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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 Chapter VI of the UNCITRAL Model Law on Public Procurement on electronic reverse auctions, comprising an introduction, commentary on related provisions of Chapter II (article 31), and commentary on article 53.



GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

Part II. Article-by-article commentary

Chapter VI: Procedures for the use of electronic reverse auctions

A. Introduction

1. Executive Summary

1. An electronic reverse auction (“auction,” or “ERA”), as defined in article 2 of the Model Law, is an online, real-time purchasing technique utilized by a procuring entity to select the successful submission. It involves the presentation by suppliers or contractors (“bidders”) of successive bids during a scheduled period of time and the automatic evaluation of those bids using ICT systems, until a winning bidder is identified. The term “successive bids” in the definition refers to successive reductions in the price or improvements in overall offers to the procuring entity. It thus provides an exception to the general rule under the Model Law that a supplier or contractor has one opportunity to present its price in response to an invitation to present a submission.

2. It has been observed that ERAs have many potential benefits. First, they can improve value for money through successive competition among bidders, using dynamic and real-time trading. The use of the Internet as the medium for holding the auction can also encourage wider participation and hence increased competition. Secondly, auctions can reduce the time and administrative costs required to conduct the procurement of simple and off-the-shelf goods and standardized services. Thirdly, they can enhance internal traceability in the procurement process as information on the successive results of the evaluation of bids at every stage of the auction and the final result of the auction are recorded; all this information is made available to the procuring entity instantaneously. In addition, they can enhance transparency as each bidder’s relative position is made known to him instantaneously; the progress and outcome of the auction are made known to all bidders instantaneously and simultaneously. Fourthly, the enhanced transparency and a fully automated evaluation process that limits human intervention may assist in the prevention of abuse and corruption.

3. Recognizing these potential benefits of ERAs, the Model Law enables such auctions on the conditions contained in article 31 [\[**hyperlink**\]](#) so as to allow their use in appropriate circumstances, and subject to the procedural requirements set out in articles 53 to 57 [\[**hyperlink**\]](#). Consistent with its approach to all procurement methods under the Model Law, UNCITRAL provides for auctions in all procurement — whether of goods, construction or services. While goods may be the most common application of the technique, such as for the purchase of office supplies, simple services — such as the purchase of hourly labour from technicians certified in a particular discipline — are found in practice.

4. ERAs have been increasing in use in recent years. Electronic technologies have facilitated the use of reverse auctions by greatly reducing the transaction costs, and by permitting the anonymity of the bidders to be preserved as the auctions take place virtually, rather than in person. For this reason, the Model Law allows only online auctions with automatic evaluation processes, where the anonymity of the bidders, and the confidentiality and traceability of the proceedings, can be preserved. The risk of collusion may nevertheless be present even in ERAs especially when they are used as a phase in other procurement methods or preceded by off-line examination or evaluation of initial bids. The procedures are discussed in more detail in the commentary to the articles in Chapter VI itself.

5. The introduction of an ERA system involves a significant investment, and is generally carried out as part of the introduction of an e-procurement system. The discussion of e-procurement in Section ** of the general commentary above [**hyperlink**] should be considered in addition to the commentary to Chapter VI.

2. Enactment: policy considerations

6. The UNCITRAL approach is to provide for ERAs used to select the winning bidder. Although there are other models in use, which involve a further examination and/or evaluation after the auction, the Model Law requires that the ERA itself is to be the final stage in the procurement proceedings in which the winner is selected, and the winning terms and conditions are to figure in the contract. The UNCITRAL approach is considered the most transparent and at lowest risk of abuse, and reflects the general prohibition of negotiations after the selection of the successful supplier or contractor throughout the Model Law.

7. ERAs under the Model Law may be conducted either as a procurement method (“stand-alone ERAs”) or as the final phase preceding the award of the procurement contract in other procurement methods (or under framework agreements with second-stage competition, “ERAs as a phase”), as and where appropriate. The two types of ERAs require different provisions to some extent; enacting States may choose to provide for both these types of ERAs, or only one. The provisions in chapter VI are drafted to allow for either option to be exercised without significant drafting amendments to the Model Law’s provisions.

8. By their very nature, ERAs encourage a focus on price, which means that for standardized and off-the-shelf products or services, the procuring entity can reap the benefits of strong competition on price. Anecdotal evidence indicates that where quality considerations are important, or where the items or services to be procured are not standardized, the risks to effective procurement are greater, because price reductions may be paid for by reducing variable quality elements (such as the materials used in manufacture). A noted concern in the use of ERAs is their relative ease of use from an administrative perspective, once systems are in place allowing for them, such that they may be overused and used in inappropriate situations. Overuse or inappropriate use may be based on an intention to reduce the numbers of competitors in the market, with risks of concentrating procurement markets and of collusion in repeated procurements, as discussed in sections ** and ** of the general remarks above [**hyperlinks**]. The conditions for use and procedures, as discussed in paragraphs ** below [**hyperlink**], have been designed to mitigate this risk, without unduly restricting the use of ERAs and their potential for development in the medium to longer term.

