



# General Assembly

Distr.: Limited  
15 September 2010

Original: English

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**United Nations Commission  
on International Trade Law**  
**Working Group I (Procurement)**  
**Nineteenth session**  
Vienna, 1-5 November 2010

## **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 a proposal for the Preamble and articles 1-13 of chapter I (General provisions) of the revised Model Law.

The Secretariat's comments are set out in the accompanying footnotes.



# UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

## 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<sup>1</sup> 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;
- (f) Achieving transparency in the procedures relating to procurement.

Be it therefore enacted as follows.

## CHAPTER I. GENERAL PROVISIONS

### Article 1. Scope of application<sup>2</sup>

This Law applies to all public procurement.

### Article 2. Definitions<sup>3</sup>

For the purposes of this Law:

- (a) “Auction”<sup>4</sup> means an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves presentation by suppliers or contractors of successively lowered bids during a scheduled period of time and automatic evaluation of the bids;<sup>5</sup>

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<sup>1</sup> Amended pursuant to A/CN.9/690, para. 94.

<sup>2</sup> The accompanying Guide text will point out that States in situations of economic and financial crisis might exempt the application of the Model Law through legislative measures (which would themselves receive the scrutiny of the legislature) (A/CN.9/668, para. 63).

<sup>3</sup> The article will be supplemented in the revised Guide to Enactment by a more comprehensive glossary of terms used in the Model Law.

<sup>4</sup> The more neutral term to “electronic reverse auction” is used in the current draft pursuant to A/CN.9/690, para. 39 (a), and the comments made during the intersessional consultations.

<sup>5</sup> The last portion was added to encompass in the definition all the main features of the reverse auction.

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

(c) “Direct solicitation” means the<sup>6</sup> solicitation addressed directly to one or a restricted number of suppliers or contractors. This excludes solicitation addressed to a limited<sup>7</sup> number of suppliers or contractors following prequalification or pre-selection proceedings;

(d) “Domestic procurement” means procurement limited to domestic suppliers or contractors pursuant to article [8] of this Law;

(e) “Framework agreement procedure”<sup>8</sup> means a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement:

(i) “Framework agreement” means an agreement or agreements between the procuring entity and the selected supplier(s) or contractor(s) concluded upon completion of the first stage of the framework agreement procedure;

(ii) “Closed framework agreement” means a framework agreement to which no supplier or contractor that is not initially a party to the framework agreement may subsequently become a party;

(iii) “Open framework agreement” means a framework agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties;

(iv) “Framework agreement procedure with second stage competition” means a procedure under an open framework agreement or a closed framework agreement with more than one supplier or contractor in which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are to be established or refined through the second stage competition;

(v) “Framework agreement procedure without second stage competition” means a procedure under a closed framework agreement in which all terms and conditions of the procurement are established when the framework agreement is concluded;

(...)<sup>9</sup>

(f) “Prequalification documents” means documents issued by the procuring entity that set out the terms and conditions of the prequalification proceedings in accordance with article [16] of this Law;<sup>10</sup>

<sup>6</sup> The word “exceptional” was deleted pursuant to A/CN.9/690, para. 108.

<sup>7</sup> The word “limited” replaced the word “restricted” used in the previous draft.

<sup>8</sup> During the intersessional consultations, suggestions were made to reconsider referring to the “procedure” in this context.

<sup>9</sup> The definition of “Material change” was deleted pursuant to A/CN.9/690, paras. 96-98. During the intersessional consultations, the prevailing view was that the definition should be deleted and the relevant provisions should address the extent of permissible change in the specific context, as has been done in draft articles 42 and 43.

<sup>10</sup> The definition is retained without square brackets pursuant to A/CN.9/690, para. 100.

