United Nations A/CN.9/WG.I/WP.79/Add.5

General Assembly

Distr.: Limited
15 February 2012

Original: English

United Nations Commission on International Trade Law
Working Group I (Procurement)
Twenty-first session
New York, 16-20 April 2012

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 articles 12 to 19 of chapter I (General provisions) of the UNCITRAL Model Law on Public Procurement.

* 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.

V.12-50895 (E)

GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

…

Part II. Article-by-article commentary

…

Article 12. Rules concerning estimation of the value of procurement [hyperlink**]**

1. The purpose of the article is to prevent the procuring entity from manipulating the estimated value of procurement by artificially reducing its value, for example to limit competition and use low-value exemptions under the Model Law. Such exemptions include from the required standstill period (article 22(3)(b)), individual public notice of award (article 23) and international advertisement of the invitation to participate (articles 18(2) and 33(4)). In addition, under some provisions of the Model Law, the value may have a direct impact on the selection of a method of procurement: restricted tendering as opposed to open tendering is available where the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject-matter of the procurement (see article 29(1)(b)); request-for-quotations under article 29(2) is available for certain low-value procurement. In all such cases, the method selected by the procuring entity for estimation of the value of procurement will determine the extent of its obligations under the Model Law. Without provisions to avoid manipulation, the procuring entity might choose to divide the procurement for abusive purposes.

2. To avoid subjectivity in the calculation of the value of procurement and anti-competitive and non-transparent behaviour, paragraph (1) sets out the basic principle that neither division of the procurement can take place nor any valuation method can be used for the purpose of limiting competition or avoiding obligations under the Law. The prohibition is therefore directed at both (i) any division of a procurement contract that is not justified by objective considerations, and (ii) any valuation method that artificially reduces the value of procurement.

3. Paragraph (2) requires the inclusion in the estimated value of the maximum total value of the procurement contract over its entire duration whether awarded to one or more suppliers or contractors, and all forms of remuneration (including premiums, fees, commissions and interest receivable) to be taken into account. In framework agreements, the estimated value is the maximum total value of all procurement contracts envisaged under the framework agreement. In procurement with option clauses, the estimated value is the estimated maximum total value of the procurement, including optional purchases.

4. Estimates are to be used primarily for internal purposes. The procuring entity should exercise caution in revealing them to potential suppliers or contractors because if the estimate is higher than market prices, suppliers or contractors might price submissions as close to the estimated value of the procurement as possible and so competition is compromised; if the estimate is below market prices, good

suppliers may choose not to compete, and quality and competition may be compromised. A blanket prohibition against revealing such estimates to suppliers or contractors may, however, be unjustifiable: providing an estimated value of a framework agreement may be necessary to allow suppliers or contractors to stock the subject-matter concerned and to ensure security of supply.

Article 13. Rules concerning the language of documents [hyperlink**]**

5. The purpose of the article is to establish certainty as regards the language of documents and communication in procurement proceedings in the enacting State. This provision is especially valuable for foreign suppliers or contractors so that, by reading the procurement law of the enacting State, they can determine the costs (translation and interpretation) required to participate in procurement proceedings in that State. The overriding aim is to facilitate access to the procurement and the participation of suppliers regardless of nationality, through the use of appropriate language or languages in the context of the procurement concerned.

6. Paragraph (1) provides a general rule that documents issued by the procuring entity in the procurement proceedings are to be in the official language(s) of the enacting State. An enacting State whose official language is not the one customarily used in international trade has the option to require, by retaining in the article the words in the second set of brackets, that the documents in addition be issued as a general rule in a language customarily used in international trade. As is discussed in the commentary to article 18(2) on pre-qualification proceedings, and to article 33(2) (on the requirements for solicitation documents in open tendering) and the equivalent for other open procurement methods [**hyperlinks**], the wording in the square brackets may effectively imply the use of the English language, and paper-based advertising, and so is optional. On the other hand, this wording is more closely aligned with the requirements of the multilateral development banks. Enacting States will therefore wish to consider their use of such donor financing, the general requirement for effective international publication, and the approach of technological neutrality under the Model Law when considering the wording of language requirements for articles 13, 18 and 33 (and other articles addressing the solicitation documents).

7. In States in which solicitation documents are issued in more than one language, it would be advisable to include in the procurement law, or in the procurement regulations, a rule to the effect that a supplier or contractor should be able to base its rights and obligations on either language version. The procuring entity might also be called upon to make it clear in the solicitation documents that both or all language versions are of equal weight.

8. The basic rule, as reflected in paragraph (2) of the article, is that the language of documents presented by suppliers or contractors in any given procurement must correspond to the language or any of the languages of the procuring entity’s documents. However, the provisions do not exclude situations where the documents issued by the procuring entity may permit presenting the documents in another language.

Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions [hyperlink**]**

9. The purpose of the article is to ensure certainty as regards the manner, place and deadline for the submission of the main documents in the procurement process. Significant legal consequences may arise out of non-compliance by suppliers or contractors with the procuring entity's requirements (such as the obligation to return a submission presented late or that otherwise does not comply with the submission requirements (see for example article 40(3) [**hyperlink**]). Paragraph (1) therefore provides important safeguards to ensure that the rules on the manner, place and deadline for submission of documents to the procuring entity apply equally to all suppliers or contractors, and that they are specified at the outset of the procurement proceedings (in the pre-qualification, pre-selection or solicitation documents, as applicable). If such information is changed subsequently, all such changes must be brought to the attention of suppliers or contractors to which the relevant documents were originally provided. If those documents were provided to an unknown group of suppliers or contractors (e.g. through a download from a website), information on the changes made must at a minimum appear in the same place at which they could be downloaded.

10. An important element in fostering participation and competition is granting to suppliers and contractors a sufficient period of time to prepare their applications or submissions. Paragraph (2) recognizes that the length of that period of time may vary from case to case, depending upon a variety of factors such as the complexity of the procurement, the extent of sub-contracting anticipated, and the time needed for transmitting applications or submissions. Thus, it is left up to the procuring entity to fix the deadline by which applications or submissions must be presented, taking into account the circumstances of the given procurement. An enacting State may wish to establish in the procurement regulations minimum periods of time that the procuring entity must allow (particularly where its international commitments may so require). These minimum periods should be established in the light of each procurement method, the means of communication used and whether the procurement is domestic or international. Such a period must be sufficiently long in international and complex procurement to allow suppliers or contractors reasonable time to prepare their submissions.

11. In order to promote competition and fairness, paragraph (3) requires the procuring entity to extend the deadline in certain circumstances: first, where clarifications or modifications, or minutes of a meeting of suppliers or contractors are provided shortly before the submission deadline, so that it is necessary to extend the deadline in order to allow suppliers or contractors to take the relevant information into account in their applications or submissions; and secondly, in the cases stipulated in article 15(3) [**hyperlink**]: that is, where any change that would render the original information materially inaccurate is made. Further publication of the revised information is also required, as explained in the commentary to that provision [**hyperlink**]. Changes as regards the manner, place and deadline for submission of documents will always constitute material changes, which would oblige the procuring entity to extend the originally specified deadline. The assumption is also that any changes made to the solicitation,

pre-qualification or pre-selection documents under this article would also be material and therefore covered by article 15(3) [**hyperlink**].

12. Paragraph (4) permits, but does not compel, the procuring entity to extend the deadline for presenting submissions in other cases, i.e., when one or more suppliers or contractors is or are unable to present their submissions on time due to any circumstances beyond their control. This is designed to protect the level of competition when a potentially important element of that competition would otherwise be precluded from participation. However, given the risks of abuse in the exercise of this discretion, the regulations or rules or guidance from the public procurement agency or similar body should address what "circumstances beyond [the supplier's or contactor's] control" may involve, how it should be demonstrated, and the default response from the procuring entity.

13. The Model Law does not address the issue of potential liability of a procuring entity should its automatic systems fail. Failures in automatic systems inevitably occur; where a failure occurs, the procuring entity will have to determine whether the system can be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for presenting submissions is necessary. Paragraphs (3) and (4) of the article give sufficient flexibility to procuring entities to extend the deadlines in such cases. Alternatively, the procuring entity may determine that a failure in the system will prevent it from proceeding with the procurement and the proceedings will therefore need to be cancelled. The procurement regulations or other rules and guidance may provide further details on failures in electronic systems and the allocation of risks. Failures occurring due to reckless or intentional actions by the procuring entity, as well as decisions it takes to address consequences of system failure, including on extensions of deadlines, could give rise to a challenge under chapter VIII of the Model Law.

Article 15. Clarifications and modifications of solicitation documents [hyperlink**]**

14. The purpose of article 15 is to establish efficient, fair and effective procedures for clarification and modification of the solicitation documents. The right of the procuring entity to modify the solicitation documents is important to ensure that the procuring entity's needs will be met, but should be balanced against ensuring that all terms and conditions of the procurement are determined and disclosed at the outset of the procedure. Article 15 therefore provides that questions and responding clarifications, and modifications, must be communicated by the procuring entity to all suppliers or contractors to which the procuring entity has provided the solicitation documents. Permit them to have access to clarifications upon request would be inadequate: they would have no way of discovering that a clarification had been made. If, however, the solicitation documents were provided to an unidentified group of suppliers or contractors (e.g. through the download of documents from a publicly-available website), the clarifications and modification must at a minimum appear where downloads were offered. The procuring entity is also obliged to inform individual suppliers or contractors of all clarifications and modifications to the extent that the identities of the suppliers or contractors are known to the procuring entity.