9. ERAs may also have an anti-competitive impact in the medium and longer term, as they may be more vulnerable than other procurement processes to collusive behaviour. The opportunity arises because there is a risk, where participating suppliers become aware of each others' identities, of price-signalling or other collusion, through the successive presentation of bids in an individual auction, and also where there is regular or periodic procurement of the same subject-matter using ERAs.¹ By comparison, in a traditional tender or other procedure, the participating suppliers are not publicly identified when submissions are presented.

10. The maintenance of anonymity is therefore critical to mitigate the risks of collusion in ERAs, so that they are no higher than in other procurement methods. Generally speaking, ERAs are more vulnerable to price manipulation, price-signalling or other anti-competitive behaviour in markets with only a limited number of potentially qualified and independent suppliers or contractors known to each other, or in markets dominated by one or two major players, and in the repeated use of auctions with the same participants, because anonymity is in practice more difficult to maintain. The Model Law's procedures have also been designed to mitigate this risk, for example by encouraging the combination of ERAs and open framework agreements under Chapter VII [[**hyperlink**](#) for repeated purchases], as further explained in the commentary to that Chapter [[**hyperlink**](#)].

11. The provisions in the conditions for use of and procedures for auctions to mitigate the risks to competition, described in the following section, address the two types of auctions provided for in the Model Law separately: in auctions as a phase, considering the risk of collusion and other anti-competitive behaviour requires a more in-depth assessment of the market concerned, as the commentary explains [[**hyperlink**](#)]. For this reason, the issues described regarding implementation and use in the following section may also inform policy decisions on enactment.

12. Enacting States will wish to consider whether or not tender securities should be permitted in ERAs. For simple auctions, which will include most stand-alone ERAs, they are unlikely to be cost-effective. As regards more complex auctions, tender securities might be appropriate. In such cases, the regulations or rules and additional guidance should address how the requirements will work in practice; including on what situations would allow the procuring entity to call on the tender security. For example, it may be considered that failing to register for an auction under article 54 may prevent the procuring entity from holding the auction because insufficient bidders will participate to provide effective competition. In practice, however, bidders cannot be obliged to change any aspects of their bids and can simply abstain from the bidding, so the tender security may in fact be worthless, or at best, not cost-effective. The implications for future participation should also be considered.²

¹ The Glossary will include the following explanation of collusion: Collusion occurs when two or more bidders work in tandem to manipulate and influence the price, keeping it artificially high, or share the market by artificially inflating bid prices or not presenting bids, or otherwise distort the process.

² The Working Group may wish to consider whether to make a stronger recommendation on this matter.

3. Issues of implementation and use

13. The following policy considerations are viewed as particularly important for the successful introduction and use of ERAs, which may inform the regulations, and rules and guidance, to be issued to support the Model Law:

(a) Appropriate use of auctions:

(i) Stand-alone auctions are most suitable for commonly used goods and services, which generally involve a highly competitive, wide market, where the procuring entity can issue a detailed description or one referring to industry standards, and where the offers from bidders offer the same quality and technical characteristics such as office supplies, commodities, standard information technology equipment, primary building products and simple services. A complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated. In such procurement, the system is comparing like with like, and price can be the determining, or a significant determining, evaluation criterion. Where there is an Internet-based market, such as for office supplies, the results may be optimal [x ref e-catalogues];

(ii) This type of procurement is likely to take place in a market with many participants, so that anonymity is assured, and competition should result. Where there are repeated such auctions, however, and whether or not they take place within framework agreements, rules or guidance should address how to ensure that the same small group of participants does not always take part; procuring entities should monitor their procedures and take steps to modify them if there is any evidence of manipulation (see, further, the guidance to article ** below [[**hyperlink**](#)]);

(iii) The types of procurement where non-quantifiable factors prevail over price and quantity considerations including the procurement of construction or services involving intellectual input that is not objectively quantifiable, such as design works, and other quality-based procurement, are less suitable for auctions. Rules or guidance should therefore stress that it would be inappropriate to use auctions in these circumstances;

(iv) In addition, in order for an ERA to function correctly in eliciting low but realistic prices, it is important for bidders to be fully aware of their cost structures;

(v) Further, the greater the number of criteria to be evaluated in the auction, the more difficult it is for both procuring entity and suppliers or contractors to understand how varying one element will impact on the overall ranking. Thus, where there are many variables, the auction will be less appropriate. In addition, there will be no meaningful competition where the auction effectively ceases to be based on a common description of the subject-matter of the procurement. Such risk is higher where many variables related to technical, quality and performance characteristics of the subject matter are involved;

