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Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement*

Note by the Secretariat

Addendum

This addendum sets out a proposal for the Guide text to accompany related provisions of chapters II, IV and V of the UNCITRAL Model Law on Public Procurement on request for proposals without negotiation and request for proposals with consecutive negotiations.

* This document was submitted less than ten weeks before the opening of the session because of the need to complete inter-session informal consultations on the relevant provisions of the draft revised Guide to Enactment.



GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

Part II. Article-by-article commentary

[for ease of reference, this addendum consolidates the proposed article-by-article commentary to various provisions of the Model Law regulating request for proposals without negotiation and request for proposals with consecutive negotiations]

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A. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals without negotiation

1. Conditions for use

The relevant provision of the revised Model Law on conditions for use:

“Article 28. Conditions for use of methods of procurement under chapter IV of this Law (... request for proposals without negotiation)

(3) The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article 46 of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposals.”

Proposed text for the Guide:

1. Paragraph (3) provides for the conditions for use of request for proposals without negotiation, a procurement method that may be used where the procuring entity (a) wishes to express its needs in a functional or output-based manner¹ and (b) needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of their quality and technical aspects. This approach is appropriate where the procuring entity does not wish to be influenced by the financial aspects of proposals when it examines and evaluates their quality and technical aspects, and the words “needs to” in the provisions are intended to convey that there is an objective and demonstrable need for the

¹ The guidance to articles 26 and 27 (on choice of procurement methods) will explain that procurement through request for proposals methods can be distinguished from tendering proceedings in that the needs of the procuring entity in request for proposals methods are set out in terms of reference that, as a general rule, focus on the functional aspects of what is to be procured. This type of presentation of the procuring entity’s needs can also be described as an output-based description. In tendering proceedings, on the other hand, the description of the needs of the procuring entity includes technical specifications and is based on a single, defined technical solution (also termed an input-based description).

procuring entity to follow this sequential examination and evaluation procedure. These circumstances may arise, for example, where the procuring entity wishes to consider whether a particular technical solution will work, or to assess the quality of key personnel. Only if the technical proposal fully responds to the terms of reference in the request for proposals will the procuring entity continue to consider the price of the proposal concerned. The method is therefore suitable for procurement of items or services of a relatively standard nature, where all aspects of the proposals can be evaluated without resort to discussions, dialogue or negotiations with suppliers.

2. The procurement method covered by the paragraph is therefore not appropriate in procurement where price is the only award criterion or one of the main award criteria, or where a complete evaluation would not be possible without evaluating price and non-price criteria together.² In such circumstances, a tendering procurement method that focuses on the price, and which does not provide for a sequential examination and evaluation of quality and technical aspects and of financial aspects, would be appropriate. The procuring entity may find that a tendering-based procurement method is also more appropriate where it has many technical requirements. The method is also not appropriate where there is a need to negotiate on any aspects of proposals (be they quality, technical or financial) since the method, like tendering, does not allow for dialogue or negotiations (for the types of procurement in which dialogue or negotiations may be appropriate and necessary, see the guidance to request for proposals with dialogue and with consecutive negotiations, at [...] below).

3. In practical terms, the technical and quality proposals will be submitted in one envelope (or its electronic equivalent), and they will require manual evaluation by suitably qualified individuals. For those proposals that respond to the terms of reference, a second envelope (or electronic equivalent) containing the financial aspects of the proposal concerned is opened. The term “financial aspects” in this context means that the envelope will contain all the commercial aspects of the proposals that cannot be set out in the terms of reference (which might include warranties, guarantees, insurance and so forth) as well as the final price.³ These aspects may be susceptible to automated evaluation.

4. [In tendering proceedings, the procuring entity may seek clarification of tenders in order to assist in the examination and evaluation procedure and envisages that minor deviations that do not affect the substance of the tender can be accepted (see article 42(1) and (2)). It may be considered that the need for such a facility may be lesser in the context of request for proposals proceedings as proposals respond to terms of reference rather than to technical specifications. Nonetheless, enacting States may wish to include provisions equivalent to those in article 42, with the accompanying safeguards.]⁴

² The Working Group may wish to give examples of procurement of this type.

³ During expert consultations, it was suggested that the term “financial aspects” used in the text might be inaccurate in the light of the experts’ understanding of the scope of the items concerned; and that a suitable alternative term might be “price-related aspects”. The Working Group may wish to consider this suggestion.

