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Report of Working Group I (Procurement) on the work of its sixteenth session (New York, 26-29 May 2009)*

Contents

* This document was submitted less than ten weeks before the opening of the session because the meeting that was the subject matter of the report took place after the ten-week deadline.

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the "Commission") entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh to thirteenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, New York, 21-25 May 2007, Vienna, 3-7 September 2007, and New York, 7-11 April 2008, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions (ERAs), including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and procedural aspects of ERAs.

3. At its seventh, eighth and tenth to twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders.

4. At its thirteenth and fourteenth (Vienna, 8-12 September 2008) sessions, the Working Group held an in-depth consideration of the issue of framework agreements. At its thirteenth session, the Working Group also discussed the issue of suppliers' lists and decided that the topic would not be addressed in the Model Law, for reasons that would be set out in the Guide to Enactment. At its fourteenth session, the Working Group also held an in-depth consideration of the issue of remedies and enforcement and addressed the topic of conflicts of interest.

5. At its fifteenth session (New York, 2-6 February 2009), the Working Group completed the first reading of the revised text of the Model Law except for its chapter IV. It noted that further research was required for some provisions in particular in order to ensure that they were compliant with the relevant international instruments.

6. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17, Part one, para. 170, and A/63/17, para. 307). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide to its Enactment (the "Guide"), should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17, Part one, para. 170). At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17, para. 307).

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its sixteenth session in New York, from 26-29 May 2009. The session was attended by representatives of the following States members of the Working Group: Austria, Belarus, Bulgaria, Cameroon, Canada, China, Czech Republic, Egypt, France, Germany, Greece, Guatemala, Honduras, Iran (Islamic Republic of), Italy, Kenya, Madagascar, Mexico, Morocco, Pakistan, Paraguay, Republic of Korea, Russian Federation, Senegal, South Africa, Spain, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela (Bolivarian Republic of).

8. The session was attended by observers from the following States: Afghanistan, Bangladesh, Belgium, Croatia, Holy See, Indonesia, Jordan, Philippines, Sweden and Turkey.

9. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: the World Bank and the World Trade Organization;

(b) *Intergovernmental organizations*: European Commission and Organization for Economic Cooperation and Development;

(c) *Invited international non-governmental organizations*: American Bar Association, Forum for International Commercial Arbitration C.I.C (FICACIC), International Bar Association, International Federation of Consulting Engineers (FIDIC), International Law Institute, and Union Internationale des Avocats.

10. The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON[1] (Sweden)

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

11. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.67);

(b) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting history of some provisions of the 1994 Model Law and the treatment of the issues raised by some of those provisions in international instruments regulating public procurement (A/CN.9/WG.I/WP.68 and Add.1);

(c) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – a revised text of the Model Law (A/CN.9/WG.I/WP.69 and Add.1-5).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

III. Deliberations and decisions

13. At its sixteenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group considered proposals for article 40 of the revised Model Law dealing with a proposed new procurement method – competitive dialogue. The Working Group agreed on the principles on which the provisions should be based and on much of the text as reflected in this report, and requested the Secretariat to review the provisions in order to align the text with the rest of the Model Law. The Secretariat was also entrusted with drafting new provisions for chapter I, such as on requests for expression of interest and cancellation of the procurement, for consideration at a later stage. The Working Group also requested the Secretariat to amend some provisions of chapter I, such as on the record of procurement proceedings, confidentiality, evaluation criteria, and public notice of procurement contract awards, and provisions of chapter II on clarifications and modifications of solicitation documents, in the light of the provisions on competitive dialogue.

[1] Elected in his personal capacity.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. Proposals for chapter IV of the revised Model Law (procurement methods involving negotiations)

1. Introduction of a proposal

14. The Working Group had before it a proposal for chapter IV of the revised Model Law submitted by delegations of Austria, France, the United Kingdom and the United States of America, entitled "Article 40. Request for Proposals with Competitive Negotiations".

15. One of the sponsoring delegations, in introducing the proposal, stated that it built on the proposal, presented to the Working Group at its previous session, which merged articles 48 and 49 of the 1994 Model Law. It was recalled that the Working Group had decided at that session to defer the consideration of chapter IV to a later stage (A/CN.9/668, paras. 209-212). The proposal, it was said, was intended to be a basis for the Working Group's deliberations on competitive negotiations.

