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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – a revised text of the Model Law

Note by the Secretariat

Addendum

This note sets out the preamble and articles 1-15 of chapter I (General provisions) of a revised text of the Model Law. Articles 16-22 of chapter I are included in document A/CN.9/WG.1/WP.66/Add.2.

The Secretariat's comments are included in the accompanying footnotes and in square brackets in bold.



UNCITRAL MODEL LAW ON PROCUREMENT [OF GOODS, CONSTRUCTION AND SERVICES]¹

Preamble

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement so as to promote the objectives of:

- (a) Maximizing economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;
- (d) Providing for the fair and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) Achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS²

Article 1. Scope of application³

[draft new text for consideration]

This Law applies to all procurement by procuring entities, except [(the enacting State may specify in this Law types of procurement to be excluded)].

¹ The Working Group may wish to consider whether the general distinction between goods, construction and services found in the 1994 text of the Model Law should be retained, given the draft proposals for its consideration relating to Chapters II-IV of the Model Law. These proposals address procurement procedures on the basis of the importance and extent of quality and non-quantifiable elements of procurement, in which the terms “goods, construction and services” would remain as descriptions only, rather than substantive elements of the Model Law. If the Working Group considers that the 1994 distinction is no longer required, the Guide to Enactment could discuss particular features of certain types of procurement, such as design and build construction procurement, and the procurement of non-quantifiable, specialised and licensed services. The remainder of this Note will, for convenience, refer to the subject-matter of the procurement.

² See A/CN.9/WG.I/WP.66, paras. 54-64, for the issues to be considered in connection with this chapter.

³ See A/CN.9/WG.I/WP.66, paras. 54-55, for the issues to be considered in connection with this article.

[old text]

- “(1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.
- (2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:
- (a) Procurement involving national defence or national security;
 - (b) ... (the enacting State may specify in this Law additional types of procurement to be excluded); or
 - (c) Procurement of a type excluded by the procurement regulations.
- (3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers or contractors when first soliciting their participation in the procurement proceedings.”

Article 2. Definitions⁴

For the purposes of this Law:

- (a) “Procurement” means the acquisition by any means of [subject matter of the procurement] [goods, construction or services];
- (b) “Procuring entity” means:
 - (i) *Option I*
Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)
Option II
Any department, agency, organ or other unit, or any subdivision thereof, of the (“Government” or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)
 - (ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of “procuring entity”);
- (c) “Supplier or contractor” means, according to the context, any potential party or the party to the procurement proceedings⁵ with the procuring entity;

⁴ Based on article 2 of the 1994 Model Law. See A/CN.9/WG.1/WP.66, para. 62, for the issues to be considered in connection with this article. The Working Group may also wish to consider the introduction of a glossary of main terms in the Guide to Enactment, to address descriptive rather than prescriptive or normative terms, to complement article 2 of the Model Law.

⁵ The reference to “the procurement proceedings” replaced the reference to “a procurement contract”. The change reflects the Working Group’s decision taking at its fourteenth session (A/CN.9/664, para. 24).

(d) “Procurement contract” means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

[draft new subparagraph (e) for consideration]⁶

(e) “Submission security” means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in article [14 (1) (f)] and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract;

[old subparagraph (h) to be deleted]

“(h) “Tender security” means a security provided to the procuring entity to secure the fulfilment of any obligation referred to in article 32 (1) (f) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;”

[old subparagraph (i) to be retained, but renumbered as subparagraph (f)]

(f) “Currency” includes monetary unit of account;

[draft new definitions for consideration]⁷

(g) “Submission(s)” means tender(s), proposal(s), offer(s), quotation(s) and bid(s) referred to collectively or generically;

(h) “Solicitation” means request to supplier or contractors to present submissions;

(i) “Successful submission” means the submission ascertained by the procuring entity to be successful in accordance with the evaluation criteria set out in the solicitation documents pursuant to article [12] of this Law;

(j) “Solicitation documents” means all documents for solicitation of submissions;⁸

(k) “Description(s) [of the subject matter of the procurement]” means the description provided in accordance with article [11] of this Law;⁹

(l) “Subject matter of the procurement” means goods, construction or services to be procured:

⁶ Based on paragraph (h) of article 2 of the 1994 Model Law, which was amended in the light of article 14 below. See also A/CN.9/WG.1/WP.66, para. 57 (c).

