement proceedings resulted in the procurement contract, and such disclosure should not result in the disclosure of price-sensitive commercial information regarding any particular bidder.³⁸

36. Under article 11 (2) of the Model Law, the portion of record containing the names and addresses of all bidders would be made available, on request, to any person after the bid has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract. The Working Group may wish to consider whether article 11 (2) should be amended so as explicitly to exclude the possibility of disclosing identity of bidders to the public if procurement proceedings have been terminated without resulting in a procurement contract. The Guide might explain that disclosure of identity of bidders, especially when a small number of bidders participated in the auction, might lead to collusion of bidders in successive auctions on the same or similar type of products and thus jeopardise the maintenance of competitiveness in the market and the success of future auctions.

37. Under article 11 (3), the price, or the basis for determining the price, and a summary of the other principal terms and conditions of each bid and of the evaluation and comparison of bids, would be made available to the bidders on request. The procuring entities, as a general rule, would be prohibited under subparagraphs (a) and (b) of article 11 (3) from disclosing detailed information relating to the examination, evaluation and comparison of bids as well as information if its disclosure would inter alia prejudice legitimate commercial interests of the parties or would inhibit fair competition. The Working Group may wish to consider whether any revisions to the disclosure provisions of article 11 would be required in the light of the specific characteristics of the ERA or whether the provisions of subparagraphs (a) and (b) of article 11 (3), strengthened by appropriate commentary in the Guide as suggested at the Working Group’s eleventh session,³⁹ would be sufficient.

³⁷ Ibid.

³⁸ Ibid., paras. 85 and 87.

³⁹ Ibid., paras. 87-88.