(vi) In some auctions as a phase, the conditions set out in subparagraphs (i) and (ii) may apply: for example, where an auction is held within an open

framework agreement, within request-for-quotations procedures, and other methods with many participating suppliers. In others, with some or all of the features described in subparagraphs (iii)-(v), auctions may strictly speaking be available under the conditions for use of article 31(2), but are unlikely to be appropriate, both because effective competition will be more difficult to achieve and because the risk of collusion will probably be higher than it would be without the auction as a phase. However, where more detailed initial steps in the procedure are required (such as assessing qualifications and responsiveness, and perhaps ranking on the basis of quality considerations that are evaluated before the auction), so that the auction itself retains more of the features of the competitive market described above, an auction may narrow down the number of outstanding evaluation items and then be appropriate. Nonetheless, it should be borne in mind that the result may be to add a layer of complexity to an already complex procurement procedure;

(vii) Regulations, or rules and other guidance should therefore guide the procuring entity in considering the market concerned before a procurement procedure commences, to identify the relative risks and benefits of an auction. In similar vein to the comments made on solicitation in the introduction to Part II of Chapter II, an assessment should be made as to whether the risks of collusion rather than competition would be higher in an ERA than in any other procurement method, before a determination as to which method and technique to use. The competition authorities in the enacting State may be able to provide relevant information on the relative risks, and any others, such as the risk of dumping in the market concerned.

(b) Phased introduction of auctions: it is recommended that enacting States lacking experience with the use of ERAs should introduce them in a staged fashion as experience with the technique evolves; that is, to commence by allowing price only auctions, where price only is to be used in determining the successful submission, and subsequently, if appropriate, to proceed to the use of more complex auctions, where the award criteria include non-price criteria;

(c) Capacity-building: in order to derive maximum benefits from the use of ERAs, both procuring entities and suppliers and contractors must have confidence in the process and its results so as to encourage participation, and must be able to operate ERAs effectively. To that end, States should be prepared to invest sufficient resources in awareness and training programmes at an early stage, for overhead costs in training and facilitating suppliers or contractors in participating in ERAs. For the procuring entity, the training should address both technical issues, such as how to quantify any non-price criteria objectively and to express them so that they can be factored in the automated mathematical formula or algorithm, and the provision of information to suppliers and contractors, especially SMEs. For suppliers and contractors, the training should address the system and how it functions, the changes involved in doing business with the government through an ERA and what impact these changes will have on their business opportunities. Otherwise, the risk is that a marketplace in which procurement was previously handled successfully may be abandoned, prices will be higher than they would have been absent the introduction of auctions, and the government's investment in the ERA system may fail. This capacity-building also implies a higher overhead cost

per procurement than traditional methods, at least in the early stages of the use of ERAs;

(d) Transparency in procedures and planning: a clear description of the subject-matter and other terms and conditions of procurement must be established and made known to suppliers or contractors at the outset of procurement, together with the formula to select the winner and all information regarding how the auction will be conducted, in particular the timing of the opening and criteria governing the closing of the auction. This may require more detailed planning than in other procurement methods, and procuring entities should be made so aware;

(e) Drafting evaluation criteria: the provisions allow, in theory, any evaluation criterion to be part of the auction, provided that it can be factored into a formula or algorithm that automatically evaluates and re-evaluates the bids during the auction itself, and which identifies the highest-ranking bid at each successive stage of the auction. During the auction, each revised bid results in a ranking or re-ranking of bids using these automated techniques. As the requirement for automatic evaluation requires the evaluation criteria to be capable of being expressed in monetary terms; the further those criteria stray from price and similar criteria (such as delivery times, and warranties or guarantees expressed as a percentage of price), the less objective their expression in monetary terms will be. There may then be a disincentive for bidders to participate, and the outcome is less likely to be successful. Non-price criteria may vary from simple criteria such as delivery and guarantee terms to more complex criteria (such as the level of emissions in cars); further guidance on what constitutes price and other criteria, and their expression as a percentage of the total price, is to be found in the commentary to article 11 above [\[**hyperlink**\]](#).

14. Technical issues, such as ensuring adequate infrastructure, that the relevant Internet sites are available and supported by adequate bandwidth, and appropriate security to avoid the elevated risk of bidders' gaining unauthorized access to competitors' commercially sensitive information should be addressed in the regulations, rules or other guidance. Issues of authenticity, integrity of data, security and related topics in the use of e-procurement generally are addressed in the Section of the general commentary on e-procurement, above [\[**hyperlink**\]](#).

15. In the light of the above commentary on ensuring appropriate use and a phased introduction to ERAs, enacting States may wish to restrict — perhaps on a temporary basis — the use of auctions to markets that are known to be competitive (e.g. where there is a sufficient number of bidders to ensure competition and to preserve the anonymity of bidders) or through qualitative restrictions such as limiting their use to the procurement of goods only, where costs structures may be easier to discern. Historically, some jurisdictions have used lists identifying specific goods, construction or services that may suitably be procured through ERAs, or excluding items from procurement through ERAs. However, experience indicates that this approach is cumbersome in practice, since it requires periodic updating as new commodities or other relevant items appear. Illustrative lists of items suitable for acquisition through ERAs or, alternatively, to list generic characteristics that render a particular item suitable or not suitable for acquisition through this procurement technique, may therefore be a preferable tool.