15. The rules are also meant to ensure that the procuring entity responds to a timely request from suppliers or contractors in time for the clarification to be taken into account. Prompt communication of clarifications and modifications also enables suppliers or contractors, for example under article 40(3) [**hyperlink**], to modify or withdraw their tenders prior to the deadline for presenting submissions, unless there is no right to do so in the solicitation documents. Similarly, minutes of meetings of suppliers or contractors convened by the procuring entity must be communicated to them promptly, so that they too can be taken into account in the preparation of submissions.

16. Paragraph (3) deals with the situations in which, as a result of clarifications and modifications, the originally published information becomes materially inaccurate. The provisions oblige the procuring entity in such cases promptly to publish the amended information in the same place where the original information appeared. This requirement is in addition to that in paragraph (2) to notify the changes individually to each supplier or contractor to which the original set of solicitation documents was provided, where applicable. The provisions of paragraph (3) also reiterate the obligation on the procuring entity in such cases to extend the deadline for presentation of submissions (see article 14(3), and the commentary thereto [**hyperlinks**]).

17. This situation should be differentiated from a material change in the procurement. For example, as stated in the commentary to article 14, changes as regards the manner, place and the deadline for presenting submissions would always make the original information materially inaccurate without necessarily causing a material change in the procurement. However, if as a result of such changes, the pool of potential suppliers or contractors is affected (for example, as a result of changing the manner of presenting submissions from paper to electronic in societies where electronic means of communication are not widespread), it may be concluded that a “material change” has taken place. In such a case, the measures envisaged in paragraph (3) of the article would not be sufficient — the procuring entity would be required to cancel the procurement and commence new procurement proceedings. A “material change” is also highly likely to arise when, as a result of clarifications and modifications of the original solicitation documents, the subject-matter of the procurement has changed so significantly that the original documents no longer put prospective suppliers or contractors fairly on notice of the true requirements of the procuring entity.

18. Although, in paragraph (4), a reference is made to “requests submitted at the meeting”, nothing under the Model Law prevents the procuring entity from also reflecting during a meeting of suppliers or contractors any requests for clarification of the solicitation documents submitted to it before the meeting, and its responses thereto. The obligation to preserve the anonymity of the source of the request will also apply to such requests.

Article 16. Clarification of qualification information and of submissions [hyperlink**]**

19. The purpose of article 16 is to allow for uncertainties in qualification information and/or submissions to be resolved. An uncertainty may involve an error in the information submitted that could be corrected. If it is uncorrected and the qualification information or submission is accepted, significant contract

performance problems could result. Secondly, the procedures allow for fairer treatment of suppliers and contractors that make minor technical errors. Thirdly, where the procedures lead to an error being corrected, they may allow the best qualified supplier or contractor to participate in the procurement, and the best submission to be accepted. Fourthly, the procedures can avoid the otherwise unnecessary disqualification of a supplier or rejection of a submission, or the unnecessary cancellation of the procurement. Fifthly, they can avoid a re-tendering or other repeat procedure, which could allow suppliers or contractors to revise prices upwards in the knowledge of the prices submitted earlier, and avoid collusive behaviour that repeat procedures facilitate. Finally, the procedures can avoid the issues that can arise if submissions contain errors that mean that the procurement contract may be void or voidable.

20. Paragraph (1) of the article permits the procuring entity to seek clarification of qualification information or submissions presented. It should also be noted that the purpose of the clarification request is to assist in the ascertainment of qualifications and the examination and evaluation of submissions, and not to allow for improvements in the information previously submitted to be made. Enacting States may wish to provide in regulations or rules or guidance that the manner of seeking such clarifications should be akin to the procedures for investigating abnormally low tenders under article 20 [**hyperlink**], and that the provisions of article 7 on communications [**hyperlink**] require, in effect, the use of a written procedure. These procedural safeguards, together with the requirement to document it in the record of the procurement as required by paragraph (6), will assist in ensuring a fair and transparent process. It is also important given that any decision resulting from the process will be amenable to challenge under Chapter VIII of the Model Law [**hyperlink**].

21. The regulations or other rules or guidance should also address the consequences that may flow from the information received in response to such a request, taking into account the matters raised in paragraphs (…) below. They should emphasize, as previously noted, that the clarification procedure is not designed as a corrections procedure — and that suppliers and contractors have no right to present corrections. What may happen as a result of a clarification procedure is that whether a supplier or contractor is qualified and whether a submission is responsive may be clarified. Alternatively, an error may be discovered, which can pose some difficulty for the procuring entity and the supplier. Under the provisions of paragraphs (2) and (3) of this article combined with the provisions of article 43(1)(b) in open tendering proceedings [**hyperlink**], minor deviations or errors, or arithmetical errors, but no others, can be corrected.[1] Where such other errors are discovered, and where they render the supplier or contractor unqualified or the submission unresponsive, the supplier will be disqualified or the submission rejected, as the case may be.[2]

22. Paragraph (2) of the article requires the procuring entity to correct any “purely arithmetical errors” that are discovered during the examination of submissions, without invoking the clarification procedure under paragraph (1). This provision

[1] The Working Group is requested to advise on the correct interpretation.

