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Finalization and adoption of the UNCITRAL Model Law on Public Procurement

Compilation of comments by Governments and international organizations on the draft Model Law on Public Procurement

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II. Comments received from Governments and international organizations

A. Comments received from Governments

Austria

[Original: English]

[21 April 2011]

The Republic of Austria would like to submit the following observations as regards the Draft Text of the Model Law on Procurement (A/CN.9/729 and addenda):

The Republic of Austria would like to point out, that — as a starting point — the text of the Model Law should contain all relevant provisions (and information) about a procurement process. The text should therefore be “self-explaining”; especially there should be (basically) no need to consult the Guide to Enactment (GtE) to understand the provisions of the Model Law (ML). In some places essential information about the application of the ML can only be found in the GtE (for example: art. 28, para. 3, and art. 29, para. 3, have the same conditions for use for two different procedures; the essential information concerning the difference can only be found in the GtE see Add.6, page 13). It is proposed that the text itself should contain all relevant information.

In the Preamble (see lit d) the term “equitable” is used. It is proposed that the term should be changed to “equal”. In the international context, the term “equal treatment” is well known. For example the European Court of Justice (ECJ) emphasizes that this principle requires “*that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified*” (see Case C-21703, Fabricom, para. 27, Case C-434/02, Arnold André, para. 68, and the case law cited there, and Case C-210/03, Swedish Match, para. 70, and the case law cited there). In this context it should be mentioned, that the example given in the draft GtE (see Add.1, para. 30) is not pertinent, because different situations are compared (paper based and electronic based communication). Furthermore the use of a different terminology (equitable — equal) rises the question what the difference between those terms would be.

The term “preselection” used in article 2 (b) (and elsewhere in the ML) is not defined. A definition should be considered. Accordingly article 33 should contain a provision how the preselection should take place (especially ensuring transparency and non-discrimination).

In article 2 (e) it should read “… means a <u>procedure</u> conducted …” (see for example art. 2 (e) (iv)).

In article 5, paragraph 1, the introductory part (“Except as provided for in paragraph (2)”) is misleading because there is no exception to public availability foreseen in paragraph 2.

A reference to article 8, paragraph 1, should be introduced in article 8, paragraph 2, to make clear that the exception must be spelled out in the laws of the Enacting State (and which should be an exception and not the general rule).

In article 8, paragraph 5 (and art. 17, para. 9, art. 48, para. 3 (e)), the term “any member of the public” and “general public” respectively could also be interpreted to include “members of the public in third countries”. It is suggested that “public availability” — for example via Internet — is sufficient. Furthermore the question should be avoided what the difference between “the public” and “the general public” might be (terminology should be aligned).

In article 9, paragraph 2 (e), the term “in this State” should be clarified. So far it would cover only the State where the procurement takes place. In the context of cross border participation this obligation would have no effect. It is suggested that the term reads “in their country of residence”.

In article 9, paragraph 8 (b), the term “may” indicates a margin of discretion of the procuring entity. It is questioned if this margin can be justified in these circumstances and if the term should not read “shall”.

In article 10, paragraph 1, it should read “detailed description of the subject matter” instead of “the description of the subject matter” (see already the wording of art. 29, para. 2 (a)).

In article 10, paragraph 3, the term “including concerning” should be reconsidered.

In article 10, paragraph 4, it should read “the description” instead of “any description” (same in para. 5 (a)). Furthermore the term “characteristics” should be changed to “aspects” (as well as in para. 5 (a)) thus aligning the terminology already used in other places. Furthermore it seems that paragraph 4 would allow procuring entities to use references to specific production methods as well. It is suggested, that this should not be admissible and paragraph 4 should be amended accordingly. It has to be pointed out though, that even with this proposed (new) language, requirement for example of green energy would be possible (only the requirement to procure green electricity produced for example through hydroelectric generators would not be permissible).

Article 11, paragraph 2 (b), seems to be extremely broad. According to this provision the evaluation criteria may include “the characteristics of the subject matter of the procurement” (the term “cost” obviously only refers to the operation, maintenance and repair of goods a.s.o). What is meant by that? Would a reference to socio-economic criteria implementing the socio-economic policies (see art. 2 (m)) not suffice or be better?

In article 11, paragraph 3, the requirement that all non-price criteria shall (basically — “to the extent practical”) always be expressed in monetary terms (arg. “and”) seems burdensome. It is suggested to replace the term “and” by “and/or”.

In article 14, paragraph 1, a word (“in”) seems to be missing.