16. It was recalled that the 1994 Model Law contained provisions on competitive negotiations (article 49), but they were considered to be insufficiently regulated to ensure transparency and the equal treatment of participants. In view of the potential economic gains of competitive negotiations in the procurement of complex works and services, the sponsoring delegations stressed the need for the Model Law to allow for the use of this procurement method. The proponents acknowledged that competitive negotiations presupposed significant discretion on the part of procuring entities in decision-making, and therefore it raised higher risks of corruption and abuse than might be present in other less flexible procedures. However, it was reported that the value of this procurement method had resulted in benefits to the procuring entity in enabling it to obtain the best solution to its procurement needs, and thus that there would be advantages to developed and developing countries alike in its use. It was also stressed that the opportunity cost of not providing for such negotiations should be taken into account.

17. It was pointed out that since the use of this procurement method involved elevated risks of corruption and abuse, an adequate regulatory framework would be required and in addition there should be in place an appropriate supporting institutional framework consisting of, inter alia: anti-bribery provisions and institutions; an independent audit function; active civil society (including oversight by mass media); a political system that was responsive in cases of abuse; a robust remedies system to allow redress; effective conflict-of-interest regulations; and a procurement workforce that was highly trained and professionalized. In other words, it was emphasized, there was a need for good governance and a high standard of administration.

18. The importance of preserving the necessary flexibility and discretion on the part of the procuring entity in the use of the procurement method, which would enhance the benefits of the procedure, was stressed. It was generally considered that, at the same time, safeguards against abuse or improper use of this procurement

method should be built in. It was pointed out that the safeguards might take different forms, such as: (a) requiring public notification of the essential decisions taken in the beginning, during and at the end of the procurement proceedings, such as modification of criteria or specifications; (b) specifying conditions for use; (c) imposing a minimum number of participants with whom negotiations should be held; (d) establishing the format of negotiations (should for example both concurrent and consecutive negotiations be permitted? It was noted that the sponsoring delegations considered that concurrent negotiations ensured the most beneficial outcome and equal treatment, and so were preferable); (e) regulating procedures for best and final offers (BAFOs), including whether one or several rounds of BAFOs should be allowed; (f) setting out rules on specifications and evaluation criteria, including the extent of permitted modifications; and (g) comprehensive record-keeping.

19. It was mentioned that while it was necessary to build minimum safeguards in the use of this procurement method, it was also necessary to recognize that procedural safeguards alone would not be sufficient unless they were supported by an appropriate institutional and regulatory framework, as detailed in paragraph 17 above. The experience of the World Bank, as an institution that provided technical assistance in reform of procurement systems, was reported in this respect. That experience indicated that putting in place the institutional frameworks and safeguards that were a prerequisite for the use of this method had proved to be among the most difficult reforms to implement. In response, it was noted that robust safeguards against improprieties in procurement were required with respect to all procurement methods, and that there had been significant reform towards introducing necessary safeguards in some States in recent years.

20. A point was made that, in considering aspects of this procurement method, the context in which it would be dealt with in the Model Law should not be overlooked, namely that competitive negotiations would be one of the tools available to the procuring entity. It was explained that, under the revised Model Law, the procuring entity would be under an obligation to choose the procurement method best suited to the given circumstances. It was further elaborated that since competitive negotiations normally involved cumbersome and time-consuming procedures, they should therefore be utilized only when appropriate, and not for simple items that were usually procured through tendering. They would be appropriate, it was said, for procurement in which a tailor-made solution would be needed (an example was given of an information technology system for the archiving of legal records, which needed long-term accessibility), and where technical excellence was an issue.

21. On the other hand, it was noted that the proposal would not address all situations in which negotiations might be needed, such as those referred to in article 19 (1) (d) and (2) of the 1994 Model Law, particularly in the context of urgent procurement. It was also stressed that the revised Model Law should specify conditions for use of each procurement method involving negotiations.

22. It was noted that the proposed procurement method often involved the following stages: (a) an optional request for expressions of interest (RFI); (b) publication of solicitation terms, rules of procedure and, if prequalification were involved, prequalification terms; (c) some form of prequalification or pre-selection, especially when it was expected that more than the optimum number of candidates would express interest in participating; (d) issuance of the request for

proposal (RFP) to those candidates that were selected for negotiations; (e) concurrent competitive dialogue; (f) completion of negotiations with the request for BAFOs; and (g) award.