[2] The Working Group is requested to consider what should happen if the errors do not make the submission unresponsive.

should be read, in the case of tendering proceedings, together with those of paragraph 43(2)(b) [**hyperlink**], which state that the procuring entity shall reject a tender if the supplier or contractor submitting it does not accept the correction. As the supplier can accept the correction, withdraw the tender, or allow the tender to be rejected, these provisions, taken together, confer a power upon the procuring entity to permit a correction. Enacting States in such a case should provide regulations or other rules that both regulate the discretion so conferred and address what should happen to a tender security in such circumstances.

23. Additional regulations or other rules and guidance will be required to define or describe an "arithmetical error". While it may be reasonably clear that adding up columns of figures incorrectly so that the total in the final tender price is incorrect is an arithmetical error, the misplacement of a decimal is less clear, as is the situation in which part of the tender price is quoted in or draws on an incorrect currency when it is clear from the document that a different currency is intended. As there may be more than one way of correcting the arithmetical error (is one element in a column of figures to be treated as incorrect, or the total?), rules and guidance will be needed to address and limit the discretion in fact conferred on the procuring entity.

24. A consequential issue is that the scope of any duty of the procuring entity to check for and identify errors should also be clarified. First, rules or guidance should address whether there is any duty, and its extent, to be more active than to note any errors that are clear on the face of the submission.

25. These issues require additional rules and guidance both to allow the procuring entity's decisions to be monitored and evaluated against objective standards, and also to avoid the risk of abuse that may arise in the circumstances. Errors may be deliberately included by suppliers or contractors so that (once submission prices are known), there may be an opportunity to "correct" them. A safeguard in this context is the requirement to correct any errors discovered, without reference to the supplier or contractor concerned. However, where the procuring entity has to contact that supplier or contractor in order to correct the error, i.e. availing itself of the facility conferred by paragraph (1), the opportunity for abuse nonetheless arises, perhaps involving both parties. Finally, there may also be issues of culpability or liability if either party was negligent in making or failing to spot errors that come to light during the contract administration period. Any such liability will generally arise under other laws in the enacting State, requiring coordination between the public procurement agency or similar body issuing procurement guidance and other bodies that may address such liability.

26. Paragraph (3) of the article limits the corrections that can be made as a result of both the clarification procedure and of the discovery of an arithmetical error. In the case of open tendering, the paragraph should be read together with the provisions of article 43(1)(b) [**hyperlink**] that allow the procuring entity to treat tenders as responsive after any "minor deviations" have been taken into account (see, further, the commentary to that article [**hyperlink**]). Paragraph (3) prohibits corrections or other changes of substance to qualification information and to submissions. Further regulation or rules and guidance will be required to set out the meaning of "substantive" in these circumstances, in addition to the explanation in the paragraph that any changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive are prohibited,

particularly as regards changes in price. While price changes as a result of the clarifications procedure are prohibited under paragraph (4) of the article, arithmetical errors may be both substantive and imply a change in price.[3]

27. Paragraph (4) provides an important safeguard against abuse in the clarifications procedure, by prohibiting negotiations in the clarifications process and any changes in price.[4] Paragraph (5), however, states that these restrictions do not apply to interactive procurement methods under articles 49-52 [**hyperlinks**], as the clarification process will take place during the dialogue or discussions, other than as regards best and final offers.[5]

Article 17. Tender securities[6] [hyperlink**]**

28. The purpose of the article is to set out requirements as regards tender securities as defined in article 2(u) [**hyperlink**], in particular as to their acceptability by the procuring entity, the conditions that must be present for the procuring entity to be able to claim the amount of the tender security, and the conditions under which the procuring entity must return or procure the return of the security document. As stated in the commentary to the definition of "tender security" in article 2, the Model Law refers to "tender security" as the commonly-used term in the relevant context, without implying that this type of security may be requested only in tendering proceedings. The definition also excludes from the scope of the term any security that the procuring entity may require for performance of the procurement contract (under article 39(k) [**hyperlink**], for example). The latter may be required to be provided by the supplier or contractor that enters into the procurement contract while the requirement to provide a tender security, when it is imposed by the procuring entity, applies to all suppliers or contractors presenting submissions (see paragraph (1) of the article).