⁷ See A/CN.9/WG.1/WP.66, para. 62. In the light of these proposed new definitions, consequential changes were made everywhere as appropriate in this revised Model Law.

⁸ The Working Group may wish to consider whether this term would indicate tendering proceedings, and accordingly whether a broader formulation, such as “solicitation or equivalent documents” should be used.

⁹ This paragraph is based on articles 16 and 27 (d) of the 1994 Model Law.

[(i) “Goods” means objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves; (the enacting State may include additional categories of goods);

(ii) “Construction” means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself;

(iii) “Services” means any object of procurement other than goods or construction; (the enacting State may specify certain objects of procurement which are to be treated as services).^{10]}

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]¹¹

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) Treaty or other form of agreement to which it is a party with one or more other States,

(b) Agreement entered into by this State with an intergovernmental international financing institution, or

(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

¹⁰ If the Working Group considers that the 1994 distinction between goods, construction and services is no longer necessary, subparagraphs (i)-(iii) can be removed from the Model Law, with appropriate discussion in the Guide to Enactment. The definitions of goods, construction and services in these subparagraphs are taken from definitions (c) to (e) in article 2 of the 1994 Model Law. If the Working Group wishes to retain definitions of these terms, the word “description” might need to be replaced in the light of draft article 11 below (based on the 1994 article 16), and the definition of construction might be amended so as to include a specific reference to incidental design or other services.

¹¹ Reproduces article 3 of the 1994 Model Law.

Article 4. Procurement regulations¹²

(1) The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

(2) The procurement regulations shall include a code of conduct for officials engaged in procurement[,addressing, inter alia, the prevention of conflicts of interest in public procurement].¹³

Article 5. Publication of legal texts¹⁴

(1) Except as provided for in paragraph 2 of this article, 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) 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.

Article 6. Information on forthcoming procurement opportunities¹⁵

Procuring entities may publish information regarding procurement opportunities from time to time. Such publication does not constitute a solicitation and does not obligate the procuring entity to issue solicitations for the procurement opportunities identified.

¹² Based on article 4 of the 1994 Model Law.

¹³ Paragraph 2 is new and is before the Working Group for the first time. It was introduced further to the Working Group's decision taken at its fourteenth session (A/CN.9/664, paras. 17 and 116). The Working Group may wish to consider whether the reference to avoidance of conflicts of interest in square brackets is necessary in the Model Law so as to link the text with the requirements of the United Nations Convention Against Corruption, or whether reference in the Guide to Enactment would be sufficient. The Working Group will also receive a Conference Room Paper at its fifteenth session that will set out the common provisions of such codes of conduct, which the Working Group may wish to include in the Guide to assist enacting States in drafting the regulations concerned. An important feature of inclusion of a code of conduct in regulations is that it would then be subject to mandatory publication in accordance with article 5(1).

¹⁴ Article 5 is as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-34), except for its paragraph (3), which is set out in a separate article 6, immediately following this article.

¹⁵ Article 6 is based on draft article 5 (3) as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, para. 34).

[draft new article for consideration]

Article 7. Rules concerning methods of procurement and type of solicitation¹⁶

(1) Except as otherwise provided by this Law, a procuring entity shall conduct procurement by means of tendering proceedings.¹⁷

(2) A procuring entity may use a method of procurement other than tendering in only in accordance with paragraphs (3) to (6) of this article, and shall choose the most competitive method [and technique]¹⁸ appropriate in the circumstances of the given procurement.¹⁹

(3) Where it is feasible to provide detailed description of the subject matter of the procurement and establish the evaluation criteria in quantifiable or monetary terms, but where the use of tendering proceedings would not be appropriate [for reasons of economic efficiency], a procuring entity may use a method of procurement referred to in chapter III of this law, provided that the conditions for the use of that method are satisfied.²⁰

(4) Where it is not feasible for the procuring entity to formulate detailed description of the subject matter of the procurement and/or establish the evaluation criteria in quantifiable or monetary terms, and any other conditions for the use of that method are satisfied, a procuring entity may use a method of procurement referred to in chapter IV of this Law.²¹

(5) A procuring entity may use electronic reverse auction as a stand-alone method of procurement or in conjunction with other methods of procurement as appropriate in accordance with the provisions of chapter V of this Law, provided that the conditions for the use of electronic reverse auctions are satisfied.²²

(6) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in the following exceptional circumstances:²³

(a) The goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in

¹⁶ The article is new and before the Working Group for the first time. It is based on a number of articles of the 1994 Model Law as indicated with respect to each relevant provision.