23. It was explained that the RFI was intended to be optional in order to investigate when necessary how the market could respond to the needs of the procuring entity. It was further noted that the RFI did not impose any obligation on the procuring entity to proceed with the procurement nor did it give any right on the suppliers or contractors that responded to the RFI. Concern was expressed that in some jurisdictions the term RFI was used to describe a mandatory stage triggering competitive negotiations. To avoid confusion, it was suggested that a different term should be used in the proposal. (On the same subject, see further paras. 38-44 below.)

24. It was further explained that, at the stage at which the solicitation terms, the rules of procedure and (if prequalification were involved) the prequalification terms were published, the procuring entity's needs would be defined as a rule in general terms (as performance/output indicators). It was noted that the needs would normally be refined through negotiations, but, in some cases, it was possible to be more specific from the outset. It was stated that the evaluation criteria and relative weight of each criterion, on the other hand, had to be defined and could not be varied throughout the process.

25. It was added that holding prequalification to assess the competencies and eligibility of suppliers or contractors to meet the needs of the procuring entity before negotiations started would normally be considered to be good practice. In this context, it was noted, prequalification might involve pre-selection in the sense that the top-ranking three or five suppliers were selected for negotiations from among the pre-qualified candidates. However, it was stressed that the procuring entity would have from the outset to reserve this possibility and to disclose the criteria and procedure for pre-selection, which should be objective and non-discriminatory. As regards the optimum number of participants, it was observed that negotiating with more than five candidates had proved to be very cumbersome and unworkable in practice, that this number would normally be the maximum number of participants, and that a desirable minimum would be three participants. A suggestion was made that determining the maximum number of suppliers with which the procuring entity would negotiate should be left to the procuring entity.

26. It was further explained that the RFP was issued to all suppliers admitted to the negotiations; time would be allowed for them to prepare their proposals; and after proposals were submitted, negotiations would take place concurrently with all remaining participants. It was noted that negotiations were as a rule held by a committee composed of the same people for each supplier, to ensure consistent results. In addition to efficiency, this use of committees was considered to be a valuable anti-corruption measure. The importance of equal treatment of all participants at the negotiations stage was stressed. It was noted that equal treatment in practice meant, for example, that the same topic was considered with the participants concurrently for the same amount of time.

27. It was explained that competitive negotiations might involve several rounds or phases of negotiations by the end of which specifications could be refined and participants would be given a chance to modify their proposals in the light of both

the refined specifications, and the questions and comments put forward by the negotiating committee during negotiations. Some participants might decide not to participate further in negotiations, or they might be excluded from further negotiations by the procuring entity if they were considered to be unable to respond to the needs of the procuring entity. Upon completion of the negotiations, the remaining participants would be given an equal chance to present BAFOs on the basis of their proposals.

28. In response to a query as to whether price was subject to negotiation, it was stated that a preliminary price would be given in all cases at the initial stage, and the final price was always included in the BAFO. While the primary focus of negotiations typically was on technical aspects, in some cases it was not possible to separate price and non-price criteria. The option to negotiate on price should not be excluded, it was said, especially in situations where the market conditions allowed and even encouraged the procuring entity to use it as a negotiating factor. In no case, it was stressed, however, should disclosure of price and any other commercially sensitive information from one supplier to another occur.

29. In response to a query, the sponsoring delegations confirmed that the tenet of the proposal was consistent with the WTO Government Procurement Agreement (GPA) and the provisional 2006 GPA,[2] but that the provisions permitting reductions of the number of participants would be considered in detail when the Working Group addressed the relevant parts of the proposal. It was noted that some requirements of the current GPA were not included in the provisional 2006 GPA and this indicated desire to facilitate the use of negotiations in procurement.

30. In response to another query, it was explained that the proposal was not intended to replace the provisions on remedies of the Model Law. Therefore, it was noted, complaints from suppliers or contractors excluded from the process were to be dealt with in accordance with the applicable provisions of the Model Law.

2. Consideration of the proposal by the Working Group

31. The Working Group proceeded with a paragraph-by-paragraph consideration of the proposal, noting that it was based on a synthesis of national provisions and not an international text.