29. The procuring entity may suffer losses if suppliers or contractors withdraw their submissions or if a procurement contract with the supplier or contractor whose submission had been accepted is not concluded due to fault on the part of that supplier or contractor (e.g., the costs of new procurement proceedings and losses due to delays in procurement). Article 17 authorizes the procuring entity to require suppliers or contractors participating in the procurement proceedings to post a tender security so as to cover such potential losses and to discourage them from defaulting.

30. Procuring entities need not require a tender security in all procurement proceedings. Tender securities are usually important when the procurement is of high-value goods or construction. In the procurement of low value items, though it may be of importance to require a tender security in some cases, the risks of delivery or performance faced by the procuring entity and its potential losses are

---

[3] The Working Group is requested to advise on this point, and whether minor deviations that would lead to price changes are to be treated as substantive.

[4] See previous paragraph and footnote thereto.

[5] The Working Group is requested to consider, by reference to the language of 16(5) and 49(12), whether this statement is accurate.

[6] The provision of guidance to the Secretariat is requested on whether practice in some jurisdictions as regards the use of securities issued in electronic form will affect the content of the commentary to this article as set out below.

generally low, and the cost of providing a tender security — which will normally be reflected in the contract price — will be less justified. Requesting the provision of securities in the context of framework agreements, because of the nature of the latter, should be regarded as an exceptional measure.[7] Although practices might continue to evolve, at the time of preparing this Guide, little experience on the use of tender securities in electronic reverse auctions has been accumulated and existing practices were highly diverse. It might be problematic to obtain a security in the context of electronic reverse auctions, as banks generally require a fixed price for the security documents. There also may be procurement methods in which tender securities are inappropriate, for example in request-for-proposals with dialogue proceedings, as tender securities would not provide a workable solution to the issue of ensuring sufficient participation in dialogue or binding suppliers or contractors as regards their evolving proposals during the dialogue phase (to be contrasted with the best and final offer stage of the procedure). (See the relevant discussion in the commentary to the relevant provisions of article 48 [**hyperlink**].) Even if in both cases referred to above (electronic reverse auctions and request-for-proposals with dialogue proceedings), tender securities were requested, subsequent tender securities cannot be requested by the procuring entity in any single procurement proceeding that involves presentation of revised proposals or bids, given the prohibition against demanding multiple tender securities as the commentary to the definition of "tender security" in article 2 explains [**hyperlink**].

31. Safeguards have been included to ensure that a tender-security requirement is imposed fairly and for the intended purpose alone: that is, to secure the obligation of suppliers or contractors to enter into a procurement contract on the basis of the submissions they have presented, and to post a security for performance of the procurement contract if required to do so.

32. Paragraph (1)(c) has been included to remove unnecessary obstacles to the participation of foreign suppliers and contractors that could arise if they were restricted to providing securities issued by institutions in the enacting State. However, the language in subparagraphs (i) and (ii) provides flexibility on this point: first, for procuring entities in States in which acceptance of tender securities not issued in the enacting State would be a violation of law; and secondly, in domestic procurement where the procuring entity stipulated in the solicitation documents in accordance with paragraph (1)(b) that a tender security must be issued by an issuer in the enacting State.

33. The reference to confirmation of the tender security in paragraph (1)(d) is intended to take account of the practice in some States of requiring local confirmation of a tender security issued abroad. The reference, however, is not intended to encourage such a practice, in particular since the requirement of local confirmation could constitute an obstacle to participation by foreign suppliers and contractors in procurement proceedings (e.g., difficulties in obtaining the local confirmation prior to the deadline for presenting submissions and added costs for foreign suppliers and contractors).

---

[7] The Working Group is requested to consider whether it would be practically possible to obtain a tender security unless the potential obligation to compete under the framework agreement is defined. Similar considerations arise in the context of ERAs and pre-BAFO stages of request for proposals with dialogue proceedings.

34. Paragraph (2) has been included in order to provide clarity and certainty as to the point of time after which the procuring entity may not make a claim under the tender security. While the retention by the beneficiary of a guarantee instrument beyond the expiry date of the guarantee should not be regarded as extending the validity period of the guarantee, the requirement that the security be returned is of particular importance in the case of a security in the form of a deposit of cash or in some other similar form. The clarification is also useful since there remain some national laws in which, contrary to what is generally expected, a demand for payment is timely even though made after the expiry of the security, as long as the contingency covered by the security occurred prior to the expiry. As in article 41(3) [**hyperlink**], paragraph (2)(d) of this article reflects that the procuring entity may avail itself, by way of a stipulation in the solicitation documents, of an exception to the general rule that withdrawal or modification of a tender prior to the deadline for presenting submissions is not subject to forfeiture of the tender security.[8]