In article 14, paragraph 5, the following addition is suggested: “and shall be published in the same manner and place in which the original information regarding the invitation to prequalify or to preselect was published”.

In article 15, paragraph 1, third sentence, the term "as will" should read "as to" (same in art. 17, para. 6).

In article 16, paragraph 1 (c) (ii) seems to be superfluous because the introduction of (c) already contains a reference to (b) where domestic procurement is addressed.

In article 16, paragraph 1 (f) (i), the following drafting is proposed: "Withdrawal or modification of the submission before or after the deadline for presenting submissions, if so stipulated in the solicitation documents;".

The requirement to the conduct of the supplier may — according to article 16, paragraph 1 (f) (ii) — only relate to the failure to sign a procurement contract. It is unclear how to understand/interpret this provision.

As regards article 16, paragraph 2, the following question arises: what happens to the tender security in an article 21, paragraph 7 — situation or if a similar situation has not been taken account of (for example in the tender documents)?

In article 17, paragraph 3 (b), it is suggested to use the term "envisaged timetable" at the end of the indent.

In article 19, paragraph 1, the situation should be covered as well in which only the price is abnormally low. To clarify this the 2nd line should read "… that the price or the price in combination with …". It is furthermore suggested that paragraph 1 (c) should become paragraph 2 (new) and old paragraph 2 should become paragraph 3 (new). It seems sufficient to have (a) and (b) as preconditions for the rejection. If this suggestion would be accepted, the term "has" in paragraph 2 (new) should read "shall".

As regards article 20, paragraph 1 (a), it is suggested to introduce a "de minimis" — threshold. The current text could be interpreted that anything of any value (!!; in extremis: a pen with the value of less than 1 Euro) given to an officer/employee of the procuring entity might have the effect of excluding a supplier or contractor. Since in practice the intention with which a gratuity is presented ("so as to influence") normally cannot be proven, evidential circumstances play an important role. It might be sufficient to clarify this issue in the GtE.

It should be considered to define and/or elaborate on the term "unfair competitive advantage". It should be clarified that the term "provisions of this State" only relate to the aforementioned "conflict of interest".

In article 21, paragraph 10, it should be clarified that the mentioned "other suppliers or contractors" are those "suppliers or contractors who have previously participated in the procurement procedure" (but have been excluded previously; all other suppliers participating till the end of the procedure must be informed of the outcome in any way). It must also be clarified that in this case the stand-still obligation does not apply.

It needs to be pointed out, that in practice the danger will arise, that the consent to disclose the information to other persons/parties will be a requirement to participate in the procurement procedure. Therefore the "permission" in the solicitation documents (without any possible chance to prohibit the disclosure by the suppliers or contractors) in article 23, paragraph 3, is really problematic and should be deleted.

In article 24, paragraph 1 (r), it should read "a written procurement contract".

In article 24, paragraph 3, the situation of cancellation of a procedure should be taken into account as regards the disclosure of the record: in the third line (beginning) it should read "on request and if available". At the end of this paragraph the following should be added: "and subject to the conditions of such an order".

The relationship between article 24, paragraphs 2-4 (especially as regards the information according to para. 2 (s) and (t)) is unclear. According to paragraph 4, (for example) the procuring entity shall not disclose information relating to the examination and evaluation of submission and submission prices, but the latter shall be disclosed on request to suppliers and contractors according to paragraph 3.

It is suggested to delete the brackets (and the words within) in article 29, paragraph 2, because this prior approval has been deleted (with the exception of art. 29, para. 5 (e)) throughout the text.

In article 31, paragraph 1 (a), the term "repeated" should be used instead of "indefinite".

It is proposed to delete the term "of the low value" in article 32, paragraph 4. This provision is misleading in the light of other "low value" provisions of the ML.

The information mentioned in article 38 (b) is partly already covered by article 36 (c).

In article 38 (v) the notice should also indicate the name and address of the authority in charge of challenge or appeal and provide for some information on deadlines (same goes for art. 46, para. 4 (h), art. 48, para. 5 (k), art. 52, para. 1 (t), and art. 61, para. 4 (b) (ix)).

Article 39, paragraph 2, introduction refers to a tender made in "writing". Paragraph 2 refers to other means of communication as well but nevertheless this term might be misunderstood as requiring at all times a paper based submission. This ambiguity is confirmed by the use in different provisions of a paper based terminology (term "envelopes" for example). The draft GtE clarifies the situation but a clear wording of the text would avoid misinterpretations (same goes for art. 58, para. 1, and art. 61, para. 4).

