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Note by the Secretariat

Addendum

This note sets out a proposal for chapter V of the revised Model Law (Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement), comprising articles 47-51.



Chapter V. Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement

Article 47. Two-stage tendering

- (1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings, except to the extent those provisions are derogated from in this article.
- (2) The solicitation documents shall call upon suppliers or contractors to present, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.
- (3) The procuring entity may, in the first stage, engage in discussions with suppliers or contractors whose tenders have not been rejected pursuant to provisions of this Law, concerning any aspect of their tenders. When the procuring entity engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors.
- (4) (a) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite all suppliers or contractors whose tenders were not rejected at the first stage to present final tenders with prices in response to a revised set of terms and conditions for the procurement;
- (b) In revising the relevant terms and conditions of the procurement, the procuring entity may:
- (i) Delete or modify any aspect of the technical or quality characteristics of the subject matter of the procurement initially provided, and may add any new characteristic that conforms to the requirements of this Law;
 - (ii) Delete or modify any criterion for examining or evaluating tenders initially provided, and may add any new criterion that conforms to the requirements of this Law, to the extent only that the deletion or modification is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement;
- (c) Any deletion, modification or addition made pursuant to subparagraph (b) of this paragraph shall be communicated to suppliers or contractors in the invitation to present final tenders;
- (d) A supplier or contractor not wishing to present a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide;
- (e) The final tenders shall be evaluated in order to ascertain the successful tender as defined in article 42 (4) (b) of this Law.

Article 48. Request for proposals with dialogue

(1) The procuring entity shall solicit proposals by causing an invitation to participate in the request for proposals with dialogue proceedings to be published in accordance with article 34 (1) of this Law, unless an exception provided for in that article applies.

(2) The invitation shall include:

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

(b) A description of the subject matter of the procurement to the extent known, 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 that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(d) The intended stages of the procedure;

(e) 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;

(f) The minimum requirements 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;

(g) A declaration pursuant to article 8 of this Law;

(h) The means of obtaining the request for proposals and the place where it may be obtained;

(i) The price, if any, charged by the procuring entity for the request for proposals;

(j) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals;

(k) The language or languages in which the requests for proposals are available;

(l) The manner, place and deadline for presenting proposals.

(3) For the purpose of limiting the number of suppliers or contractors from which to request proposals, the procuring entity may engage in preselection proceedings. The provisions of article 17 of this Law shall apply mutatis mutandis to the preselection proceedings, except to the extent that those provisions are derogated from in this paragraph:

(a) The procuring entity shall specify in the preselection documents that it will request proposals only from a limited number of preselected suppliers or contractors that best meet the qualification criteria specified in the preselection documents;

(b) The preselection documents shall set out the maximum number of pre selected suppliers or contractors from which the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing such a number the procuring entity shall bear in mind the need to ensure the effective competition;

(c) The procuring entity shall rate the suppliers or contractors that meet the criteria specified in the preselection documents according to the manner of rating that is set out in the invitation to preselection and the preselection documents.

(d) The procuring entity shall preselect suppliers or contractors that acquired the best rating up to the maximum number indicated in the preselection documents but at least three if possible;

(e) The procuring entity shall promptly notify each supplier or contractor whether or not it has been preselected and shall upon request communicate to suppliers or contractors that have not been preselected the reasons therefor. It shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been preselected.

(4) The procuring entity shall issue the request for proposals:

(a) Where an invitation to participate in the request for proposals with dialogue 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) Where preselection proceedings have been engaged in, to each preselected supplier or contractor in accordance with the procedures and requirements specified in the preselection documents;

(d) In the case of direct solicitation under article 34 (2) of this Law, to each supplier or contractor selected by the procuring entity;

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.

(5) The request for proposals shall include, in addition to the information referred to in paragraphs (2) (a) to (f) and (1) of this article, the following information:

(a) Instructions for preparing and presenting proposals;

(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) Any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that will not be the subject of dialogue during the procedure;

(g) Where the procuring entity intends to limit the number of suppliers or contractors that it will invite to participate in the dialogue, the minimum number of suppliers or contractors, which shall be not lower than three, if possible, and, where appropriate, the maximum number and the criteria and procedure, in conformity with the provisions of this Law, that will be followed in selecting it;

(h) The criteria and procedure for evaluating the proposals in accordance with article 11 of this Law;

(i) 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;

(j) 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;

(k) 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;

(l) 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;

(m) 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.

(6) (a) The procuring entity shall examine all proposals received against the established minimum requirements and shall reject each proposal that fails to meet these minimum requirements on the ground that it is non-responsive;

(b) Where the limitation on the number of suppliers or contractors that can be invited to participate in the dialogue was established and the number of

responsive proposals exceeds that maximum, the procuring entity shall select the maximum number of responsive proposals in accordance with the criteria and procedure specified in the request for proposals;

(c) A notice of rejection and the reasons for the rejection shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

(7) The procuring entity shall invite each supplier or contractor that presented a responsive proposal, within any applicable maximum, to participate in dialogue. The procuring entity shall ensure that the number of suppliers invited to participate in the dialogue is sufficient to ensure effective competition, and shall be at least three, if possible.

(8) The dialogue shall be conducted by the same representatives of the procuring entity on a concurrent basis.

(9) During the course of the dialogue, the procuring entity shall not modify the subject matter of the procurement, nor any qualification or evaluation criterion, nor any minimum requirements established pursuant to paragraph (2) (f) of this article, nor any elements of the description of the subject matter of the procurement or term or condition of the procurement contract that is not subject to the dialogue as notified in the request for proposals.

(10) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that are communicated by the procuring entity to a supplier or contractor shall be communicated at the same time on an equal basis to all other participating suppliers or contractors, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article 23 of this Law.

(11) Following the dialogue, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing, and shall specify the manner, place and deadline for presenting best and final offers.

(12) No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.

(13) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

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.

Article 50. Competitive negotiations

(1) Paragraphs (3), (5) and (6) of article 33 of this Law shall apply to the procedure preceding the negotiations.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor before or during the negotiations shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article 23 of this Law.

- (3) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present, by a specified date, a best and final offer with respect to all aspects of their proposals.
- (4) No negotiations shall take place between the procuring entity and suppliers or contractors with respect to their best and final offers.
- (5) The successful offer shall be the offer that best meets the needs of the procuring entity.

Article 51. Single-source procurement

Paragraphs (4) to (6) of article 33 of this Law shall apply to the procedure preceding the solicitation of a proposal or price quotation from a single supplier or contractor. The procuring entity shall engage in negotiations with the supplier or contractor from which a proposal or price quotation is solicited unless such negotiations are not feasible in the circumstances of the procurement concerned.