⁴ The Working Group may wish to consider whether such a provision could alternatively be included in article 46 itself and in other appropriate procurement methods (or as a general provision, in which case it may also be applied to pre-qualification and qualification).

5. Under the Model Law, request for proposals without negotiation is available, subject to its conditions for use, for all types of procurement, in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 27 (2) of the Model Law; for the relevant guidance, see paragraphs ... above). Enacting States should be aware nevertheless that some multilateral development banks recommend, where procurement methods sharing the features of request for proposals without negotiation as provided for in the revised Model Law are to be used, that they be used for the procurement of well-defined services that are neither complex nor costly, such as the development of curricula, that are usually outsourced because procuring entities generally lack the internal capacity to undertake this type of work. Some multilateral development banks may not authorize the use of this method in other circumstances, at least as regards projects financed by them.

6. The procedures for the use of request for proposals without negotiation, including the submission of the envelopes as described above, are set out in article 46; they mirror the transparency and competition mechanisms of open tendering, save that (as further explained below), the procuring entity may engage in direct solicitation in defined circumstances. For further guidance on those procedural aspects, see paragraphs [...] below.

For a discussion of the changes in conditions for use from the 1994 text, see section A.4 below.

2. Solicitation

The relevant provision of the revised Model Law on solicitation:

“Article 34. Solicitation in request for proposals proceedings

(1) An invitation to participate in the request for proposals proceedings shall be published in accordance with article 32 (1) and (2), except where:

(a) The procuring entity engages in pre-qualification proceedings in accordance with article 17 of this Law or in pre-selection proceedings in accordance with article 48 (3) of this Law; or

(b) The procuring entity engages in direct solicitation under the conditions set out in paragraph (2) of this article; or

(c) The procuring entity decides not to cause the invitation to be published in accordance with article 32 (2) of this Law in the circumstances referred to in article 32 (4) of this Law.

(2) The procuring entity may engage in direct solicitation in request for proposals proceedings if:

(a) The subject matter to be procured is available only from a limited number of suppliers or contractors, provided that the procuring entity solicits proposals from all those suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter to be

procured, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) The procurement involves classified information, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

(3) The procuring entity shall include in the record required under article 24 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings.

(4) The procuring entity shall cause a notice of the procurement to be published in accordance with the requirements set out in article 33 (5) where it engages in direct solicitation in request for proposals proceedings.”

Proposed text for the Guide:

1. The article regulates solicitation in request for proposals proceedings. The Model Law provides for three types of request for proposals proceedings: request for proposals without negotiation; request for proposals with dialogue; and request for proposals with consecutive negotiations. The article applies to all three types of request for proposals proceedings. It provides for various solicitation options that the procuring entity may choose, depending on the circumstances of the given procurement.

2. In line with the objectives of the Model Law of fostering and encouraging participation in procurement proceedings by suppliers and contractors and promoting competition among them, paragraph (1) of this article sets out a requirement for open international solicitation as the default rule. The provisions contained in that paragraph are aimed at ensuring that as many suppliers and contractors as possible are made aware of the procurement proceedings and are able to express their interest in participating. As is also the case in tendering proceedings, this objective is fulfilled by providing that an invitation to participate in the request for proposals proceedings should be publicized widely as prescribed in the paragraph.

3. Where request for proposals proceedings are preceded by pre-qualification proceedings, solicitation is subject to separate regulation under article 17, the provisions of which also require international solicitation in the same manner as is required in article 32. Further guidance is set out in the commentary to the guidance to those articles. After the pre-qualification proceedings have been completed, the request for proposals must be provided to all pre-qualified suppliers. Similarly, when pre-selection proceedings are used in request for proposals with dialogue proceedings under article 48 (3), special rules apply: the request for proposals is to be preceded by an open invitation to pre-selection, and following the pre-selection proceedings, the request for proposals is issued to all pre-selected suppliers or contractors. As is the case with pre-qualification, wide international outreach, except in the cases referred to in article 32 (4), is ensured in pre-selection proceedings through the application of article 17 (2).

4. As is also the case in tendering proceedings, there are exceptions to the default rule requiring international solicitation. They are contained in paragraphs (1) (b) and (c) of the article. The exceptions set out in paragraph (1) (c) mirror those contained in article 32: that is, for domestic and low-value procurement as described in

article 32 (4). Given the similarity between these provisions, the considerations raised in this Guide as regards article 32 should be taken into account in enacting this paragraph (see paragraphs ... above). The exception set out in paragraph (1) (b) is not found in article 32 since it is relevant only in the request for proposals proceedings where there may be choice between open and direct solicitation.