¹⁷ Based on provisions of article 18 (1) of the 1994 Model Law. The Guide to Enactment could explain the implications of this provision, including that the procuring entity should first seek to draft both specifications and evaluation criteria when considering whether or not tendering proceedings are feasible.

¹⁸ The Working Group may wish to consider whether the Model Law should include a reference to the various tools available within procurement methods, such as electronic reverse auctions and framework agreements, should be made in this context.

¹⁹ New text. See A/CN.9/WG.1/WP.66, paras. 35, 37, 41 and 43.

²⁰ Based on article 18 of the 1994 Model Law, referring to the chapter of the Model Law addressing simpler procurement.

²¹ Based on articles 18 and 19 (1) (a) of the 1994 Model Law.

²² Based on draft article 22 bis as amended at the Working Group's twelfth session (A/CN.9/640, paras. 56-57, and A/CN.9/WG.1/WP.59, para.3). See article 42 of the revised Model Law.

²³ The paragraph is based on article 22 of the 1994 Model Law.

respect of the goods, construction or services, such that no reasonable alternative or substitute exists, and the use of a competitive procurement method would therefore not be possible;”²⁴

[draft new subparagraph (b) for consideration]²⁵

(b) There is an urgent need for the subject matter of the procurement, and engaging in tendering proceedings or any other method of procurement²⁶ because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were owing to a catastrophic event, or otherwise neither foreseeable by the procuring entity nor the result of dilatory conduct on its part.

[old subparagraphs (b) and (c) to be deleted]²⁷

“(b) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(c) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods;”

[old subparagraphs (d) and (e) to be maintained, but renumbered as paragraphs (c) and (d)]

(c) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;²⁸

(d) The procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their

²⁴ Based on article 22 (1) (a) of the 1994 Model Law. As to whether the qualification relating to exclusive rights should be required, see A/CN.9/WG.1/WP.66, para. 44.

²⁵ See A/CN.9/WG.1/WP.66, paras. 42-43.

²⁶ This formulation would imply that the use of competitive negotiations under article 41 of the revised Model Law is also precluded for reasons of urgency, a point that could be stressed in the Guide to Enactment. If there is only one supplier or contractor, single source procurement is available under subparagraph (a) irrespective of the urgency of the procurement. The Guide to Enactment could also stress that the need for the subject matter refers also to the quantity needed urgently, and not just to the subject-matter of the procurement, so as to avoid open-ended procurement justified on the basis of an initial urgent need.

²⁷ Reproduces article 22 (1) (b) and (c) of the 1994 Model Law.

²⁸ Reproduces article 22 (1) (d) of the 1994 Model Law.

commercial viability or to recover research and development costs, and provided that the use of any method of procurement specified in chapter IV of this Law is not possible [or appropriate];²⁹ or

[old subparagraph (f) to be deleted]³⁰

“(f) The procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.”³¹

[draft new subparagraph (e) for consideration]

(e) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary [in cases of serious economic emergency in order to avert serious economic or social harm]³² [in order to promote a policy specified in article [12 (3) (e)], provided that procurement from no other supplier or contractor is capable of promoting that policy].³³

[draft new paragraphs (7)-(9) for consideration]

(7) (a) A procuring entity using a method of procurement other than tendering in accordance with paragraphs (3) to (6) of this article shall [use open solicitation/commence the procurement by soliciting submissions [or, where applicable, applications to prequalify] through the publication of an invitation conforming to the requirements of article [25] in ... (the enacting State specifies the official gazette or other official publication in which the notice is to be published),]³⁴ unless:

²⁹ Based on article 22 (1) (e) of the 1994 Model Law. The last part of the subparagraph starting with the words “and provided that” was added. See A/CN.9/WG.1/WP.66, para. 41, for the reasons thereof.

³⁰ Reproduces article 22 (1) (f) of the 1994 Model Law.

³¹ An alternative new text, which would tend to more limited inclusion of defence and similar procurement, proposed in the light of the issues raised in A/CN.9/WG.1/WP.66, para. 41, and the proposed expanded scope of article 1 (see A/CN.9/WG.1/WP.66, paras. 54-55, and article 1 above), could read as follows: “In the case of procurement involving national defence or national security, where the procuring entity determines that [the use of any other method of procurement under this Law is not possible [or appropriate]] [single-source procurement is the most appropriate method of procurement]”. The wording in the second set of square brackets is based on article 22 (1) (f) of the 1994 Model Law.