35. In the light of the cost of providing a tender security, which will normally be reflected in the contract price, the use of alternatives to a tender security should be considered and encouraged where appropriate. In some jurisdictions, a bid securing declaration is used in lieu of tender securities. Under this type of declaration, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for contingencies that normally are secured by a tender security. (Sanctions do not generally include debarment, as debarment should not be concerned with commercial failures (see the relevant commentary to article 9 above [**hyperlink**]).) These alternatives aim at promoting more competition in procurement, by increasing participation in particular of SMEs that otherwise might be prevented from participation because of formalities and expenses involved in connection with presentation of a tender security.[9]

Article 18. Pre-qualification proceedings [hyperlink**]**

36. The purpose of the article is to set out the required procedures for pre-qualification proceedings. Pre-qualification proceedings are intended to identify, at an early stage, those suppliers or contractors that are suitably qualified to perform the contract. Such a procedure may be particularly useful for the purchase of complex or high-value goods, construction or services, and may even be advisable for purchases that are of a relatively low value but of a highly specialized nature. The reason in each case is that the evaluation of submissions in those cases is much more complicated, costly and time-consuming than for other procurement. Competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high-value contracts, where the cost of preparing the submission may be high, if the competitive field is too large and where they run the

---

[8] The Working Group may wish to consider whether there is a need to add discussion of possible extensions of the period of effectiveness of tender securities in the commentary to this article, in addition to the commentary to article 41 (i.e. where the period of validity of the tenders is itself extended).

[9] The need for further discussion on the potentially onerous nature of securities is to be considered, in the light of the following issues raised earlier in the Working Group's deliberations: the further negative effects of requiring suppliers or contractors to present tender securities, issues of mutual recognition and the right of the procuring entity to reject securities in certain cases.

risk of having to compete with submissions presented by unqualified suppliers or contractors. The use of pre-qualification proceedings may narrow down the number of submissions that the procuring entity will evaluate to those from qualified suppliers or contractors. It is thus a tool to facilitate the effective procurement of relatively complex subject matter.

37. Pre-qualification under paragraph (1) of the article is optional and may be used regardless of the method of procurement used.[10] Because of an additional step and delays in the procurement caused by pre-qualification and because some suppliers or contractors may be reluctant to participate in procurement involving pre-qualification, given the expense of so doing, pre-qualification should be used only when strictly necessary, in situations described in the immediately preceding paragraph.

38. The pre-qualification procedures set out in article 18 are made subject to a number of important safeguards. These safeguards include the limitations in article 9 [**hyperlink**] (in particular on the assessment of qualifications, applicable equally to pre-qualification procedures) and the procedures found in paragraphs (2) to (10) of this article. This set of procedural safeguards is included to ensure that pre-qualification procedures are conducted using objective terms and conditions that are fully disclosed to participating suppliers or contractors; they are also designed to ensure a minimum level of transparency and to facilitate the exercise by a supplier or contractor that has not been pre-qualified of its right to challenge its disqualification.

39. The first safeguard is that procedures for inviting participation in pre-qualification procedures follow those for open solicitation. Paragraph (2) therefore requires the publication of the invitation to pre-qualify. The publication in which this invitation is to be advertised is set out in the procurement regulations, rather than in the Model Law, in common with the provisions in articles 33(1) and 34(5) [**hyperlinks**] on the publication of the invitation to tender or prior notice of the procurement, as the case may be. Although such publication is likely in many enacting States to be required in the official Gazette, the reason for this more flexible approach allow for procedures in enacting States to change. As the official Gazette has traditionally been a paper publication, the approach also follows the Model Law's principle of technological neutrality (i.e. avoids favouring a paper-based environment). See, further, the discussion of ensuring effective access to information published regarding procurement in the commentary to the above articles, and article 5 on publication of legal texts [**hyperlinks**].

40. The default rule also requires international publication in a manner that will ensure that suppliers from overseas will have proper access to the invitation, unless (as in the case of an invitation to tender under article 33(4) [**hyperlink**]), the procuring entity decides that suppliers or contractors from outside the State concerned are unlikely to wish to participate in the light of the low value of the procurement concerned. The commentary in the introduction to Chapter I [**hyperlink**] considers the general issues arising in the setting of low-value thresholds under the Model Law, urging consistency in the designation of low-value

---

[10] During expert consultations, it was queried whether the use of pre-qualification should be discouraged in open tendering. The Working Group is requested to consider whether any additional comment on the issue should be included here.

procurement (whether there is an explicit threshold or not). The concept of low-value procurement in this case should not be interpreted as conferring upon enacting States complete flexibility to set the appropriate threshold sufficiently high to exclude the bulk of its procurement from requirement of international publication. The procurement regulations or guidance from the public procurement agency or similar body should therefore provide further detail of how to interpret "low-value" in this case. In addition, it should be emphasized that low value alone is not a justification for excluding international participation of suppliers per se (by contrast with domestic procurement set out in article 8 [**hyperlink**]), so that international suppliers can participate in a procurement that has not been advertised internationally if they so choose; for example, if they respond to a domestic advertisement or one on the Internet.