5. Recognizing that in certain instances, the requirement of open solicitation might be unwarranted or might defeat the objectives of economy and efficiency, paragraph (2) of this article sets out those cases where the procuring entity may engage in direct solicitation in request for proposals proceedings (without pre-qualification or pre-selection). Subparagraphs (a) and (b) generally track the circumstances that may justify direct solicitation in restricted tendering (under article 28 (1)), and the considerations raised in this Guide as regards article 28 (1) are thus relevant in the context of paragraphs (2) (a) and (b). (For the guidance on article 28 (1), see paragraphs ... above.) Subparagraph (c) sets out a distinct ground that may justify recourse to direct solicitation in request for proposals proceedings — procurement involving classified information. In such cases, the procuring entity must solicit proposals from a sufficient number of suppliers or contractors to ensure effective competition.

6. In deciding whether or not to engage in direct solicitation, the procuring entity should give consideration as to whether it is authorized to reject any unsolicited proposals or as to the manner in which it would consider any such proposals. The discussions on this point in this Guide as regards article 33 are also relevant in this context (see paragraphs ... above).

7. Because direct solicitation impedes the objectives of the Model Law of fostering and encouraging open participation in procurement proceedings by suppliers and contractors and promoting competition among them, paragraphs (3) and (4) are included to provide for more transparency and accountability when direct solicitation is used. Paragraph (3) requires the procuring entity including in the record of procurement proceedings a statement of the reasons and circumstances upon which it relied to justify the use of direct solicitation in request for proposals proceedings. Paragraph (4) requires the procuring entity, where it engages in direct solicitation in request for proposals proceedings, to cause a notice of the procurement to be published in accordance with the requirements set out in article 33 (5) (unless classified information would thereby be compromised) (for the guidance on article 33 (5), see paragraphs ... above). Both measures intend to facilitate a possible challenge by affected suppliers or contractors to the use and manner of use by the procuring entity of direct as opposed to open solicitation.

For a discussion of the changes as regards solicitation from the 1994 text, see section A.4 below.

3. Procedures

The relevant provision of the revised Model Law on procedures:

“Article 46. Request for proposals without negotiation

(1) The procuring entity shall solicit proposals by causing an invitation to participate in the request for proposals without negotiation proceedings to be published in accordance with article 34 (1) of this Law, unless an exception provided for in that article applies.

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- (2) The invitation shall include:
- (a) The name and address of the procuring entity;
 - (b) A description of the subject matter of the procurement, and the desired or required time and location for the provision of such subject matter;
 - (c) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
 - (d) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article 9 of this Law;
 - (e) The criteria and procedures for opening the proposals and for examining and evaluating the proposals in accordance with articles 10 and 11 of this Law, including the minimum requirements with respect to technical and quality characteristics that proposals must meet in order to be considered responsive in accordance with article 10 of this Law, and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;
 - (f) A declaration pursuant to article 8 of this Law;
 - (g) The means of obtaining the request for proposals and the place where it may be obtained;
 - (h) The price, if any, charged by the procuring entity for the request for proposals;
 - (i) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals;
 - (j) The language or languages in which the requests for proposals are available;
 - (k) The manner, place and deadline for presenting proposals.
- (3) The procuring entity shall issue the request for proposals:
- (a) Where an invitation to participate in the request for proposals without negotiation proceedings has been published in accordance with the provisions of article 34 (1) of this Law, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;
 - (b) In the case of pre-qualification, to each supplier or contractor pre-qualified in accordance with article 17 of this Law;
 - (c) In the case of direct solicitation under article 34 (2) of this Law, to each supplier or contractor selected by the procuring entity; and that pays the price, if any, charged for the request for proposals. The price that the procuring entity may charge for the request for proposals shall reflect only the cost of providing it to suppliers or contractors.

(4) The request for proposals shall include, in addition to the information referred to in paragraphs (2) (a) to (e) and (k) of this article, the following information:

(a) Instructions for preparing and presenting proposals, including instructions to suppliers or contractors to present simultaneously to the procuring entity proposals in two envelopes: one envelope containing the technical and quality characteristics of the proposal and the other envelope containing the financial aspects of the proposal;

(b) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;

(c) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(d) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(e) The means by which, pursuant to article 15 of this Law, suppliers or contractors may seek clarifications of the request for proposals, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(f) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(g) 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;

(h) Notice of the right provided under article 63 of this Law to challenge or appeal decisions or actions taken by the procuring entity that are allegedly not in compliance with the provisions of this Law, together with information about the duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(i) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by another authority and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;

(j) 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 presentation of proposals and to the procurement proceedings.