Paragraph (1)

32. The proposed paragraph (1), which addressed the conditions for use of the procedure, read as follows:

> "(1) [Subject to approval by … (the enacting State may designate an authority to issue the approval)], a procuring entity may engage in procurement by means of a request for proposals (RFP) with competitive negotiations if it is not feasible for the procuring entity to formulate a detailed description of, or specifications for, the subject matter of the procurement, as:

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[2] Document GPA/W/297, available as of the date of this report at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

(a) Due to the technical nature of the subject matter of the procurement it will be necessary for the procuring entity to invite rounds of proposals from vendors with a view to negotiating price or technical improvements;

(b) The nature or state of development of the relevant sector of suppliers or contractors is largely unknown or such that the procuring entity would first require substantial input from the sector before being able to finalize the specifications or description of the subject matter of the procurement;

(c) The subject matter of the procurement or the delivery method chosen by the procuring entity is [complex and] has many aspects, and is likely to require a high degree of customization;

(d) The subject matter of the procurement is [complex and] dynamic and the term of the contract sufficiently long, such that the specifications are likely to change over the term of the contract [to reflect technological advances]; or

(e) The relevant sector of suppliers or contractors does not have a [uniform] [similar] approach to pricing or delivery of the subject matter of the procurement."

33. As regards the conditions for use of this procedure:

(a) The need for setting out conditions for use in the Model Law (rather than the Guide to Enactment) was stressed as a critical safeguard for use of the procedure. In this regard, it was noted that the conditions should reflect the types of procurement for which the procedure would be appropriate;

(b) The need for approval from a higher authority (placed in square brackets in the chapeau) was queried, as was whether the authority's role should extend to supervision of the procedure. The sponsoring delegations stressed the need for an independent agency, which could bar the use of competitive negotiations if the appropriate institutional framework, capacity and integrity within the procuring entity were not available, based on the criteria set out in paragraph 17 above. Other delegations queried whether this approval requirement, which might be costly and cumbersome, would be justified. They also queried whether the role of the agency would be to assess the administration and governance standards in the State concerned, or to assess those of the procuring entity, or the justification for recourse to competitive negotiations on a case-by-case basis. In this regard, concern was expressed that the approving agency would in reality have to rely on the expertise of the procuring entity as regards the choice of this procedure, and thus the safeguard might be illusory. On the other hand, it was said that removing the approval requirement might undermine open tendering as the primary procurement method, and also might operate as a disincentive to enact the procedure at all. After debate, it was agreed to include the approval requirement in square brackets as an option for the legislator, with the Guide explaining the importance of this safeguard and the need in addition for effective oversight of the procedure;

(c) It was queried whether reference in the chapeau provisions should be made to a "detailed" description of the subject matter of the procurement, and to "detailed" specifications (being part of that description). On the one hand, it was stated that avoiding the term might lead to overuse of the method where it was not

justified (simply avoiding appropriate preparation for the procurement); on the other hand, it was commented that the procuring entity would need some level of detail simply in order to issue a basic functional description, and therefore that the qualifier did not bring any real clarification to the basic question of whether or not it was "feasible" to draft appropriate description and specifications. Other delegations considered that if functional specifications, rather than technical specifications, could be drafted, there would be no need to use a method that sought to define solutions through the procedure itself. Agreeing that in any event the description should be sufficiently precise to elicit offers that responded to needs of procuring entity, but that the requirement for specifications needed for tendering would still not be met, the Working Group deferred its final consideration of this question;

(d) As regards the detailed conditions for use in subparagraphs (a) to (e) of the proposed text, it was suggested that these conditions might not all be consistent among themselves and with the overarching requirement in the chapeau, and that the list was not (and could not be) exhaustive. It was queried whether: (i) subparagraph (a) could in fact permit negotiations on price and technical improvements, rather than negotiating solutions; (ii) in subparagraph (b) the procedure might be one in which information to assist in drafting specifications was given to the procuring entity, and did not involve negotiations per se; and (iii) the situation described in subparagraph (a) of the proposed text might be more suitable for ERAs, in subparagraph (b) for two-stage tendering, and in subparagraph (d) for framework agreements (as regards this provision, it was also noted that allowing changes in specifications might deviate from the basic principles of the Model Law). In addition, some considered that the scope of subparagraph (e) was not clear. The interaction between the proposed paragraph (1) and the proposed paragraph (13) was also questioned. In the light of such queries, it was agreed that the paragraph would be reformulated to set out general conditions for use, based on those in article 19 (1) (a) of the 1994 Model Law (but also allowing for some non-technical reasons that might not allow a precise formulation of the description). It was also agreed that some or all of the subparagraphs of the proposal would be included in the Guide as examples of situations in which the procedure could be appropriate.