³² The text in the first set of square brackets is new. It is based on the Guide commentary to article 22 of the 1994 Model Law. See A/CN.9/WG.1/WP.66, paras. 45-47.

³³ The text in the second set of square brackets is from article 22 (2) of the 1994 Model Law. The Working Group may wish to consider various provisions in the Model Law that address non-procurement related socio-economic policy goals, and the extent to which they should remain in their current formulation, as a separate aspect of the revisions to the Model Law.

³⁴ The Working Group may wish to introduce the term “open” solicitation to refer to procurement commenced by an advertisement as described in articles 24 and 37 of the 1994 Model Law, so that this shorthand term can be used in the articles addressing the various procurement methods in the Model Law. In the 1994 Model Law, the term was not used, but the term “direct solicitation” was used in article 37(3). The Working Group may wish to retain the term “direct

- (i) The conditions for the use of [direct solicitation] specified in articles [35, 37, 40 and 41] are present; or
- (ii) [Direct solicitation] is the only means of ensuring confidentiality or is required by reason of the national interest;

provided that in using [direct solicitation], the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.³⁵

(b) Where [direct solicitation] is used to ensure confidentiality, and where the procuring entity determines that the procedures set out in articles [6, 15 (10) as regards public disclosure, 20, 22 (2), 24, or *the provisions on public disclosure in chapter VII. Review are to be added*] of this Law should not apply, it shall include in the record of the procurement required under article [22] of this Law, a statement of the grounds and circumstances on which it relied to justify its determination;

(c) Open solicitation shall include the international publication of the invitation to present submissions [as described in article 24(2)],³⁶ except:

- (i) Where the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article [9 (1)]; or
- (ii) The procuring entity determines, in view of the low value of the subject matter of the procurement, that only domestic suppliers or contractors are likely to be interested in presenting submissions, in which case it shall include in the record of the procurement required under article [22] of this Law, a statement of the grounds and circumstances on which it relied to justify its determination.³⁷

(8) A procuring entity may enter into a framework agreement in accordance with the provisions of chapter VI of this Law.³⁸

(9) The procuring entity shall include in the record required under article [22] a statement of the grounds and circumstances on which it relied to justify the use of any procurement method other than tendering or the use of [direct solicitation] as referred to in paragraphs (2) to (7) of this article.³⁹

solicitation”, as the alternative to open solicitation. The Working Group may also wish to consider whether there should be definitions of these terms in article 2 of the Model Law. For convenience, rather than repeating lengthy definitions, the remainder of this Note will use the terms “open” and “direct” solicitation.

³⁵ Based on provisions of article 37 (3) of the 1994 Model Law.

³⁶ The Working Group may wish to include in article 2 a definition of the term “international publication”, so as to simplify this paragraph and article 24(2).

³⁷ Based on repetitive provisions found in articles 17 (a) and (b), 23 (a) and (b), and 37 (2) of the 1994 Model Law.

³⁸ New text.

³⁹ Based on article 18 (4) of the 1994 Model Law.

Article 8. Communications in procurement⁴⁰

(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 [VII] or in the course of a meeting, or forming part of the record of procurement proceedings under article [22], 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.

(2) Communication of information between suppliers or contractors and the procuring entity referred to in articles [14 (1)(d),⁴¹ 15 (6) and (10),⁴² 19 (4),⁴³ 31 (2)(a),⁴⁴ 33 (1),⁴⁵ ...⁴⁶ and in the case of direct solicitation in accordance with article 7 (2) (b)⁴⁷] 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 specify:

(a) Any requirement of form;

(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

⁴⁰ The article is based on article 5 bis as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 17-25). The consequential changes have been made in paragraph (2) of this article (cross-references to other appropriate provisions of the Model Law) in the light of the revisions to this Model Law.

⁴¹ Corresponds to the previous reference to article 32 (1) (d).

⁴² Corresponds to the previous reference to article 7 (4) and (6).