(5) Before opening the envelopes containing the financial aspects of the proposals, the procuring entity shall examine and evaluate the technical and quality characteristics of proposals in accordance with the criteria and procedures specified in the request for proposals.

(6) The results of the examination and evaluation of the technical and quality characteristics of the proposals shall be immediately included in the record of the procurement proceedings.

(7) The proposals whose technical and quality characteristics fail to meet the relevant minimum requirements shall be considered to be non-responsive and shall be rejected on that ground. A notice of rejection and the reasons for the rejection, together with the unopened envelope containing the financial aspects of the proposal, shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

(8) The proposals whose technical and quality characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall promptly communicate to each supplier or contractor presenting such a proposal the score of the technical and quality characteristics of its respective proposal. The procuring entity shall invite all such suppliers or contractors to the opening of the envelopes containing the financial aspects of their proposals.

(9) The score of the technical and quality characteristics of each responsive proposal and the corresponding financial aspect of that proposal shall be read out in the presence of the suppliers or contractors invited in accordance with paragraph (8) of this article to the opening of the envelopes containing the financial aspects of the proposals.

(10) The procuring entity shall compare the financial aspects of the responsive proposals and on that basis identify the successful proposal in accordance with the criteria and the procedure set out in the request for proposals. The successful proposal shall be the proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price.”

Proposed text for the Guide:

1. The article regulates the procedures for procurement using request for proposals without negotiations. Paragraph (1), by cross-referring to article 34, reiterates the default rule contained in article 34 (1) of the Model Law that an invitation to participate in the proceedings must, as a general rule, be publicized as widely as possible, so as to ensure wide participation and competition. Solicitation may be preceded by pre-qualification. The exceptions to the open solicitation rule and the guidance on solicitation procedures following pre-qualification are provided for in article 34. (For the guidance to article 34, see paragraphs ... above.)

2. When open solicitation without pre-qualification is involved, an invitation to participate in the request for proposals without negotiation proceedings is issued,

which must include the minimum information listed in paragraph (2). Providing that minimum information is designed to assist suppliers or contractors in determining whether they are interested and eligible to participate and, if so, how they can participate. The relevant requirements are similar to those applicable to an invitation to tender (article 36) and an invitation to participate in request for proposals with dialogue proceedings (article 48 (2)). They contain the required minimum and do not preclude the procuring entity from including additional information that it considers appropriate. The procuring entity should take into account that it is usual practice to keep the invitation brief and include therein the most essential information about procurement, which is most pertinent to the initial stage of the procurement proceedings. All other information about the procurement, including elaboration of the information contained in the invitation, is included in the request for proposals (see paragraph (4) of this article). This approach helps to avoid repetition, possible inconsistencies and confusion in the content of the documents issued by the procuring entity to suppliers or contractors. Nonetheless, where the procuring entity uses electronic means of advertisement and communication, it is possible to include in the invitation a web link to the terms of the request for proposals itself: this approach is proving beneficial in terms of both efficiency and transparency.

3. The procuring entity may omit information about the currency of payment and on applicable languages referred to in subparagraphs (i) and (j) in domestic procurement, if it would be unnecessary in the circumstances; however, an indication of the language or languages may still be important in some multilingual countries even in the context of domestic procurement. Subparagraph (e) refers to the minimum requirements with respect to technical and quality characteristics that proposals must meet in order to be considered responsive. This provision covers both the threshold that is to be established for rejecting proposals and assigning scores to proposals that meet or exceed the proposals.

4. Paragraph (3) specifies the group of suppliers or contractors to which the request for proposals is to be issued. Depending on the circumstances of the given procurement, such suppliers may comprise the entire group of suppliers or contractors that respond to the invitation in accordance with the procedures and requirements specified therein; or if pre-qualification has been undertaken, only to those that were pre-qualified; or in the case of direct solicitation, only to those that are directly invited. The provisions contain a standard clause, found also in other provisions of the Model Law in similar context, that the price that may be charged for the request for proposals may reflect only the cost of providing the request for proposals to suppliers or contractors. (See the guidance to article [...] for a further discussion of this limitation.)