(g) “Procurement” means the acquisition<sup>11</sup> of goods, construction or services (the “subject matter of the procurement”);<sup>12</sup>

(h) “Procurement contract” means a contract or contracts<sup>13</sup> resulting from the procurement proceedings and made between the procuring entity and supplier(s) or contractor(s);

(i) “Procurement involving classified<sup>14</sup> information” means procurement in which the procuring entity may be authorized by the procurement regulations or by other provisions of law of this State to take special measures and impose special requirements for the protection of classified information, including to determine which provisions of this Law calling for public disclosure shall not apply;<sup>15</sup>

(j) “Procurement regulations” means regulations to be enacted in accordance with article [4] of this Law;

(k) “Procuring entity” means:

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<sup>11</sup> Amended pursuant to A/CN.9/690, para. 101. The accompanying Guide text will explain that the definition encompasses acquisition by purchase, but also by lease (drawing on equivalent terms in article I.2 of the WTO Agreement on Government Procurement (the 1994 version of GPA) and article II.2 (b) of the provisionally agreed text of the revised GPA (the 2006 version of GPA), the latter referring to “purchase, lease and rental or hire purchase, with or without an option to buy”).

<sup>12</sup> The accompanying Guide text will set out the substance of the definitions of the goods, construction and services from the 1994 text (article 2 (c) to (e)).

<sup>13</sup> The accompanying Guide text will note that reference to contracts in plural intends to encompass inter alia split contracts awarded as a result of the same procurement proceedings. In this regard, it will refer to the provisions of the Model Law stipulating that suppliers or contractors may be permitted to present submissions for only a portion of the subject matter of the procurement (e.g. article 33 (g) of this draft).

<sup>14</sup> The accompanying Guide text will explain that the term “classified information” intends to refer to information designated as classified by an enacting State in accordance with the relevant national law, and that the provision does not intend to confer any discretion on the procuring entity to expand the definition of “classified information”. The Guide will also explain that the term “classified information” being understood in many jurisdictions as information to which access is restricted by law or regulation to particular classes of persons, and that the term does not intend to refer only to the procurement in the sectors where “classified information” is most commonly encountered, such as national security and defence, but also to procurement in any other sector where protection of certain information from public disclosure may be permitted by law, such as in the health sector (for example procurement of vaccines in the case of pandemics in order to avoid panic) or where sensitive medical research and experiments may be involved. Because of the risk of abuse of exceptions to transparency requirements, the Working Group may wish to recommend in the Guide that the issues pertaining to the treatment of “classified information” should be regulated at the level of statutes in order to ensure appropriate scrutiny by the legislature.

<sup>15</sup> The accompanying Guide text will note that the definition, where it is used in the Model Law, is supplemented by the requirement in the article on the documentary record of procurement proceedings to include in the record the reasons and circumstances on which the procuring entity relied to justify the measures and requirements imposed during the procurement proceedings for protection of classified information, such as exemptions from public disclosure.

(i) *Option I*

Any governmental department, agency, organ or other unit, or any subdivision or multiplicity thereof,<sup>16</sup> that engages in procurement, except ...; (and)

*Option II*

Any department, agency, organ or other unit, or any subdivision or multiplicity thereof,<sup>17</sup> 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”);

(l) “Public procurement” means procurement carried out by a procuring entity;<sup>18</sup>

(m) “<sup>19</sup>Socio-economic policies”<sup>20</sup> means environmental, social, economic and other policies of this State authorized or required by the procurement regulations or other provisions of law of this State<sup>21</sup> to be taken into account by the procuring entity in the procurement proceedings. (The enacting State may expand this subparagraph by providing an illustrative list of such policies;)<sup>22</sup>

<sup>16</sup> Amended pursuant to A/CN.9/690, paras. 102 and 103. The accompanying Guide text will explain that procurement can be done by groups or consortia of procuring entities, and they can collectively be dealt with as a single “procuring entity”. It will further note that, in some jurisdictions, to ensure political accountability, even when procuring entities band together, one remains the lead procuring entity. The Guide will also refer to a consortium of procuring entities from various States where a procuring entity from one State in its capacity as the lead procuring entity acts as an agent of procuring entities from other States.

<sup>17</sup> Ibid.

<sup>18</sup> The accompanying Guide text will cross-refer to the definitions of “procurement” and “procuring entity”.

<sup>19</sup> There was suggestion during the intersessional consultations to add the word “Government” or use it instead of the word “socio-economic” in that definition. While there was some support for the use of the term “Government socio-economic policies”, the term “Government policies” was considered to be very broad for the purposes intended. Alternative phrases used in academic texts include “secondary policies”, “horizontal policies” and “horizontal considerations”.