⁴³ Corresponds to the previous reference to article 36 (1), and the Working Group may wish to amend or remove it, depending on the finalization of the Working Group's revisions to the proposed article on the acceptance and entry into force of the procurement contract and introduction of the standstill period. The issue is whether or not a procurement contract can enter into force on the basis of, for example, a telephone call, to be followed by written confirmation. See, also, article 19(9) below (drawing on article 36(4) of the 1994 Model Law) regarding the meaning of dispatch.

⁴⁴ Corresponds to the previous reference to the same article.

⁴⁵ Corresponds to the previous reference to article 34 (1).

⁴⁶ The missing reference is to the previous article 44 (b) to (f) (selection procedure with consecutive negotiation). It shall be updated in the light of the revisions to chapter IV.

⁴⁷ Corresponds to the previous reference to articles 37 (3) and 47 (1) of the 1994 Model Law.

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.

Article 9. Participation by suppliers or contractors⁴⁸

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

Article 10. Qualifications of suppliers and contractors⁴⁹

(1) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings;

(2) Suppliers or contractors must meet such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:⁵⁰

(i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, ethical standards, and reputation, and the personnel, to perform the procurement contract;

(ii) That they have legal capacity to enter into the procurement contract;

⁴⁸ Reproduces article 8 of the 1994 Model Law.

⁴⁹ Based on article 6 of the 1994 Model Law, with consequential changes in the light of the revisions to this Model Law, and with the amendments as marked.

⁵⁰ This formulation is intended to allow the procuring entity to assess the qualifications or all suppliers or contractors, or only those of the winning supplier or contractor. The Guide to Enactment could also explain that the elements of subparagraph (i) should be addressed before the submission of tenders or other offers to avoid inappropriate pressure to accept a winning offer from a supplier that might not be qualified, particularly in procurement for items that are not available off-the-shelf. The Working Group has previously indicated that the terminology used in the Model Law, which is not always replicated in other systems, should be explained in the Guide to Enactment.

(iii) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;

(v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.

(2) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (1) (b).

(3) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this article.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents.

(5) Subject to articles [9 (1) and 12 (4)], the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality, or that is not objectively justifiable.

[draft new paragraph (6) for consideration]⁵¹

(6) Notwithstanding paragraph (5) of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission to demonstrate its qualifications in procurement proceedings. In doing so, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

⁵¹ Based on article 10 of the 1994 Model Law, which was amended pursuant to the preliminary agreement reached at the Working Group's sixth session. See A/CN.9/WG.1/WP.66, paras. 71-72. The suggestions of expert consultants have also been incorporated.

(7) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false;

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

Article 11. Rules concerning description of the subject-matter of the procurement, and the terms and conditions of the procurement contract or framework agreement⁵²

(1) The procuring entity shall set out in the solicitation documents the description of the subject-matter of the procurement that it will use in assessing whether a submission is responsive. No description of the subject-matter of a procurement that creates an obstacle to the participation of suppliers or contractors in the procurement proceedings, including any obstacle based on nationality, shall be included or used in the prequalification documents, if any, or in the solicitation documents.

(2) The description of the subject-matter of the procurement may include specifications, plans, drawings, designs, requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology.

(3) To the extent possible, any description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical and quality characteristics or the performance characteristics of that subject matter. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is also a salient, sufficiently precise and intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as “or equivalent” are included.⁵³

(4) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the subject matter of the procurement

⁵² Based on article 16 with consequential changes in the light of the new definitions proposed to be added in article 2 above. The Guide to Enactment will explain the importance of this article, because it sets out what a responsive submission will be, and could also suggest that the solicitation documents should state the reference source for technical terms used (such as the European Common Procurement Vocabulary). The Working Group may also wish to consider whether this latter element should become a mandatory requirement for the solicitation documents.

⁵³ The suggestions of expert consultants have been included in this paragraph.

shall be used, where available, in formulating any description of the subject matter of the procurement to be included in the prequalification documents, if any, or in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement and the contract to be entered into as a result of the procurement proceedings, and in formulating other relevant aspects of the prequalification documents, if any, or solicitation documents.

Article 12. Rules concerning evaluation criteria⁵⁴

(1) The procuring entity shall set out in the solicitation documents the criteria to be used by the procuring entity in evaluating submissions and determining the successful submission. Where any criteria other than price are to be used in evaluating submissions and determining the successful submission, the procuring entity shall set out in the solicitation documents the relative weight to be accorded to each evaluation criterion and the manner in which the criteria are to be applied in the evaluation.⁵⁵

(2) The evaluation criteria shall:

- (a) Relate to the subject-matter of the procurement;
- (b) Include the price of the subject-matter of the procurement.