5. Paragraph (4) contains a list of the minimum information that should be included in request for proposals in order to assist the suppliers or contractors in preparing their proposals and to enable the procuring entity to compare the proposals on an equal basis. The list is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 38) and contents of request for proposals in request for proposals with dialogue proceedings (article 48 (5)). The differences reflect the procedural specifics of this procurement method, and are aimed at ensuring that the financial aspects of proposals are presented, although simultaneously, separately from quality and technical aspects of the proposals. As explained above, the

procuring entity will not have access to the financial aspects of proposals until after it has evaluated their technical and quality aspects. The procuring entity may omit information about currency of payment referred to in subparagraph (c) in domestic procurement, if it would be unnecessary in the circumstances.

6. Paragraphs (5) to (10) of the article regulate the sequential examination and evaluation procedure in this procurement method. They ensure that the procuring entity will not be influenced by the financial aspects of proposals when it evaluates quality and technical aspects of proposals and assigns scores to suppliers or contractors as a result of that evaluation. A number of provisions in those paragraphs are aimed at ensuring transparency and integrity in the process. Paragraphs (6) to (8), for example, contain requirements that the results of the evaluation of technical and quality aspects of the proposals are to be promptly reflected in the record of procurement proceedings and communicated to all suppliers or contractors that presented proposals. Special rules are designed for suppliers and contractors whose quality and technical aspects of proposals were rejected: they are to receive promptly not only information about the fact of rejection but also the reasons therefor, and the unopened envelopes containing financial aspects of their proposals are returned to them. These provisions are essential for the timely debriefing of, and effective challenge, by aggrieved suppliers. (For a fuller discussion of the benefits and procedures for debriefing, see [...].)

7. Paragraphs (8) and (9) allow the presence at the opening of the second envelopes (those containing the financial aspects of proposals) of suppliers or contractors whose proposals as regards quality and technical aspects of proposals met or exceeded the minimum requirements. They can thus verify the accuracy of the information announced by the procuring entity at the opening of second envelopes that is relevant to them, such as on the scores assigned and the financial aspects of their proposals, and can observe whether the successful proposal is identified in accordance with the criteria and the procedure set out in the request for proposals.

8. The Model Law regulates complex scenarios involving the separate evaluation of all aspects of proposals and combining the results of those evaluations in order to determine the successful proposal. Paragraph (10) therefore defines the successful proposal in this procurement method as the proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price.⁵ Enacting States should be aware however that in the procurement of simpler subject matter, the procuring entity may select the successful proposal on the basis of price alone. This approach may be appropriate in situations where the procuring entity does not need to evaluate quality and technical aspects of proposals and assign any scores but rather establishes a threshold by which to measure quality and technical aspects of proposals at such a high level that all the suppliers or contractors whose proposals attain a rating at or above the threshold can in all probability perform the procurement contract at a more or less equivalent level of competence. There should also be no need in such cases to

⁵ During expert consultations on the guidance to this article, it was suggested that the Working Group may wish to use the term “most advantageous proposal” for consistency with the term used in tendering, as this term (unlike the previous term “lowest evaluated tender”) no longer has an implicit emphasis on price.

evaluate any financial aspects of proposals other than price. Such procedures are compatible with the Model Law on the condition that the procedures and all criteria involved are set out in the solicitation documents and are applied accordingly.

For a discussion of the changes in the procedures from the 1994 text, see section A.4 immediately below.

4. Points regarding request for proposals without negotiation proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law

Conditions for use

9. Request for proposals without negotiation is a new procurement method that draws its features from the selection procedure without negotiation (article 42) of the 1994 Model Law. The 1994 Model Law provided for the selection procedure without negotiation in the context of procurement of services only. Under the revised Model Law, request for proposals without negotiation is not treated as a procurement method appropriate only for procurement of services, in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 27 (2) of the Model Law; for the relevant guidance, see paragraphs ... above).

[Details as regards solicitation and procedures to be added at a later date]

B. Proposed text for the Guide to Enactment of the revised Model Law addressing issues of request for proposals with consecutive negotiations

1. Conditions for use

The relevant provision of the revised Model Law on conditions for use:

“Article 29. Conditions for use of methods of procurement under chapter V of this Law (... request for proposals with consecutive negotiations, ...)