16. Enacting States may also wish to provide, for example in the procurement regulations and further rules and supporting guidance, additional conditions for the use of ERAs, such as consolidating purchases to amortize the costs of setting up the system for holding auctions, including those of third-party software and service providers, and guidance on the concept of “price” criteria drawing on the provisions of article 11 and associated commentary [\[**hyperlinks**\]](#).

17. It is recommended that the public procurement agency or other body and the competition law authorities in an enacting State monitor competition in markets where techniques such as ERAs are used. The public procurement system should require the procuring entity to possess good intelligence on past similar transactions, the relevant marketplace and market structure.

18. Finally, it is common for third-party agencies to set up and administer auctions for procuring entities, which can further increase their relative ease of operation, and hence raise the risks of overuse and misuse noted above. Procuring entities should also be aware of other possible issues arising from outsourcing decision-making beyond government, such as to third-party software and service providers; the latter may have organizational conflicts of interest posing a serious threat to competition in that the third parties will wish to maximize their returns by promoting ERAs, without necessarily considering whether they are the appropriate procurement technique. To this extent, these third parties may effectively advise on procurement strategies. These issues arise also in other procurement techniques, such as framework agreements, and generally where outsourcing is concerned, and are discussed in Section [**](#) of the general commentary above [\[**hyperlink**\]](#). The Model Law discourages charging fees for the use of procurement systems, including for auctions, because they operate as a disincentive to participate, contrary to the principles and objectives of the Model Law; the manner of remunerating a third-party service-provider should be considered in the light of these matters. Finally, even if the public procurement agency or similar body or a procuring entity outsources the conduct of an auction or auctions to third-party service providers, the relevant body or procuring entity must retain sufficient skills and expertise to supervise the activities of such third-party providers.

B. Provisions on electronic reverse auctions

Article 31. Conditions for use electronic reverse auctions [\[hyperlink**\]](#)**

19. The purpose of article 31 is to set out conditions for the use of ERAs, either as stand-alone ERAs or ERAs as a phase (in which case they are cumulative with the other conditions for use of the procurement method concerned). These conditions are designed to mitigate the risks of improper use of or overuse of ERAs described in paragraphs [**](#) of the Introduction to this Chapter [\[**hyperlink**\]](#).

20. Paragraph (1) sets out the conditions for use of stand-alone ERAs. They are based on the notion that stand-alone ERAs are primarily intended to satisfy the needs of a procuring entity for standardized, simple and generally available items that it may need, as further described in the introduction to this Chapter above [\[**hyperlink**\]](#).

21. The requirement for a precise description of the subject-matter of the procurement found in paragraph (1)(a), coupled with the requirement for a detailed description in article 10 [\[**hyperlink**\]](#), will preclude the use of this procurement technique in procurement of most services and construction, unless they are of a highly simple nature and are in reality quantifiable (for example, straightforward maintenance works).

22. In formulating that and other terms and conditions of the procurement, procuring entities will need to set out clearly the detailed technical and quality characteristics of the subject-matter, as required in article 10 of the Model Law, so as to ensure that bidders will bid on a common basis. In this respect, the fact that bids will be automatically compared means that technical specifications, rather than functional ones, are generally more effective. The use of a common procurement vocabulary to identify goods, construction or services by codes or by reference to general market-defined standards is therefore desirable.

23. Paragraph (1)(b) is aimed at mitigating the risks of collusion and ensuring rigorous competition in stand-alone auctions (for a discussion of these matters, see paragraphs [**](#) of the Introduction to this Chapter [\[**hyperlink**\]](#)). It requires that there must be a competitive market of suppliers or contractors anticipated to be qualified to participate in the ERA, but does not impose any minimum per se. It is, however, supplemented by article 55(2) [\[**hyperlink**\]](#) under which the procuring entity has the right to cancel the auction if the number of suppliers or contractors registered to participate in the auction is insufficient to ensure effective competition during the auction (see paragraphs [...](#) of this Guide for the guidance on the relevant provisions of article 55(2) [\[**hyperlink**\]](#)).

24. The reference in paragraph (1)(b) to suppliers or contractors that are “anticipated to be qualified” to participate in the ERA should not be interpreted as implying that pre-qualification will be involved in procurement through ERAs. It may be the case that, in order to expedite the process and save costs, the qualifications of the winning bidder only are assessed after the auction. See paragraphs [...](#) of this Guide for guidance on the relevant provisions of article 57 [\[**hyperlink**\]](#).

25. The award of contracts under ERAs may be based on either the price or the price and other criteria that are specified in the beginning of the procurement proceedings. When non-price criteria are involved in the determination of the successful submission, paragraph (1)(c) requires that such criteria must be quantifiable and capable of expression in monetary terms (e.g., figures, percentages): this provision overrides the caveat in article 11 that the expression in monetary terms should be made “where practicable” [\[**hyperlink**\]](#). While all criteria can in theory be expressed in such terms, as noted above [\[**hyperlink**\]](#), an optimal result will arise where the evaluation criteria are objectively and demonstrably capable of expression in such terms.