41. Enacting States may also wish to encourage procuring entities to assess, first, whether international participation is a likelihood in the circumstances of each given procurement assuming that there is international publication and whether or not it is low value: this may involve considering geographic factors, and whether the supply base from abroad is limited or non-existent, which may be the case for example for indigenous crafts. Secondly, they should consider what additional steps international participation might indicate. In this regard, the Model Law recognizes that in such cases of low-value procurement the procuring entity may or may not have an economic interest in precluding the participation of foreign suppliers and contractors: a blanket exclusion of foreign suppliers and contractors might unnecessarily deprive it of the possibility of obtaining a better price. On the other hand, international participation may involve translation costs, additional time periods to accommodate translation of the advertisement or responses from foreign suppliers, and might require the procuring entity to consider tenders or other offers in more than one language. The procuring entity will wish to assess the costs and benefits of international participation, where its restriction is permitted, on a case-by-case basis.

42. The term "address" found in paragraph (3)(a) is intended to refer to the physical registered location as well as any other pertinent contact details (telephone numbers, e-mail address, etc. as appropriate). See, further, the description of the term "address" in the Glossary in Annex ** [**hyperlink**].[11]

43. While the provisions of the article allow for charges for the pre-qualification documents, development costs (including consultancy fees and advertising costs) are not to be recovered through those provisions. It is understood, as stated in paragraph (4) of the article, that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate). In addition, enacting States should note that best practice is not to charge for the provision of such documents.[12]

44. The reference to the "place" found in paragraph (5)(d) [**hyperlink**] includes not the physical location but rather an official publication, portal, etc.

---

[11] The general commentary on "addresses" in the Glossary will note that the term should be interpreted consistently throughout the Model Law whether reference is to the address of the procuring entity or the address of a supplier or contractor.

[12] The last sentence reflects the view of some commentators, as a statement of principle, but some consider that this is not a practical proposition.

where authoritative and up-to-date texts of laws and regulations of the enacting State are made available to the public. The issues raised in the commentary to article 5 [**hyperlinks**], on ensuring appropriate access to up-to-date legal texts are therefore also relevant in the context of this paragraph.

45. The references to "promptly" in paragraphs (9) and (10) should be interpreted to mean that the notification required must be given to suppliers and contractors prior to solicitation. This is an essential safeguard to ensure that there can be an effective review of decisions made by the procuring entity in the pre-qualification proceedings. For the same reason, article 10 requires the procuring entity to notify each supplier or contractor that has not been pre-qualified of the reasons therefor.

46. The provisions of the article on disclosure of information to suppliers or contractors or the public are subject to article 24 on confidentiality [**hyperlink**] (which contains limited exceptions to public disclosure).

47. Pre-qualification should be differentiated from pre-selection, envisaged under the Model Law only in the context of request-for-proposals with dialogue proceedings under article 49 [**hyperlink**]. In pre-qualification, all pre-qualified suppliers or contractors may present submissions. In the case of pre-selection, the maximum number of pre-qualified suppliers or contractors that will be permitted to present submissions is set at the outset of the procurement proceedings, and the maximum number of participants is made known in the invitation to pre-selection. The identification of qualified suppliers or contractors in pre-qualification proceedings is on the basis of whether applicants pass or fail pre-established qualification criteria, while pre-selection involves additional, generally competitive, selection procedures when the established maximum of suppliers or contractors would be exceeded (e.g. the pre-selection may involve, after a pass/fail examination, a ranking against the qualification criteria and the selection of the best qualified up to the established maximum). This measure is taken even though the drafting of rigorous pre-qualification requirements may in fact limit the number of pre-qualified suppliers or contractors.

Article 19. Cancellation of the procurement [hyperlink**]**

48. The purpose of article 19 is to enable the procuring entity to cancel the procurement. It has the unconditional right to do so prior to the acceptance of the successful submission. After that point, it may do so only if the supplier or contractor whose submission was accepted fails to sign the procurement contract as required or fails to provide any required contract performance security (see paragraph (1) of article 19 and article 22(8) and the commentary thereto, outlining the other options available in such circumstances [**hyperlinks**]).

49. Inclusion of this provision is important because a procuring entity may need to cancel the procurement for reasons of public interest, such as where there appears to have been a lack of competition or to have been collusion in the procurement proceedings, where the procuring entity's need for the subject matter of procurement ceases, or where the procurement can no longer take place due to a change in Government policy or a withdrawal of funding or because all the submissions have turned out to be unresponsive, or the proposed prices substantially exceeded the available budget. The provisions of the article thus recognize that the

public interest may be best served by allowing the procuring entity to cancel undesirable procurement rather than requiring it to proceed.