(3) A procuring entity may engage in procurement by means of request for proposals with consecutive negotiations in accordance with article 49 of this Law where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposals, and it assesses that consecutive negotiations with suppliers or contractors are needed in order to ensure that the financial terms and conditions of the procurement contract are acceptable to the procuring entity.”

Proposed text for the Guide:

1. Paragraph (3) sets out conditions for use of request for proposals with consecutive negotiations. The conditions for use and procedures of this method resemble those of the request for proposals without negotiation referred to in article 28 (3) of the Model Law. Like the request for proposals without negotiation procedure, it has proved to be beneficial where quality and technical characteristics

may be the main priority and where the procuring entity needs to consider the financial aspects of proposals separately and only after completion of examination and evaluation of the quality and technical aspects of the proposals (i.e. so that the procuring entity is not influenced by the financial aspects when it examines and evaluates quality and technical aspects of proposals). The words “needs to” in the provisions intend to convey that there is an objective and demonstrable need for the procuring entity to follow this sequential examination and evaluation procedure. Thus, like the request for proposals without negotiation, this procurement method is appropriate for use only where the examination and evaluation of quality and technical aspects of the proposals separately from consideration of financial aspects of proposals is possible and needed.

2. The difference of this procurement method from the request for proposals without negotiation is in the need to hold negotiations on the financial aspects of the proposals, reflecting that it is appropriate for the procurement of goods or services that are designed for the procuring entity, rather than for procurement of subject matter of a fairly standard nature. The request for proposals with consecutive negotiations procedure is thus appropriate for use in the procurement of more complex subject matter, such as intellectual services, where holding negotiations on commercial or financial aspects of proposals is indispensable — there may be so many variables in these aspects of proposals that they cannot be all foreseen and specified at the outset of the procurement and must be refined and agreed upon during negotiations.

3. All stages in this procurement method preceding the stage of negotiations are the same as in the request for proposals without negotiation: the procuring entity sets a threshold on the basis of the quality and technical aspects of the proposals, and then ranks those proposals that are rated at and above the threshold, ensuring that the suppliers or contractors with whom it will negotiate are capable of providing the required subject matter of the procurement. The procuring entity then holds negotiations on financial aspects of the proposals first with the supplier or contractor that was ranked highest; if negotiations with that supplier are terminated, the procuring entity holds negotiations with the next highest-ranked supplier and so on, to the extent necessary, until it concludes a procurement contract with one of them. These negotiations are aimed at ensuring that the procuring entity obtains fair and reasonable financial proposals. The format of consecutive, as opposed to concurrent or simultaneous, negotiations has proved to be the most appropriate in the context of this procurement method in the light of the scope of negotiations covering exclusively financial or commercial aspects of the proposals. When the need exists to negotiate on other aspects of proposals, this procurement method cannot be used. (For the guidance on article 49 regulating procedural aspects of this procurement method, see paragraphs ... below).

4. Request for proposals with consecutive negotiations is not reserved exclusively for the procurement of services. This approach is in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 27 (2)) (for the relevant guidance, see paragraphs ... above). Enacting States should be aware, nevertheless, that some multilateral development banks recommend the use of the procurement method with features of the request for proposals with consecutive negotiations as provided for in the Model Law for

the procurement of advisory services (i.e. those with an intellectual output). The method has traditionally been widely used in such type of procurement. Such banks may not authorize the use of this method in other circumstances, at least as regards projects financed by them.

For a discussion of the changes in conditions for use from the 1994 text, see section B.4 below.

2. Solicitation

[Please see in the guidance on RfP without negotiation]

3. Procedures

The relevant provision of the revised Model Law on procedures:

“Article 49. Request for proposals with consecutive negotiations

(1) The provisions of article 46 (1)-(7) of this Law shall apply mutatis mutandis to procurement conducted by means of request for proposals with consecutive negotiations, except to the extent those provisions are derogated from in this article.

(2) The proposals whose technical and quality characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall rank each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals, and shall:

(a) Promptly communicate to each supplier or contractor presenting the responsive proposal the score of the technical and quality characteristics of its respective proposal and its ranking;

(b) Invite the supplier or contractor that has attained the best ranking in accordance with those criteria and procedure for negotiations on the financial aspects of its proposal; and

(c) Inform other suppliers or contractors that presented responsive proposals that they may be considered for negotiation if the negotiations with the suppliers or contractors with a better ranking do not result in a procurement contract.

(3) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (2) (b) of this article will not result in a procurement contract, the procuring entity shall inform that supplier or contractor that it is terminating the negotiations.