(3) The evaluation criteria and the determination of the relative weights shall be, to the extent practicable:

- (a) Objective; and
- (b) Quantified or expressed in monetary terms.

(3) The evaluation criteria may concern the following elements, provided that they relate to the subject matter of the procurement:

(a) A margin of preference applied pursuant to paragraph [(4)] of this article, including any ancillary or related costs;

(b) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the functional characteristics of goods or construction, the terms of payment and of guarantees in respect of the subject matter of the procurement;

⁵⁴ New article. It is based on articles 27 (e), 34 (4), 38 (m), 39 and 48 (3) of the 1994 Model Law. See A/CN.9/WG.1/WP.66, paras. 26, 27 and 57 (b).

⁵⁵ The Guide to Enactment will explain that the aim of this provision is to enable supplier or contractors to assess how their submissions will be measured against each other and against the evaluation criteria. Although there are no provisions setting out the level of sub-criteria that should be disclosed, the Guide will explain that the meaning of the reference to “the manner in which [they are] to be applied” is that any sub-factors or criteria that will be applied have to be disclosed, as must any mathematical formula that will be used.

(c) [Where the procurement is conducted in accordance with chapter IV,⁵⁶ the effectiveness of the submission presented by the supplier or contractor in meeting the needs of the procuring entity and, where relevant,⁵⁷ the qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services];⁵⁸

(d) The effect that acceptance of a submission would have on the balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic development potential offered by submissions, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand this subparagraph by including additional criteria)];⁵⁹ and

(e) National defence and security considerations.

(4) If authorized by the procurement regulations, (and subject to approval by ... (the enacting State designates an organ to issue the approval),) in evaluating and comparing submissions, a procuring entity may grant a margin of preference for the benefit of submissions for construction by domestic contractors, for the benefit of submissions for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.⁶⁰

(5) The evaluation criteria and their relative weights disclosed in accordance with this article shall be applied in the determination of the successful submission in the manner in which they have been so disclosed.⁶¹

⁵⁶ This formulation assumes that the Working Group excludes article 42 of the 1994 Model Law from the revised text of the Model Law. If the Working Group wishes to include an equivalent to article 42 for procurement in which the qualifications and expertise of individuals is an evaluation criterion in Chapter III, the references in this draft would be updated.

⁵⁷ The reference "where relevant" has been inserted in order to distinguish between those criteria that might be qualification rather than evaluation criteria. The Guide to Enactment will explain the difference between qualification criteria, responsiveness criteria and evaluation criteria, noting that the same criterion cannot be used in more than one of the assessments of qualification, responsiveness and evaluation.

⁵⁸ To be considered in conjunction with chapter IV and the PFIPs instruments. See A/CN.9/WG.I/WP.66, paras. 16-25 and 67-70.

⁵⁹ The Working Group deferred its consideration of this subparagraph. See A/CN.9/WG.I/WP.66, paras. 29-30.

⁶⁰ The Working Group deferred its consideration of this paragraph. See A/CN.9/WG.I/WP.66, para. 29.

⁶¹ The Guide to Enactment will explain that this will be the lowest price tender, the lowest evaluated tender, or proposal that best meets the needs of the procuring entity, etc, as the case may be. The Working Group has also decided to consider this terminology as part of its review of the Model Law.

Article 13. Rules concerning the language of solicitation documents⁶²

The prequalification documents and solicitation documents shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except for domestic procurement under article [7 (2) (c)] of this Law).

Article 14. Securities⁶³

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a security:

(a) The requirement shall apply to all such suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the security and the confirmer, if any, of the security, as well as the form and terms of the security, must be acceptable to the procuring entity;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a security shall not be rejected by the procuring entity on the grounds that the security was not issued by an issuer in this State if the security and the issuer otherwise conform to requirements set forth in the solicitation or equivalent documents (, unless the acceptance by the procuring entity of such a security would be in violation of a law of this State);

(d) Prior to presenting a submission, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required security; any requirement that refers directly or indirectly to conduct by the supplier or contractor presenting the submission shall not relate to conduct other than:

(i) Withdrawal or modification of the submission after the deadline for presenting of submissions, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign the procurement contract if required by the procuring entity to do so;

⁶² This article is based on the provisions of article 17 of the 1994 Model Law, which was amended in the light of article 7 (2) (c) above.