The proposal in footnote 4 of Add.6 of the draft GtE is supported (additional provision in art. 46 concerning clarification).

The text of article 47, paragraph 4 (b), could be construed to be interpreted in a way, that the procuring entity may fundamentally change the relevant terms and conditions/subject matter of the contract. This would be contrary to the basic principles of the ML. A legal "safeguard" should be introduced to prevent that something like that is happening.

The text of article 48, paragraph 9, should be clarified insofar as to make clear what can be amended throughout the dialogue. So far "the procuring entity shall not modify the subject matter of the procurement … nor any elements of the description of the subject matter … that is not subject to the dialogue" (same goes for para. 5). A definition of the term "dialogue" would be very welcome (especially to show the difference between a dialogue, a clarification, discussion and negotiations — see art. 23, para. 3, terminology).

In article 52, paragraph 1 (c), the term "the contract form, if any, to be signed" is creating confusion. If a contract is to be signed by the parties than it must be in writing (paper/electronic form).

In article 52, paragraph 2 (which is in brackets), a reference to footnote 1 should be added.

The text of article 53, paragraph 1 (a), should be aligned with the text of article 52, paragraph 1 (g).

Article 59, paragraphs 3 (b) and (c) seem to contain the same provision.

It should be checked, if a reference to article 8 should be added to article 57 (normally there is one, see for example art. 59, para. 3 (e) (i)).

In article 59, paragraph 3, a reference to the remedy system (see for example art. 61, para. 4 (ix)) is missing.

In article 62 the heading and the text suggest a difference. According to the heading "no material change" might take place, whereas in the text "no change … to the subject matter" is allowed at all.

In article 63, paragraph 1, the text refers to a non-compliance of a decision or action "with the provisions of this Law". The right of challenge or appeal will be based on the non-compliance with national legislation enacting provisions of the Model Law but not with the Model Law per se.

The publication requirement under article 65, paragraph 3 (introduction), seems to be unnecessary since only interested parties may challenge or appeal and other participants are to be notified under paragraphs 3 (b) and (c).

Article 65, paragraphs 3 (a) and (c), contain the possibility for the procuring entity to decide on the (further?) suspension which according to article 64, paragraph 1, is automatic insofar as the conclusion of the contract/framework is concerned. The current wording (see below remarks to art. 66, paragraph 6 (a)) should be clarified. Same goes for article 66, paragraphs 3 and 5, and article 66, paragraph 9, which should be made coherent with the new (clarified) wording.

The contents of footnote 7 to article 66 should be incorporated in the GtE and not in the Model Law.

In article 66, paragraph 5 (c) the term "insert" should be deleted in the square brackets.

As regards article 66, paragraph 6 (a), the question arises, if the deadlines and the finding that an application is "manifestly without merit" are not checked by the independent body at the outset (= when the application is submitted). In this case the situation may never arise, that after the order of suspension the independent body finds that the application is manifestly without merits or not presented within the deadlines according to the ML. Therefore the second situation envisaged in the introductory sentence of paragraph 6 "shall lift the suspension" may never arise. If this wording should connect to the "automatic suspension" according to article 64, paragraph 1, the term "lift the suspension" is inappropriate (because it was not ordered), instead the term "lapse" (see wording in art. 64, para. 2) or "cease" could be used.

As regards article 66, paragraph 8, the ML should take care of the situation, that the files may be very extensive. Therefore it is proposed to change the text as follows: “the procuring entity shall provide the … with all documents or grant access to all documents relating to the procurement proceedings ...”.

In article 66, paragraph 9, the reference to “a lawful decision” is questionable. The question if a decision of a procuring entity is lawful or not is decided ultimately by the court of last instance. Therefore the situation might arise that the independent body takes the view that a decision is lawful but it’s decision might subsequently be overturned by a court. In this context it is proposed to delete the term “lawful” and just to refer to the confirmation of “a decision by the procuring entity”.

The reference to “any governmental authority” in article 67, paragraph 1, needs to be clarified. Who might that be and why should they be entitled to participate?

Regarding article 67, paragraph 3, the question arises, if there should not be a provision as regards classified information. In this context the following provision might solve the problem: “The [name of independent body] shall guarantee an adequate level of confidentiality of classified information or other information contained in the files transmitted by the parties, and act in conformity with defence and/or security interests throughout the procedure.”

Furthermore open access to proceedings involving classified information is highly problematic; a restricted access (at the request of a party) must be possible.

Article 69 itself should reflect the basic requirements of a judicial review system (see footnote 14).