<sup>20</sup> The Working Group has agreed to reconsider the need for this definition (A/CN.9/690, para. 120 (v)).

<sup>21</sup> Amended pursuant to A/CN.9/690, para. 106. The Guide will explain that the provisions are not intended to be open-ended, but to encompass only those policies set out in the legislation of the enacting State, and those that can be triggered by international regulation such as United Nations Security Council anti-terrorism measures or sanctions regimes. The aim of the provisions is to ensure that (a) socio-economic policies (which might include political policies as well as those enumerated in the paragraph) are not determined on an ad hoc basis by the procuring entity, and (b) applied across all government purchasing, so that their costs and benefits can be seen. If there is any other organ or organs with the authority to promulgate socio-economic policies in an enacting State, the Guide will note that it or they should operate under these constraints (and not allow, for example, misuse and abuse through ad hoc adoption of policies, favouritism, etc).

<sup>22</sup> The accompanying Guide text will contain an illustrative list of such policies, such as that

(n) “Solicitation” means an invitation to tender or to present quotations, proposals or bids, according to the context;<sup>23</sup>

(o) “Solicitation documents” means documents issued by the procuring entity, including any amendments thereto,<sup>24</sup> that set out the terms and conditions of the given procurement;

(p) “Standstill period”<sup>25</sup> means the period before the entry into force of the procurement contract, during which the suppliers or contractors whose submissions have been examined may seek review of the decision of the procuring entity to accept the successful submission at the end of that period;

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

(...)<sup>26</sup>

(r) “Supplier or contractor” means, according to the context, any potential party or any party to the procurement proceedings with the procuring entity;

(s) “Tender security”<sup>27</sup> 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 [15 (1) (f)] of this Law and includes such arrangements as bank guarantees, surety bonds, standby 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.

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contained in the 1994 Model Law (article 34 (4) (c) (iii)). The Guide will also describe the costs to procurement that recourse to such policies can bring, and that they are commonly considered to be appropriate only for the purposes of assisting development, such as capacity-building.

<sup>23</sup> Amended to differentiate “solicitation” from “the invitation to participate in the procurement proceedings,” the latter being broader as it may encompass an invitation to pre-qualify or an invitation to the pre-selection in accordance with article 43. The accompanying Guide text will elaborate on the meaning of solicitation in each procurement method, in particular that in the auctions where initial bids are requested for assessment of their responsiveness or evaluation, the solicitation starts already from an invitation to present initial bids rather than from the invitation to bid after the opening of the auction.

<sup>24</sup> The accompanying Guide text will explain the difference in the meaning of “solicitation documents” in various procurement methods. With respect to the amendments, it will cross-refer to the relevant provisions of the Model Law, such as draft articles 13 bis, 14, 42 and 43 of this Law.

<sup>25</sup> This definition was revised pursuant to A/CN.9/690, paras. 109 and 110.

<sup>26</sup> The definition of “Successful submission” was deleted pursuant to A/CN.9/690, para 111.

<sup>27</sup> The accompanying Guide text will explain that although the Model Law refers to “tender security”, as the commonly-used term in the relevant context, this should not imply that this type of security may be requested only in the tendering proceedings. It will also explain that the definition does not intend to imply that multiple tender securities can be requested by the procuring entity in any single procurement proceedings that involve presentation of revised proposals or bids.

### **Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]<sup>28</sup>**

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.

### **Article 4. Procurement regulations<sup>29</sup>**

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.

### **Article 5. Publication of legal texts**

(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.<sup>30</sup>

<sup>28</sup> The accompanying Guide text will explain that the texts in square brackets in this article are relevant to, and intended for consideration by, federal States, and that although treaties have an effect on national implementation of this Law and that more stringent requirements might be applicable, international commitments should not be used as a pretext to avoid basic safeguards under the Model Law (A/CN.9/690, para. 113). It will also alert enacting States that the provisions of the article might need to be adapted to constitutional requirements or should not be enacted at all if they conflict with the constitutional law of the enacting State (A/64/17, paras. 75-78).