⁶³ This article reproduces provisions of article 32 of the 1994 Model Law with consequential changes in the light of the proposed revisions to article 2 above.

(iii) Failure to provide a required security for the performance of the contract after the submission has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the security, and shall promptly return, or procure the return of, the security document, after whichever of the following that occurs earliest:

(a) The expiry of the security;

(b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) The termination of the procurement proceedings without the entry into force of a procurement contract;

(d) The withdrawal of the submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

Article 15. Prequalification proceedings⁶⁴

(1) The procuring entity may [and in cases specified in articles ... shall]⁶⁵ engage in prequalification proceedings with a view towards identifying, prior to the solicitation,⁶⁶ suppliers and contractors that are qualified. The provisions of article [10] shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall cause an invitation to prequalify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to prequalify is to be published). The invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation, except in cases of domestic procurement under article [7 (2) (c)] of this Law.⁶⁷

⁶⁴ Based on articles 7, 23, 24, 25 (2) and 37 (1), (2) and (4), of the 1994 Model Law. See A/CN.9/WG.I/WP.66, paras. 22, 38 and 57(d) to 59, for the issues to be considered in connection with this article. The Working Group may also wish to consider whether any requirement for a certain level of financing should be included in the prequalification invitation or documents. In addition, the Working Group may wish to consider whether the any of the qualification criteria must be assessed at a certain stage of the proceedings (such as those set out in draft article 10(2)(i) above).

⁶⁵ To be considered with article 35 (restricted tendering) and chapter IV and conformed with the PFIPs instruments. See A/CN.9/WG.I/WP.66, paras. 22 (a), 38 and 59.

⁶⁶ The phrase "prior to the solicitation" replaced the previous wording "prior to the submission of tenders, proposals or offers", to make distinction with article 10 (1) on qualifications clearer. See A/CN.9/WG.I/WP.66, para. 58.

⁶⁷ Paragraph (2) is new and based on articles 23, 24 and 37 (1) and (2) of the 1994 Model Law.

(3) The invitation to prequalify shall contain, at a minimum, the following information:⁶⁸

(a) The name and address of the procuring entity;⁶⁹

(b) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;⁷⁰

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [10 (1) (b)];⁷¹

(d) A declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article [9 (1)], as the case may be;⁷²

(e) The means of obtaining the prequalification documents and the place from which they may be obtained;⁷³

(f) The price, if any, charged by the procuring entity for the prequalification documents and, subsequent to prequalification, for the solicitation documents;⁷⁴

(g) Except in cases of domestic solicitation under article [7 (2) (c)] of this Law, the currency and terms of payment for the prequalification documents and, subsequent to prequalification, for the solicitation documents;⁷⁵

(h) Except in cases of domestic solicitation under article [7 (2) (c)] of this Law, the language or languages in which the prequalification documents are available and in which, subsequent to prequalification, the solicitation documents will be available;⁷⁶

(i) The manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and

⁶⁸ Paragraph (3) is new and based on articles 7 (3), 23, 25 (2) that in turn extensively refers to article 25 (1), and 37 (1), of the 1994 Model Law.

⁶⁹ See article 25 (2) to be read together with article 25 (1) (a), and 37 (1), of the 1994 Model Law.

⁷⁰ See article 7 (3) (a) (ii), article 25 (2) to be read together with articles 25 (1) (b) and (c), and article 37 (1), of the 1994 Model Law.

⁷¹ See article 25 (2) to be read together with article 25 (1) (d), of the 1994 Model Law.

⁷² See article 25 (2) to be read together with article 25 (1) (e), of the 1994 Model Law.

⁷³ See article 25 (2) (a) and article 37 (1), of the 1994 Model Law.

⁷⁴ See article 25 (2) (b), article 25 (2) to be read together with article 25 (1) (g), and article 37 (1), of the 1994 Model Law.

⁷⁵ See article 23 for the exception, article 25 (2) (c) and article 25 (2) to be read together with article 25 (1) (h), of the 1994 Model Law.