26. Paragraph (2) addresses the use of ERAs as a phase. Such ERAs may be used in the second-stage competition in framework agreements, where there are limited numbers of variables to auction. Although there will be risks of collusion as the bidders will be known to each other, such risks are inherent in the use of closed framework agreements, and the determination as to whether or not ERAs are suitable as described above should therefore be made when the manner in which a

framework agreement will operate is itself determined. Although available under the flexible conditions for use of ERAs as a phase in all procurement methods envisaged under the Model Law, ERAs may not always be appropriate, as discussed in paragraphs ** of the general commentary [**hyperlink**] above, particularly where there is a focus on quality and a more complex evaluation of quality aspects than just pass/fail responsiveness criteria. In such cases, it may often be impossible or inappropriate to evaluate the quality aspects automatically through the auction. Since the Model Law requires the auction to be the final stage before the award of a procurement contract, auctions also cannot be used where quality aspects are to be evaluated after the auction (on these issues, see paragraphs ** above of the commentary in the introduction to this Chapter above [**hyperlink**]).

Article 53: Electronic reverse auction as a stand-alone method of procurement

Solicitation in stand-alone ERAs

27. Article 53 sets out, first, the procedures for soliciting participation in procurement by means of a stand-alone ERA, and incorporates the provisions of article 33 (which also govern open tendering) by cross-reference [**hyperlink**]. Although there are core procedures that will cover all stand-alone ERAs, the procedures for each procurement will depend on the complexity of the ERA at hand. Some ERAs may be very simple, not even requiring the bidders' qualifications and the responsiveness of their bids to be ascertained before the auction, while other may be more complex and involve the examination and evaluation of initial bids. Pre-qualification is unlikely in the type of procurement concerned, though theoretically available. The subject-matter of the procurement, the examination and evaluation criteria to be used, and whether qualifications are to be assessed before the auction (or, as allowed under article 57(2), only those of the winner are to be assessed after the auction) will determine the complexity of the procedures.

28. For example, for the procurement of off-the-shelf products, there is almost no risk that bids will turn out to be unresponsive and little risk of bidders being unqualified. Hence the need for pre-auction checks is correspondingly low. In such cases, a simple declaration by suppliers or contractors before the auction may be sufficient (for example, that they possess the required qualifications and they understand the nature of, and can provide, the subject matter of the procurement). In other cases, ascertaining responsiveness before the auction may be necessary (for example, when only those suppliers or contractors capable of delivering cars with a pre-determined maximum level of emissions are to be admitted to the auction), and initial bids, as described in the following paragraph, will therefore be required. In some such cases, the procuring entity may wish to rank suppliers or contractors submitting responsive initial bids before the auction (in the given example, suppliers or contractors whose initial bids pass the established threshold will be ranked on the basis of the emissions levels), so as to indicate their relative position and the extent of improvement that their bids may need during the auction in order to increase a chance to win the auction. In such cases, the auction must be preceded by an evaluation of the initial bids. The article has been drafted to accommodate all these different options.

29. Article 53(1) regulates the solicitation of bids in stand-alone ERAs. By cross referring to the provisions of article 33 [**hyperlink**], it requires open solicitation, reflecting one of the conditions for the use of ERAs as a stand-alone

procurement method — the existence of a competitive market (see article 31(1)(b) [\[**hyperlink**\]](#)). By additionally requiring international solicitation as an application of the default rule under the Model Law, the provisions aim at achieving as wide participation in an ERA as possible. The limited exceptions to international solicitation are those that apply to other procurement methods requiring open solicitation and are listed in article 33(4) (domestic procurement in accordance with article 8 and cases of low-value procurement. See the guidance to article 33(4) in Section/paragraphs [** above \[**hyperlinks**\]](#)). Should the auction be preceded by pre-qualification, the provisions of article 18 will apply to the pre-qualification proceedings and to the solicitation of bids from those that have been pre-qualified (noting that those provisions have also been designed to ensure unrestricted and public international solicitation as the default rule).

30. The provisions on solicitation have been designed to fulfil one of the essential conditions for use of stand-alone ERAs — effective competition during the auction (article 31(1)(b) [\[**hyperlink**\]](#)). The importance of fulfilling that condition is underlined in certain other provisions of this chapter: for example by the requirement in article 53 [\[**hyperlink**\]](#) that the minimum number of suppliers or contractors required to register for the auction must be specified in the invitation to the auction (paragraph (1)(j) [\[**hyperlink**\]](#)), and by requiring the cancellation of the auction if the specified minimum of registered suppliers or contractors is not reached. In addition, in accordance with article 55(2) [\[**hyperlink**\]](#), the procuring entity may cancel the auction even if the required minimum has been reached but the procuring entity still considers that the number of registered suppliers or contractors is not sufficient to ensure competition.