<sup>29</sup> The accompanying Guide text will contain a list of cross-references to all provisions of the Model Law where requirements about the content of the procurement regulations are found.

<sup>30</sup> Amended pursuant to A/CN.9/690, para. 115. The accompanying Guide text will explain that laws and regulations of the enacting State will regulate which State agency is responsible for fulfilling the obligations under this article.

## **Article 6. Information on possible forthcoming procurement**

- (1) Procuring entities may publish information regarding planned procurement activities for forthcoming months or years.<sup>31</sup>
- (2) Procuring entities may also publish an advance notice of possible future procurement.<sup>32</sup>
- (3) Publication under this article does not constitute a solicitation, does not oblige the procuring entity to issue a solicitation and does not confer any rights on suppliers or contractors.<sup>33</sup>

## **Article 7. Communications in procurement<sup>34</sup>**

- (1) Any document, notification, decision or any other information generated in the course of a procurement and communicated as required by this Law, including in connection with review proceedings under chapter [VIII] or in the course of a meeting, or forming part of the record of procurement proceedings under article [23], 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) Direct solicitation<sup>35</sup> and communication of information between suppliers or contractors and the procuring entity referred to in articles [15 (1) (d),<sup>36</sup> 16 (6) and (9),<sup>37</sup> 35 (2) (a),<sup>38</sup> 37 (1)<sup>39</sup> and 44 (2) to (4)]<sup>40, 41</sup> may be made by means that do not provide a record of the content of the information on the condition that,

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<sup>31</sup> The accompanying Guide text will emphasize the need for proper procurement planning.

<sup>32</sup> The accompanying Guide text will explain that the reference to “an advance notice of possible future procurement” is made to enable procuring entities to assess the market for complex procurement, without using a term that might be confused with a notice seeking expressions of interest that is usually published in conjunction with request for proposals proceedings.

<sup>33</sup> The accompanying Guide text will explain that the provisions of this article may be applied regardless of the procurement method, and will also highlight the importance of the provisions in the light of the United Nations Convention against Corruption (UNCAC), as ensuring transparency throughout the process and eliminating any advantageous position of suppliers or contractors that otherwise may gain access to procurement planning phases in a non-transparent manner. The Guide will also explain the media where the type of information covered by the article is usually published (A/CN.9/687, para. 37).

<sup>34</sup> The accompanying Guide text will explain that: (a) in procurement containing classified information, classified information may be included in an appendix to the solicitation documents that is not made public; and (b) that the means of communication may be changed by issuing an addendum to the original solicitation documents (A/CN.9/690, para. 117).

<sup>35</sup> Corresponds to references in article 9 of the 1994 Model Law to articles 37 (3) and 47 (1) of that text.

<sup>36</sup> Id., as regards reference to article 32 (1) (d) of the 1994 text.

<sup>37</sup> Id., as regards reference to article 7 (4) and (6) of the 1994 text.

<sup>38</sup> Id., as regards reference to article 31 (2) (a) of the 1994 text.

<sup>39</sup> Id., as regards reference to article 34 (1) of the 1994 text.

<sup>40</sup> Id., as regards reference to article 44 (b) to (f) of the 1994 text (selection procedure with consecutive negotiation).

<sup>41</sup> It was decided that the other references in the 1994 text (to articles 36 (1) (notice of acceptance of the successful tender), and to article 12 (3) (notice of the rejection of all submissions)) would be deleted (A/64/17, para. 122).



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) In procurement involving classified information, if the procuring entity considers it necessary, measures and requirements needed to ensure the protection of classified information at the requisite level;

(c) 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;

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

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

(4) The procuring entity may use only those means of communication that are in common use by suppliers or contractors in the context of the particular procurement. In any meeting held with suppliers or contractors, the procuring entity shall use only those means that ensure in addition that suppliers or contractors can fully and contemporaneously participate in the meeting.

(5) The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned.

## **Article 8. Participation by suppliers or contractors<sup>42</sup>**

(1) Suppliers or contractors shall be permitted to participate in procurement proceedings without regard to nationality, except where the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on grounds<sup>43</sup> specified in the procurement regulations or other provisions of law of this State.<sup>44</sup>

<sup>42</sup> Amended pursuant to A/CN.9/690, paras. 118-120.

