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## **Draft revised text of the Model Law**

### **Note by the Secretariat**

#### **Addendum**

This note sets out a proposal for the Preamble and articles 1 to 13 of chapter I (General provisions) of the revised Model Law.



# 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 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

This Law applies to all public procurement.

### Article 2. Definitions

For the purposes of this Law:

- (a) “Currency” includes monetary unit of account;
- (b) “Direct solicitation” means solicitation addressed directly to one or a restricted number of suppliers or contractors. This excludes solicitation addressed to a limited number of suppliers or contractors following pre-qualification or preselection proceedings;
- (c) “Domestic procurement” means procurement limited to domestic suppliers or contractors pursuant to article 8 of this Law;
- (d) “Electronic reverse auction” 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 the automatic evaluation of bids;

- (e) “Framework agreement procedure” 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;
- (f) “Pre-qualification documents” means documents issued by the procuring entity under article 17 of this Law that set out the terms and conditions of the pre-qualification proceedings;
- (g) “Preselection documents” means documents issued by the procuring entity under article 48 (3) of this Law that set out the terms and conditions of the preselection proceedings;
- (h) “Procurement” means the acquisition of goods, construction or services (the “subject matter of the procurement”);
- (i) “Procurement contract(s)” means a contract or contracts concluded between the procuring entity and supplier(s) or contractor(s) at the end of the procurement proceedings;
- (j) “Procurement involving classified 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 measures and impose requirements for the protection of classified information;
- (k) “Procurement regulations” means regulations enacted in accordance with article 4 of this Law;
- (l) “Procuring entity” means:

(i) *Option I*

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

*Option II*

Any department, agency, organ or other unit, or any subdivision or multiplicity 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”);

(m) “Public procurement” means procurement carried out by a procuring entity;

(n) “Socio-economic policies” 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 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.);

(o) “Solicitation” means an invitation to tender or to present proposals, quotations or bids, according to the context;

(p) “Solicitation documents” means documents issued by the procuring entity, including any amendments thereto, that set out the terms and conditions of the given procurement;

(q) “Standstill period” means the period starting from the dispatch of a notice as required by article 21 (2) of this Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under chapter VIII of this Law, the decision so notified;

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

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

(t) “Tender 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 16 (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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**Article 3. International obligations of this State relating to procurement (and intergovernmental agreements within (this State))<sup>1</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**

The [name of the organ or authority authorized to promulgate the procurement regulations] is authorized to promulgate procurement regulations to fulfil the objectives and to implement 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, the 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.

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

(1) Procuring entities may publish information regarding planned procurement activities for forthcoming months or years.

(2) Procuring entities may also publish an advance notice of possible future procurement.

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<sup>1</sup> The texts in parenthesis in this article are relevant to, and intended for consideration by, federal States.

(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.

### **Article 7. Communications in procurement**

(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 challenge and appeal proceedings under chapter VIII or in the course of a meeting, or forming part of the record of procurement proceedings under article 24, 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 and communication of information between suppliers or contractors and the procuring entity referred to in articles 16 (1) (d), 17 (6) and (9), 40 (2) (a), 42 (1) and 49 (2) to (4), 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) 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**

(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 specified in the procurement regulations or other provisions of law of this State.

(2) Except when authorized or required to do so by the procurement regulations or other provisions of law of this State, the procuring entity shall establish no other requirement aimed at limiting participation of suppliers or contractors in procurement proceedings that discriminates 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.

(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 on which it relied.

(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.

### **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) Suppliers or contractors shall 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, managerial capability, reliability, experience and the personnel to perform the procurement contract;

(b) That they meet ethical and other standards applicable in this State;

(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;

(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 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.

(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).

(4) Any requirement established pursuant to this article shall be set out in the pre-qualification or preselection 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 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 pre-qualification or preselection 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.

(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 so as 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.

(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 17 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.

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

(1) The procuring entity shall set out in the pre-qualification or preselection 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.

(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, including any restriction based on nationality, shall be included or used in the pre-qualification or preselection documents, if any, or in the solicitation documents.

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

(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 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.

(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 pre-qualification or preselection documents, if any, and in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms and standardized conditions, where available, in formulating the terms and conditions of the procurement and the procurement contract or the framework agreement to be entered into in the procurement proceedings, and in formulating other relevant aspects of the pre-qualification or preselection 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 characteristics of goods or construction and the environmental characteristics of the subject matter, 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 46, 48 and 49, the 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.
- (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;
  - (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. The margin of preference shall be calculated in accordance with the procurement regulations.
- (5) The procuring entity shall set out in the solicitation documents:
  - (a) Whether the successful submission will be ascertained on the basis of price or of price and other criteria;
  - (b) All evaluation criteria established pursuant to this article, including the price and any margin of preference;
  - (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 48, in which case the procuring entity shall list all evaluation criteria in descending order of importance;
  - (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

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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**

- (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 its obligations under this Law.
- (2) In estimating the value of procurement, the procuring entity shall include the estimated maximum total value of the procurement contract or of all procurement contracts envisaged under a framework agreement over its entire duration, taking into account all forms of remuneration.

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

- (1) The pre-qualification or preselection 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 the circumstances referred to in article 32 (4) of this Law).
  - (2) Applications to pre-qualify or for preselection, if any, and submissions may be formulated and presented in the language of the pre-qualification or preselection documents, if any, and solicitation documents, respectively, or in any other language permitted by those documents.
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