31. Paragraph (1) in addition lists all information that must be included in the invitation to the auction. Since, in simple auctions, the invitation is followed by the auction itself and no further information may be provided, the list is intended to cover exhaustively all information that must be provided to suppliers or contractors before the auction. The aim is to enable them to determine whether they are interested and eligible to participate in the procurement proceedings, and if so, how they can participate. The information requirements are similar to those applicable to an invitation to tender (article 37 [\[**hyperlink**\]](#)) and the contents of solicitation documents in open tendering proceedings (article 38 [\[**hyperlink**\]](#)). As discussed in paragraphs [** of the Introduction to this Chapter above \[**hyperlink**\]](#), the Model Law discourages charging entry fees for the use of procurement systems. If there were to be any entry fee for the auctions, consistent with the position for all procurement methods; where one is levied, at a minimum it must be disclosed in the invitation.

32. Additional information has been included in the list (as compared to the open tendering list) reflecting the procedural particularities of this procurement method, in particular that it is held online and involves the automatic evaluation of bids during the auction. Subparagraph (g) specifically highlights the need to provide to potential suppliers or contractors, alongside the evaluation criteria and procedures, the mathematical formula that will be used in the evaluation procedure during the auction. The automatic evaluation of bids using a mathematical formula, one of the distinct features of ERAs, is possible only where the evaluation criteria are quantifiable and expressed in monetary terms (as required by article 31(1)(c) [\[**hyperlink**\]](#)). Providing the mathematical formula from the outset of the

procurement ensures that bids will be evaluated on a transparent and equal basis. This information, coupled with the requirement in paragraph (4)(c) to provide suppliers or contractors submitting initial bids with the result of any pre-auction evaluation, and the requirement in article 56(2) [\[**hyperlink**\]](#) to keep bidders informed of the progress of the auction, allows bidders to establish their status during the auction transparently and independently from the procuring entity and the system. They can thus verify the integrity of the evaluation process.

33. The information to be provided in subparagraph (j) to (p) is also particular to ERAs. Subparagraph (j) refers to the minimum number of suppliers or contractors required to register for the auction to be held. The importance of such information for ensuring effective competition during the auction is highlighted in paragraph [**above \[**hyperlink**\]](#). No single minimum can be stated in the Model Law itself (unlike for other procurement methods, such as request for quotations, where reference is made to a minimum of three quotations). This is because in some ERAs, a minimum of three bidders may fulfil the requirement of ensuring effective competition and may ensure the anonymity of bidders and the avoidance of collusion, while in other cases it may not. The circumstances of each procurement will guide the procuring entity in specifying the appropriate minimum number. To avoid collusion, the minimum should be set as at a high a level as possible, taking into account however that the procuring entity will be obliged to cancel the auction if the minimum is not reached (while it may, under article 55(2) [\[**hyperlink**\]](#), cancel the auction even if the minimum has been reached, for example if collusion among registered suppliers or contractors is suspected or genuine competition even with the established minimum cannot be achieved (see the relevant commentary to article 55(2) in paragraph [... below \[**hyperlink**\]](#)). Objectivity and ensuring fair and equitable treatment of suppliers or contractors should not be overlooked in this context.

34. Subparagraph (k) is an optional provision (accordingly presented in brackets) permitting a maximum number of bidders to be set, and setting out the procedure and criteria that are to be followed in selecting the maximum. As the accompanying footnote explains, the provision should not be enacted by States where local technical conditions do not so require, and in any event should be complemented with paragraph (2) of this article, so as to provide essential safeguards against abuse. UNCITRAL has permitted this measure in ERAs to allow for technical capacity limitations constraining access to the systems concerned (e.g. the software acquired for holding ERAs may accommodate only a certain maximum number of bidders). However, enacting States should be aware that such capacity constraints are declining at a rapid rate, and the provision should become obsolete within a short period.

35. Establishing a maximum contradicts the Model Law's general principle of full and open competition; it is therefore permitted only in the exceptional circumstances prescribed. The concept is to limit the number of participants for practical reasons but not the principle of competition, and the restriction is permissible only to the extent justified by the actual technical capacity constraints. Selection of the participants within this established minimum is to be carried out only in accordance with pre-disclosed criteria and procedures, which must be non-discriminatory. In order to select the participants on an objective basis, the procuring entity may use a variety of techniques, as further explained in the

commentary in the Introduction to Chapter IV, such as random selection, the drawing of lots or a “first come first served” approach [\[**hyperlink**\]](#), or it may apply other criteria that seek to distinguish among the bidders, provided that they are non-discriminatory.³ This relatively informal approach reflects the fact that where there is a sufficient number of participants, there will be sufficient market homogeneity to allow the best market offers to be elicited. As explained in the commentary in the Introduction to Chapter IV [\[**hyperlink**\]](#), neither pre-qualification nor examination of any initial bids submitted, both of which involve pass/fail tests permits the selection of a pre-determined number of best-qualified suppliers or contractors or best-ranked bids. (For a description of initial bids, see paragraphs [** below \[**hyperlink**\]](#).)