<sup>43</sup> Although a suggestion was made during the intersessional consultations to refer explicitly in these provisions to “the extent of domestic content,” the view prevailed that such reference would be inadvisable. In this respect, practical difficulties with calculating the extent of the domestic content, especially since supply chain is becoming more complex and international, were highlighted. Difficulties with defining nationality as opposed to domestic content were also mentioned. It was agreed that the accompanying Guide text would stress that any restriction under these provisions would be against free trade.

<sup>44</sup> Amended pursuant to A/CN.9/690, paras. 118-120. In particular, paragraph (1) (a) in the previous draft reading “Where the procuring entity decides, in view of the low value of the goods, construction or services to be procured, that only domestic suppliers or contractors are likely to be interested in presenting submissions” was deleted. This was on the understanding that, as is the case in the 1994 text (article 23), the procuring entity cannot have recourse to domestic procurement on the sole basis that the subject matter of the procurement is of the low value and thus only domestic suppliers or contractors are likely to be interested in presenting

(2) Except when authorized or required<sup>45</sup> to do so by the procurement regulations or other provisions of law of this State,<sup>46</sup> the procuring entity shall establish no other requirement aimed at limiting participation of suppliers or contractors in procurement proceedings that discriminates<sup>47</sup> against or among suppliers or contractors or against categories thereof.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare whether participation of suppliers or contractors in the procurement proceedings is limited pursuant to this article and on which ground. Any such declaration may not later be altered.<sup>48</sup>

(4) A procuring entity that decides to limit participation of suppliers or contractors in procurement proceedings pursuant to this article shall include in the record of the procurement proceedings a statement of the reasons and circumstances<sup>49</sup> on which it relied.<sup>50</sup>

(5) The procuring entity shall make available to any member of the public, upon request, its reasons for limiting participation of suppliers or contractors in the procurement proceedings pursuant to this article.<sup>51</sup>

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submissions. What it can do in such case, but it does not have to, is to advertise such low-value procurement only domestically. This understanding was reflected in article 29 bis (4) of the current draft. The accompanying Guide text will explain that this paragraph may deal not only with cases of domestic procurement (e.g. to cover situations where nationalities subject to international or bilateral sanctions are excluded). Although socio-economic policies would most likely justify recourse to exceptions provided for in this subparagraph, the reference only to the socio-economic policies of an enacting State was not considered sufficient since limiting participation in procurement proceedings on the basis of nationality may occur on grounds other than socio-economic policies of this State, such as safety and security.

<sup>45</sup> Amended pursuant to A/CN.9/690, para. 120, and aligned with the similar wording found elsewhere in the current draft (e.g. article 11 (4) (b)).

<sup>46</sup> The accompanying Guide text will explain that this paragraph intends to cover situations when limitation of participation in procurement proceedings is not on the basis of nationality or not solely on that basis (e.g. set-aside programmes in some jurisdictions for small and medium enterprises or coming from disadvantaged areas). The paragraph may cover, as paragraph (1) does, domestic procurement (e.g. procurement with participation of only suppliers or contractors coming from disadvantaged areas within the same State) or international procurement limited to certain groups of suppliers or contractors (e.g. persons with disabilities).

<sup>47</sup> The accompanying Guide text will explain that, apart from clearly discriminatory measures, in practice some measures may be taken that produce inadvertently discriminatory effect on suppliers or contractors.

<sup>48</sup> The accompanying Guide text would specify the media where the declaration would be published.

<sup>49</sup> During the intersessional consultations, suggestion was made to replace the reference to “reasons and circumstances” with the word “grounds” to allow reference to applicable law/regulations. The Working Group may however wish to recall its decision at its earlier sessions to use the term “reasons and circumstances” consistently throughout the revised Model Law. The latter term was therefore retained in the current draft. The accompanying Guide text will elaborate on the importance of setting out in the record also the legal grounds, with reference to applicable law and regulations, for the decision.

<sup>50</sup> The paragraph was retained without square brackets pursuant to A/CN.9/690, para. 120.

<sup>51</sup> It is suggested that the Guide text that will discuss transparency requirements of the Model Law should list separately all public disclosure requirements found in the Model Law.