⁷⁶ See article 23 for the exception, article 25 (2) (d) and article 25 (2) to be read together with article 25 (1) (i), of the 1994 Model Law.

allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity.⁷⁷

(4) The procuring entity shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of providing them to suppliers or contractors.⁷⁸

(5) The prequalification documents shall include, at a minimum the following information:⁷⁹

(a) Instructions for preparing and submitting prequalification applications;⁸⁰

(b) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;⁸¹

(c) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;⁸²

(d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings;⁸³

(e) If already known, the place and deadline for presenting submissions;⁸⁴

[(f) Whether the procuring entity intends to solicit submissions only from a limited number of prequalified suppliers or contractors upon completion of the prequalification proceedings in accordance with paragraph (9) of this article, and, if so, that number and the manner in which the selection will be carried out;]⁸⁵

(g) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings.⁸⁶

(6) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring

⁷⁷ See article 7 (3) (a) (iv) and article 25 (2) (e), of the 1994 Model Law.

⁷⁸ See article 7 (2) and article 37 (4), of the 1994 Model Law.

⁷⁹ See article 7 (3) of the 1994 Model Law.

⁸⁰ See article 7 (3) (a) (i) of the 1994 Model Law.

⁸¹ See article 7 (3) (a) (iii) of the 1994 Model Law.

⁸² See article 7 (3) (b) (ii) to be read together with article 38 (p), of the 1994 Model Law.

⁸³ See article 7 (3) (b) (ii) to be read together with article 38 (s), of the 1994 Model Law.

⁸⁴ See article 25 (2) to be read together with article 25 (1) (j), of the 1994 Model Law.

⁸⁵ New text based on model provision 6 (4) (c) of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects. It is to be considered with paragraph 9 and with consequential changes in paragraphs 10 to 12, of this article. All these provisions together should in turn be considered with chapter IV and the PFIPs instruments. See A/CN.9/WG.1/WP.66, para. 22 (b). One aspect of this question that the Working Group may wish to consider is the extent to which such a process can be regulated so that it is carried out in an impartial and objective manner.

⁸⁶ See article 7 (3) (a) (v) of the 1994 Model Law.

entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents.⁸⁷

(7) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.⁸⁸

(8) Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.⁸⁹

[(9) Notwithstanding paragraph [8] of this article, [in procurement proceedings under chapter IV of this Law,]⁹⁰ the procuring entity may, provided that it has made an appropriate statement in the prequalification documents to that effect, reserve the right to solicit submissions upon completion of the prequalification proceedings only from a limited number of suppliers or contractors that best meet the prequalification criteria. For this purpose, the procuring entity shall rate the suppliers or contractors that meet the prequalification criteria on the basis of the criteria applied to assess their qualifications and draw up the list of suppliers or contractors that will be invited to present submissions upon completion of the prequalification proceedings. In drawing up the list, the procuring entity shall apply only the manner of rating that is set forth in the prequalification documents.]⁹¹

(10) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified [or preselected in accordance with paragraph [(9)] of this article] and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified [or preselected].⁹²

(11) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified [or preselected in accordance with paragraph [(9)] of this article] the grounds therefor, but the procuring entity is not

⁸⁷ See article 7 (4) of the 1994 Model Law. The Working Group may wish to consider whether those criteria should be subject to a greater degree of regulation, as is the evaluation of tenders.

⁸⁸ See article 7 (5) of the 1994 Model Law.

⁸⁹ See article 7 (6), the last sentence, of the 1994 Model Law.

⁹⁰ The Working Group may wish to consider that such an option should also exist in other methods of procurement. If so, the words in the square brackets would be deleted.

⁹¹ New text based on model provision 9 (2) of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects. It is to be considered with chapter IV and the PFIPs instruments. See A/CN.9/WG.1/WP.66, para. 22 (b). The consequential changes in the square brackets are in paragraphs 5 (f) and 10 to 12 of this article. As noted in footnote 85 above, the Working Group may wish to consider objectivity and impartiality in this process, particularly in the light of the review provisions that, as currently drafted, would apply to the procuring entity's decisions in this regard.

⁹² See article 7 (6) of the 1994 Model Law, without the last sentence that was placed in paragraph (8) the current draft.

required to specify the evidence or give the reasons for its finding that those grounds were present.⁹³

(12) The procuring entity may require a supplier or contractor that has been prequalified [or preselected in accordance with paragraph [(9)] of this article] to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.⁹⁴

⁹³ See article 7 (7) of the 1994 Model Law.

⁹⁴ See article 7 (8) of the 1994 Model Law.