(4) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best ranking; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors still participating in the procurement proceedings for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

(5) During the course of the negotiations, the procuring entity shall not modify the subject matter of the procurement, nor any qualification,

examination or evaluation criterion, including any established minimum requirements, nor any elements of the description of the subject matter of the procurement or term or condition of the procurement contract other than financial aspects of proposals that are subject to the negotiations as notified in the request for proposals.

(6) The procuring entity may not reopen negotiations with any supplier or contractor with which it has terminated negotiations.”

Proposed text for the Guide:

1. The article regulates request for proposals with consecutive negotiations procedures. All stages in this procurement method preceding the stage of negotiations are the same as in request for proposals without negotiation. Paragraph (1) therefore makes reference to the applicable provisions of article 46. The guidance to those provisions therefore applies also to this article (see paragraphs ... above).⁶

2. Paragraphs (2) to (6) regulate the distinct procedures of this procurement method. Paragraph (2) addresses issues of ranking and the invitation to consecutive negotiations. The reference in paragraph (2) (b) to “financial aspects of proposals”⁷ intends to exclude any quality, technical and other aspects of proposals that have been considered as part of the examination and evaluation of quality and technical characteristics of proposals.

3. Paragraphs (3) and (6) refer to the notion of “termination of negotiations”. This notion means the rejection of a supplier’s final financial proposal and the consequent exclusion of that supplier from further participation in the procurement proceedings. Thus, no procurement contract can be awarded to the supplier(s) with which the negotiations have been terminated as provided for in paragraphs (3) and (4). This feature may be considered rigid and it may be considered to defeat the efficacy of the procedure. Only at the end of a process of negotiation with all suppliers may the procuring entity know which proposal in fact constitutes the best offer; that offer however may have been rejected as a result of the termination of negotiation with the supplier or contractor submitting it. In addition, the procedure does not necessarily ensure a strong bargaining position on the part of the procuring entity since the highest-ranked supplier, knowing its preferred status, may have little incentives to negotiate, particularly as regards price. The benefit of leverage that may be present in concurrent negotiations is not present here.

4. UNCITRAL has nevertheless decided to include this feature of this procurement method in order to emphasize competition on quality and technical aspects of proposals. When the procurement method is used in appropriate circumstances, this distinct feature of the procurement method may impose discipline on both suppliers and procuring entities to negotiate in good faith. The first-ranking supplier faces a risk that negotiations with the procuring entity may be terminated at any time, leading to the permanent exclusion of the supplier from the procurement proceedings. That supplier may also consider that

⁶ See, also, footnote 4 above as regards the use of a clarification procedure in this procurement method.

⁷ See footnote 3 above, as regards the use of this term.

negotiations with the lower-ranked suppliers are more likely to succeed since such suppliers will have an incentive to improve their position to win, and it is in the interest of the procuring entity to have the procurement contract in the end of the process. Thus the highest-ranked supplier will be under some pressure to negotiate while the procuring entity, facing the risk of rejecting the best technical proposal, will exercise restraint in putting an excessive focus on the financial aspects of proposals at the expense of quality and technical considerations. Fixing a period for the negotiations in the solicitation documents may be considered another effective discipline measure on both sides in negotiations.

5. Whether the procuring entity is willing to compromise on quality and technical considerations by terminating negotiation with a better-ranked supplier and beginning negotiations with the next ranked supplier will very much depend on the circumstances of procurement, in particular the results of the examination and evaluation of the quality and technical aspects of proposals. The extent of the gap between the proposals of various suppliers may vary widely, and the procuring entity's strategies in negotiations must be adjusted accordingly. The procuring entity can always cancel the procurement if it faces unacceptable proposals.

4. Points regarding request for proposals with consecutive negotiations proposed to be discussed in the Section of the Guide to Enactment addressing changes from the 1994 text of the Model Law

Conditions for use

1. Request for proposals with consecutive negotiations is a procurement method that draws its features from the selection procedure with consecutive negotiations of the 1994 Model Law (article 44). Unlike its equivalent in the 1994 text, the procurement method in the revised text is not reserved exclusively for procurement of services. This approach is in conformity with the UNCITRAL decision not to base the selection of procurement method on whether it is goods, works or services that are procured but rather in order to accommodate the circumstances of the given procurement and to maximize competition to the extent practicable (article 27 (2)) (for the relevant guidance, see paragraphs ... above).

[Details as regards solicitation and procedures to be added at a later date]