## Article 9. Qualifications of suppliers and contractors

(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) <sup>52</sup>Suppliers or contractors must meet such of the following criteria as the procuring entity considers appropriate and relevant in the circumstances of the particular procurement:

(a) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities,<sup>53</sup> managerial capability, reliability, experience and the personnel to perform the procurement contract;

(b) That they meet applicable ethical and other standards;<sup>54</sup>

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

(d) 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;

(e) That they have fulfilled their obligations to pay taxes and social security contributions in this State;<sup>55</sup>

(f) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the

<sup>52</sup> The opening phrase was deleted since it raised concerns in the Working Group (A/CN.9/690, para. 121) as well as, in its amended version reading “In order to participate in the procurement proceedings and be awarded the procurement contract”, during the intersessional consultations. In particular, it was noted that read together with article 16 (1), it implied that prequalification would always be necessary. This wording, it was also explained, would allow procuring entities to formulate excessively demanding qualification requirements and through their application restrict the pool of participants for the purpose of reducing the workload for themselves. The other view was that the deleted wording was adequate but the Guide should alert that assessment of qualifications at the outset of the procurement, while justifiable in some procurement, restricts the competition and should also refer to the provisions of the Model Law that allow challenge disqualification.

<sup>53</sup> The accompanying Guide text will explain that the requirement that suppliers or contractor must possess the “necessary equipment and other physical facilities” is not intended to restrict the participation of small and medium-sized enterprises in public procurement. The Guide will note that often such enterprises would not themselves possess the required equipment and other physical facilities but rather ensure through their subcontractors that the required equipment and facilities were made available for the implementation of the procurement contract.

<sup>54</sup> Amended pursuant to A/CN.9/690, para. 122. The accompanying Guide text will explain with reference to “other standards” that the procuring entity should be entitled to satisfy itself, for example, that suppliers or contractors have all the required insurances, and to impose security clearances or consider environmental aspects where necessary.

<sup>55</sup> The accompanying Guide text will explain the effect of this provision on foreign suppliers or contractors, with a cross-reference to article 8 that prevents imposing requirements other than those stipulated in the procurement regulations or other provisions of law of the enacting State, to deter participation in the procurement proceedings by foreign suppliers or contractors.

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.<sup>56</sup>

(3) 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 appropriate documentary evidence or other information to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (2).<sup>57</sup>

(4) Any requirement established pursuant to this article shall be set out in the prequalification documents, if any, and in the solicitation documents,<sup>58</sup> 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 Law.

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

(6) Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article [8] of this Law, 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, or that is not objectively justifiable.<sup>59</sup>

(7) Notwithstanding paragraph (6) 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 for the particular procurement. 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.

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<sup>56</sup> It was suggested that the accompanying Guide text should refer to the World Bank's guidelines on suspension procedures (A/CN.9/687, para. 50).

<sup>57</sup> At the Working Group's seventeenth session, it was agreed that the accompanying Guide text should explain the interaction between paragraphs (3) and (2), in particular paragraph (2) (a), of this article (A/CN.9/687, para. 48).

<sup>58</sup> The accompanying Guide text will note that, in some jurisdictions, standard qualifications requirements are found in procurement regulations and the prequalification documents simply cross-refer to those regulations. For reasons of transparency and equal treatment, the Model Law requires all requirements to be set out in the prequalification and solicitation documents, but the Guide will note that the requirements of paragraph (4) may be satisfied where the prequalification or solicitation documents or both refer to the qualification requirements in sources that are transparent and readily available (A/CN.9/690, para. 123).

<sup>59</sup> The accompanying Guide text will note that, despite this statement in the Model Law, some practical measures, such as a choice of the language, although objectively justifiable, may lead to discrimination against or among suppliers or contractors or against categories thereof.

(8) (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, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;

(d) The procuring entity may require a supplier or contractor that was pre-qualified in accordance with article [16] of this Law to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate its qualifications again if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate its qualifications again as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.<sup>60</sup>

**Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement<sup>61</sup>**

(1) The procuring entity shall set out in the prequalification documents, if any, and in the solicitation documents the description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.<sup>62</sup>

(2) Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article [8] of this Law, no description of the subject matter of a procurement that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings,<sup>63</sup> including any restriction based on nationality, shall be included or used in the prequalification documents, if any, or in the solicitation documents.