36. Subparagraphs (l) to (p) list the information about the technical aspects of the auction that must be provided to accommodate its online features and to ensure transparency and predictability in the process (such as specifications for connection, the equipment being used, the website, any particular software, technical features and, if relevant, capacity). The Model Law lists only those minimum functional requirements crucial for the proper handling of ERAs, and they are expressed in technologically neutral terms. These requirements should be supplemented by regulations, and further rules or supporting guidance to provide additional detail: for an example, regulations must spell out the permissible criteria governing the closing of the auction referred to in subparagraph (o), such as: (i) when the date and time specified for the closing of the auction has passed; (ii) when the procuring entity, within a specified period of time, receives no more new and valid prices or values that improve on the top-ranked bid; or (iii) when the number of stages in the auction, fixed in the notice of the ERA, has been completed. The regulations or other rules should also make it clear that each of these criteria may entail the prior provision of additional specific information; guidance should expand on the types of information concerned. Examples include that item (ii) above would require the specification of the time that will be allowed to elapse after receiving the last bid before the auction closes. Item (iii) above would require the prior provision of information on whether there will be only a single stage of the auction, or multiple stages (in the latter case, the information provided should cover the number of stages and the duration of each stage, and what the end of each stage entails, such as whether the exclusion of bidders at the end of each stage is envisaged).

37. With reference to subparagraph (p), the regulations should also require the disclosure of: (i) the procedures to be followed in the case of any failure, malfunction, or breakdown of the system used during the auction process; (ii) how and when the information in the course of the auction will be made available to the bidders (at a minimum, and to ensure equal treatment, the same information should be provided simultaneously to all bidders); and (iii) as regards the conditions under which the bidders will be able to bid, any minimum improvements in price or other values in any new bid during the auction or limits on such improvements. In the latter, case, the information must explain the limits (which may be inherent in the technical characteristics of the items to be procured). Suppliers or contractors may decide against participation in procurement involving ERAs, for example because of

³ The Working Group may wish to consider whether the provisions indeed confer a greater flexibility than those of Chapter IV procurement methods, as this comment indicates.

the lack of technical capacity, information technology literacy or confidence in the process, once all these matters are known.

38. This detailed information may be provided in the notice of the ERA itself or, by reference, in the rules for the conduct of the auction, provided that all relevant information is made known to all suppliers or contractors sufficiently in advance before the auction, to allow them to properly prepare for participation in the auction. It should be acknowledged that it may not always be possible to provide all relevant information in the invitation. For example, the deadline for registration to the auction (subparagraph (m)) and the date and time of the opening of auction (subparagraph (n)) in complex auctions involving the examination or evaluation of initial bids (see paragraphs **16-21** above) may not be known with certainty before the examination or evaluation is completed. The criteria for closing the auction may need to be determined when the number of suppliers or contractors registered for the auction and other information that affects the structure of the auction (whether it would be held in one round or several subsequent rounds) are known. Where it is not possible to provide all relevant information in precise terms, the invitation must set out at a minimum the general criteria, leaving specific criteria to be defined later in the process but in no case later than the commencement of the auction.

39. Some information listed in paragraph (1) must be interpreted by reference to other provisions of this chapter. For example, subparagraph (f), referring to the criteria and procedure for the examination of bids against the description of the subject matter of the procurement, should be read together with the provisions of article 57(2) [\[**hyperlink**\]](#) that allow the examination of the winning bid after the auction in very simple auctions. Subparagraph (f) also includes any criteria that cannot be varied during the auction (such as minimum technical requirements). Subparagraph (s), referring to the name, functional title and address of contact person(s) in the procuring entity for direct communication with suppliers or contractors “in connection with the procurement proceedings before and after the auction”, has to be read together with the provisions of article 56(2)(d) [\[**hyperlink**\]](#) that prohibits any communication between the procuring entity and bidders during the auction.

40. Some information required to be provided for other procurement methods is not appropriate in the context of ERAs, and so does not appear in paragraph (1). For example, bids for a portion or portions of the subject matter of the procurement are not permitted (otherwise, separate auctions within the same procurement proceedings would be required). There is no provision permitting a meeting of suppliers or contractors, in order to preserve the anonymity of bidders. Subparagraph (x) on post-auction formalities does not include any reference to approval by an external authority, both to reflect the conditions for the use of stand-alone ERAs and the type of the subject matter envisaged to be procured through such ERAs under article 31(1) [\[**hyperlink**\]](#) of the Model Law. The execution of a written procurement contract under article 22 [\[**hyperlink**\]](#) of this Law is, however, not excluded, and specific formalities in the context of ERAs, such as the possibility of assessing qualifications or responsiveness after the auction, have been included.

41. Paragraph (2) dealing with the imposition of a maximum number of suppliers or contractors that can be registered for the auction has been discussed in

connection with paragraph (1)(k) of the article (see paragraph ** above). Notably, the procuring entity may impose such a maximum number only to the extent that technical capacity limitations in its communication system so require. As is also the case with open framework agreements, enacting States should be aware that technical developments are likely to make this provision obsolete in the short to medium term.