50. In the light of the unconditional right given to the procuring entity to cancel the procurement up to acceptance of the successful submission, the article provides for safeguards against any abuse of this right. The first safeguard is contained in the notification requirements in paragraph (2), which are designed to foster transparency and accountability and effective review. Under that paragraph, the decision on cancellation together with reasons therefor should be promptly communicated to all suppliers or contractors that presented submissions so that they could challenge the decision on cancellation if they wish to do so. Although the provisions do not require the procuring entity to provide a justification for its decision (on the understanding that, as a general rule, the procuring entity should be free to abandon procurement proceedings on economic, social or political grounds which it need not justify), the procuring entity must provide a short statement of the reasons for that decision, in a manner that must be sufficient to enable a meaningful review of the decision.[13] The procuring entity need not but is not prevented from providing justifications when it decides that it would be appropriate to do so (for instance, when it wishes to demonstrate that the decision was neither irresponsible nor as a result of dilatory conduct). It may also decide to engage in debriefing (as to which, see Section ** of the general commentary and the introduction to Chapter VII [**hyperlinks**]).

51. An additional safeguard is in the requirement for the procuring entity to cause a notice of its decision on cancellation to be published in the same place and manner in which the original information about procurement was published. This measure is important to enable the oversight by the public of the procuring entity's practices in the enacting State.

52. Some provisions in paragraphs (1) and (2) of the article are designed for treating submissions presented but not yet opened by the procuring entity (for example, when the decision on cancellation is made before the deadline for presenting tenders). After the decision on cancellation is taken, any unopened submission must remain unopened and returned to suppliers or contractors presenting them. This requirement avoids the risk that information supplied by suppliers or contractors in their submissions will be used improperly, for example by revealing it to competitors. This provision is also aimed at preventing abuse of discretion to cancel the procurements for improper or illegal reasons, such as after the desired information about market conditions was obtained or after the procuring entity learned that a favoured supplier or contractor will not win.

53. In many jurisdictions, decisions to cancel the procurement would not normally be amenable to review, in particular by administrative bodies, unless abusive practices were involved. The Model Law however does not exempt any decision or action taken by the procuring entity in the procurement proceedings from challenge or appeal proceedings under chapter VIII (although a cautious approach has been taken in the drafting of article 67 [**hyperlink**] to reflect that in some jurisdictions the administrative body would not have jurisdiction over this type of claim). What the Model Law purports to do in paragraph (3) of this article is to limit

[13] The Working Group may wish to consider whether an example illustrating the differences between reasons and justifications should be added.

the liability of the procuring entity for its decision to cancel the procurement to exceptional circumstances. Under paragraph (3), the liability is limited towards suppliers or contractors having presented submissions to any situation in which the cancellation was a consequence of irresponsible or dilatory conduct on the part of the procuring entity.

54. Under Chapter VIII of the Model Law [**hyperlink**], the right to challenge the decision of the procuring entity to cancel the procurement proceedings may be exercised but whether liability on the part of the procuring entity would arise would depend on the factual circumstances of each case. Paragraph (3) is considered important in this respect because it provides protection to the procuring entity from unjustifiable protests and, at the same time, safeguards against an unjustifiable cancellation of the procurement proceedings by the procuring entity. It is however recognized that, despite the limitations of liability under paragraph (3), the procuring entity may face liability for cancelling the procurement under other branches of law. In particular, although suppliers or contractors present their submissions at their own risk, and bear the related expenses, cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened even in circumstances not covered by paragraph (3).

55. Administrative law in some countries may restrict the exercise of the right to cancel the procurement, e.g., by prohibiting actions constituting an abuse of discretion or a violation of fundamental principles of justice. Administrative law in some other countries may, on the contrary, provide for an unconditional right to cancel the procurement at any stage of the procurement proceedings, even when the successful submission was accepted, regardless of the provisions of the Model Law. Law may also provide for other remedies against abusive administrative decisions taken by public officials. The enacting State may need therefore to align the provisions of the article with the relevant provisions of its other applicable law. The Glossary in Annex ** [**hyperlink**] provides examples of the type of conduct intended to be caught by this provision, and the public procurement agency or other similar body may wish to issue more detailed guidance to procuring entities on the scope of their discretion and potential liability both under the procurement law and any other laws in the enacting State that may confer liability for administrative acts.

56. The cancellation of the procurement by the procuring entity under this article should be differentiated from termination of the procurement proceedings as a consequence of challenge proceedings under article 67(9)(g) of the Model Law [**hyperlink**]. The consequences of both are the same — no further actions and decisions are taken by the procuring entity in the context of the cancelled or terminated procurement after the cancellation or termination becomes effective.