<sup>60</sup> The accompanying Guide text will note that in most procurement (with the exception perhaps of complex procurement requiring long negotiations), these provisions should be limited to the winner as envisaged in articles 37 (6) and (7) and 51.

<sup>61</sup> The accompanying Guide text will elaborate on the way the socio-economic factors can be taken into account in setting out the description of the subject matter of the procurement and the terms and conditions of the procurement contract or a framework agreement.

<sup>62</sup> The accompanying Guide text will explain that the minimum requirements intend also to cover thresholds referred to in the provisions on request for proposals without negotiation and consecutive negotiations.

<sup>63</sup> Amended pursuant to A/CN.9/690, para. 124.

(3) The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements, including concerning testing and test methods,<sup>64</sup> packaging, marking or labelling or conformity certification, and symbols and terminology.<sup>65</sup>

(4) To the extent practicable, 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<sup>66</sup> of that subject matter. There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as “or equivalent” are included.<sup>67</sup>

(5) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the subject matter of the procurement 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, and in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms and standardized conditions,<sup>68</sup> where available, in formulating the terms and conditions of the procurement and the procurement contract or the framework agreement to be entered into as a result of the procurement proceedings, and in formulating other relevant aspects of the prequalification documents, if any, and solicitation documents.

### **Article 11. Rules concerning evaluation criteria and procedures**

(1) Except for the criteria set out in paragraph (4) of this article, the evaluation criteria shall relate to the subject matter of the procurement.

(2) The evaluation criteria may include:

(a) The price;

(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 characteristics of the subject matter of the procurement, such as the functional

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<sup>64</sup> The accompanying Guide text will explain that the requirements may include those relevant to environment protection or other socio-economic policies of the enacting State.

<sup>65</sup> The accompanying Guide text will note the importance of ensuring that the description is sufficiently precise (A/CN.9/690, para. 125).

<sup>66</sup> The accompanying Guide text will explain that the relevant technical and quality characteristics or the performance characteristics may also cover characteristics relevant to environment protection or other socio-economic policies of the enacting State.

<sup>67</sup> The accompanying Guide text will explain that a brand name should be called out in a solicitation only where absolutely necessary, and if a brand name is called out, the solicitation should specify the salient features of the subject matter being sought, and should state specifically that the brand name item “or equivalent” may be offered.

<sup>68</sup> Amended pursuant to A/CN.9/690, para. 124.

characteristics of goods or construction and the environmental characteristics of the subject matter,<sup>69</sup> the terms of payment and of guarantees in respect of the subject matter of the procurement;

(c) Where relevant in procurement conducted in accordance with articles [41, 43 and 44], experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement.

(3) All non-price evaluation criteria shall, to the extent practicable, be objective, quantifiable and expressed in monetary terms.<sup>70</sup>

(4) In addition to the criteria set out in paragraph (2), the evaluation criteria may include:

(a) Any criteria that the procurement regulations or other provisions of law of this State authorize or require to be taken into account (subject to approval by ... (the enacting State designates an organ to issue the approval));

(b) A margin of preference for the benefit of domestic suppliers or contractors or domestically produced goods, if authorized or required by the procurement regulations or other provisions of law of this State<sup>71</sup> [(and subject to approval by ... (the enacting State designates an organ to issue the approval))].<sup>72</sup> The margin of preference shall be calculated in accordance with the procurement regulations.<sup>73</sup>

(5) The procuring entity shall set out in the solicitation documents:<sup>74</sup>

(a) Whether the successful submission will be ascertained on the basis of price or of price and other criteria;<sup>75</sup>

(b) All evaluation criteria established pursuant to this article, including the price and any margin of preference;<sup>76</sup>

<sup>69</sup> The accompanying Guide text will explain that this paragraph allows the procuring entity to include characteristics such as the environmental character of the production line. More generic socio-economic policy considerations are addressed in articles 8, 9 and 10 and paragraph (4) of this article.