42. Paragraphs (3) and (4) establish additional requirements for the contents of the invitation to the auction and other pre-auction stages in stand-alone ERAs involving initial bids. Although it would normally be the case that a price-only auction does not require initial bids and other pre-auction procedures, the provisions are flexible enough to allow for this eventuality (where, for example, the procuring entity considers that minimum technical requirements are critical). The enacting State may omit these two paragraphs if it decides to provide in its national public procurement law only for very simple auctions, not involving any pre-auction stages beyond the invitation and registration for the auction.

43. In more complex auctions, where the procuring entity wishes to examine qualifications and responsiveness prior to the auction and so calls for initial bids, it must include the information in the invitation to the auction specified in paragraph (3), i.e. additional to that listed in paragraph (1). In such cases, the procuring entity must both request initial bids and provide sufficiently detailed instructions for preparing them, including the scope of the initial bids, the language in which they are to be prepared and the manner, place and deadline for presenting them. Paragraphs (1)(f) and (g) as regards the criteria for examination and evaluation of bids will also be applicable to initial bids, and the information to be provided under those paragraphs will therefore need to cover those steps before and during the auction. Since an overlap will exist between the information to be provided about the initial bids and bids during the auction, the procuring entity must correctly identify which information is relevant to which stage, to avoid confusion (in particular as regards the manner, place and deadline for presenting initial bids as opposed to the manner of accessing the auction and the manner and deadline for registering to the auction, different evaluation criteria and procedures and so on). The information provided as regards preparation, examination or evaluation of initial bids must be carefully drafted to allow suppliers or contractors to prepare initial bids and assure them that their initial bids will be examined or evaluated on an equal basis.

44. Paragraph (4) regulates additional pre-auction steps that are required for an examination or evaluation of initial bids. To allow effective challenge by aggrieved suppliers or contractors, a notice of rejection of any initial bid together with the reasons for rejection must be promptly communicated to the supplier or contractor concerned. The provisions of paragraph (4) do not regulate the reasons for rejection but the provisions of chapter I of the Model Law will apply, such as article 9 [\[**hyperlink**\]](#) setting reasons for disqualification, article 10 [\[**hyperlink**\]](#) that set out responsiveness criteria, article 20 [\[**hyperlink**\]](#) on the rejection of abnormally low submissions, and article 21 [\[**hyperlink**\]](#) on the exclusion of a supplier or contractor on the ground of inducements, conflicts of interest or unfair competitive advantage. For ease of reference, the enacting State may wish to consider listing all grounds for the rejection of initial bids in the procurement regulations or other rules or guidance.

45. All suppliers or contractors submitting responsive initial bids must be invited to the auction unless the provisions of paragraphs (1)(k) and (2) have been enacted and the number of suppliers or contractors submitting responsive initial bids to be invited to the auction has been limited by the procuring entity in accordance with those provisions. If so, the procuring entity can reject bids in accordance with the criteria and procedure specified in the invitation to the auction for the selection of the maximum number. If the pool of suppliers or contractors submitting responsive initial bids will turn out to be below the minimum established in accordance with paragraph (1)(j), the procuring entity must cancel the auction; if the pool turns out to be above the minimum but still insufficiently large to ensure effective competition during the auction, the procuring entity may decide to cancel the auction, in accordance with article 55(2) [\[**hyperlink**\]](#) (see the relevant commentary to article 54(2) [\[**hyperlink**\]](#)).

46. As stated in paragraph 2 above, some complex auctions may involve an examination and all initial bids that meet the minimum threshold are admitted to the auction. In some others there is an additional evaluation of the initial bids and they may be ranked. In this case, the ranking of suppliers or contractors submitting responsive bids and other information about the outcome of the evaluation must be communicated to them, under paragraph (4)(c), before the auction can commence. In complex auctions, the procuring entity may receive initial bids that significantly exceed the minimum requirements, particularly where suppliers would be permitted to offer items with different technical merits and correspondingly different price levels, and the ranking may have a significant impact on participation in the auction itself, requiring the procuring entity to consider whether there will be effective competition.

47. The information to be communicated to suppliers or contractors on the results of evaluation and any ranking may vary from auction to auction; in all cases, it should be sufficient to allow those suppliers or contractors to determine their status vis-à-vis their competitors in the auction before the auction so that to allow meaningful and responsive bidding during the auction. Together with the mathematical formula to be used during the auction, as disclosed in the invitation to the auction in accordance with paragraph (1)(g), this information should allow suppliers or contractors independently to assess their chances of success in the auction and identify which aspects of their bids they should and could vary and by how much, in order to improve their ranking. Paragraph 3 of the commentary to article 56 below [\[**hyperlink**\]](#) discusses the possible conflict between full transparency and avoiding facilitating collusion in the transmittal of this information to bidders, and provides options on the question for consideration.

48. The provisions of paragraph (4) have been designed with a view to preserving the anonymity of bidders and the confidentiality of information about their initial bids and the results of any examination or evaluation. Only information relevant to the initial bid is provided to each bidder. To ensure fair and equitable treatment of suppliers and contractors, the information must be dispatched promptly and concurrently to all of them.