<sup>70</sup> The accompanying Guide text will explain that expressing all non-price evaluation criteria in monetary terms in the request for proposals with dialogue proceedings (article 43 of the current draft) would not be practicable.

<sup>71</sup> Aligned with the relevant wording in the definition “Socio-economic policies” (A/CN.9/690, para. 106. See, also, footnotes 24-27 above). See however the immediately following footnote.

<sup>72</sup> The Working Group is invited to consider whether the words in square brackets should be retained. It may wish to note a close link of these provisions with the definition “Socio-economic policies” where these words do not appear.

<sup>73</sup> The accompanying Guide text will cross-refer to the article regulating the documentary record of procurement proceeding that require putting on the record the relevant information on the use of a margin of preference in the given procurement.

<sup>74</sup> The accompanying Guide text will cross-refer to the corresponding provisions in the articles regulating the contents of solicitation documents in the context of each procurement method.

<sup>75</sup> The accompanying Guide text will explain that the solicitation documents must make it clear whether the selection will be on the basis of the lowest priced submission or the most advantageous submission, as appropriate.

<sup>76</sup> The phrase “price subject to any margin of preference” was replaced with “price and any margin

(c) Where any criteria other than price are to be used in the evaluation procedure, the relative weights of all evaluation criteria, including price and any margin of preference, except where the procurement is conducted under article [43], in which case the procuring entity shall list all evaluation criteria in descending order of importance;<sup>77</sup>

(d) The manner of application of the criteria in the evaluation procedure.

(6) In evaluating submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents, and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents. No criterion or procedure shall be used that has not been set out in accordance with this provision.

## **Article 12. Rules concerning estimation of the value of procurement<sup>78</sup>**

(1) A procuring entity shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among suppliers or contractors or otherwise avoid obligations under this Law.

(2) In estimating the value of procurement, the procuring entity shall include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers or contractors, taking into account all forms of remuneration.<sup>79, 80</sup>

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of preference” in this and the following subparagraphs.

<sup>77</sup> The accompanying Guide text will explain that this provision is intended to ensure full transparency, so that suppliers will be able to see how their submissions will be evaluated. It will also explain that a basket of non-price criteria will normally include some quantifiable and objective criteria (such as maintenance costs) and some subjective elements (the relative value that the procuring entity places on speedy delivery or green production lines, for example), amalgamated into an overall quality ranking. Thus for procurement not involving negotiations, the procuring entity has to disclose both how the non-price basket factors will weigh, and how the basket will weigh against price. The accompanying Guide text will also explain the importance of setting out the appropriate level of detail of the evaluation criteria, and will cross-refer to the provisions of article 43 that require listing the evaluation criteria in descending order of importance in competitive dialogue proceedings where it is often not possible to establish the relative weight of evaluation criteria at the outset of the procurement. It will also discuss how a margin of preference is generally applied in practice, and will examine the merits and demerits of the possible alternative approaches.

<sup>78</sup> The accompanying Guide text will explain that the provisions of the article are in particular relevant in the context of low-value procurement (see articles 21 and 29 bis (4) of the current draft), restricted tendering and request for quotations proceedings.

<sup>79</sup> The accompanying Guide text will explain that in procurement that provides for the possibility of option clauses, the estimated value under the article will refer to the estimated maximum total value of the procurement, inclusive of optional purchases, as this is regulated in the respective provisions of the WTO GPA (article II.2 and 3 of the 1994 version and article II.6 of the 2006 version).

<sup>80</sup> The accompanying Guide text will explain that estimates are to be used primarily for internal purposes of the procuring entity (A/CN.9/690, para. 127). The intersessional consultations concluded that prohibiting revealing such estimates to suppliers in all cases, as suggested in the second part of paragraph 127 of A/CN.9/690, would be unjustifiable.



### **Article 13. Rules concerning the language of documents**

- (1) The prequalification documents, if any, and the solicitation documents shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade unless decided otherwise by the procuring entity in a domestic procurement).
  - (2) Applications to pre-qualify, if any, and submissions may be formulated and presented in the language of the prequalification documents, if any, and solicitation documents, respectively, or in any other language permitted by those documents.
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