34. The Working Group had before it a revised proposal for paragraph (1) reading:

"**Conditions for use**

[Subject to approval by … (the enacting State may designate an authority to issue the approval)], a procuring entity may engage in procurement by means of a request for proposals (RFP) with competitive negotiations if it is not feasible for the procuring entity to formulate a sufficiently comprehensive description, in order to obtain the most satisfactory solution to its procurement needs."

35. Support was expressed for the proposed text. The Working Group's understanding was that the Guide would explain that the proposed text would include the possibility that the procuring entity could consider more than one solution. It was also understood that the Guide would draw to the attention of enacting States that the proposed procurement method would not address the type of negotiations that sought only technical improvements and price reductions.

36. The observer from the World Bank queried whether the Guide would explain the scope of this procurement method, i.e. whether it would be limited to the procurement of some types of services, and whether it would also apply to the procurement of goods and construction. It was confirmed that the Guide would provide examples of appropriate types of goods, construction and services to which this method would apply.

37. Concern was expressed that the conditions for use of this procurement method would overlap with those for two-stage tendering. The Working Group agreed to defer its consideration of this issue and of two-stage tendering to a later stage. (On the same subject, see, further paras. 50 and 63 to 66 below).

Paragraph (2)

38. The proposed paragraph (2) read as follows:

> "(2) A procuring entity shall issue a request for expressions of interest (RFI) before issuing a request for proposals from suppliers or contractors, to identify the minimum number of suppliers or contractors from whom it must request proposals according to paragraph (3). A notice seeking expressions of interest must be published in a newspaper or relevant trade publication or relevant technical or professional journal of wide international circulation."

39. It was queried whether issue of an RFI should be mandatory or optional. Noting that the aim might be to investigate the market concerned, it was agreed that it should be optional. Consequently, it was agreed that the word "shall" in the first sentence would be replaced with the word "may", and that the text after the comma in that sentence would be deleted. Further, the second sentence would start with "Any notice". A proposal to replace the first sentence with the phrase "a procuring entity may launch the competitive negotiation process by issuing a notice of RFI" was not accepted. However, it was suggested instead that the reference to "before issuing a request …" could be replaced by the phrase "before commencing competitive negotiations".

40. It was also agreed, in consequence, that responding to such a notice should not confer any rights on suppliers, nor impose an obligation on the procuring entity to proceed with the solicitation, and wording to such effect drawn from article 48 (2) of the 1994 text and draft revised article 6 would be included. As regards the wording of the notice requirement, the need for consistency with similar provisions in the Model Law (including as to whether an open solicitation would always be appropriate), and technological neutrality were emphasized.

41. The Working Group had before it the revised text for paragraph (2) reading:

> "[**Request for expression of interest**
>
> (2) A procuring entity [may] issue a request for expression of interest (RFI) [as part of the planning process] before [initiating a procurement under this Law] [launching a competitive negotiation procedure]. [The purpose of this RFI may be …] Any notice seeking expression of interest must be published in a newspaper or relevant trade publication or relevant technical or professional journal of wide international circulation. [Neither the notice nor any response shall confer any rights on suppliers or contractors, including any right to have

a proposal evaluated; nor does the notice obligate the procuring entity to issue a solicitation.]"

42. The Working Group noted that the notion of an RFI, as it was proposed, was a new concept in the Model Law. It was considered that one purpose of the RFI, investigating whether the market could respond to the procuring entity's needs before any procurement procedure was initiated, would be relevant not only to the procurement method in question but to all procurement methods. Support was therefore expressed for including in the revised Model Law a stand-alone provision allowing the procuring entity to investigate market conditions before launching any procurement. The provision, it was said, should set out the purposes of an RFI and build on the proposal in paragraph 41 above. The suggestion was also made that the provision should contain a definition of an RFI.

43. The point was made that the location of the provision would depend on the purposes it sought to fulfil: if the purpose was to seek assistance of the market to finalize specifications, then the inclusion of the provision in chapter IV was appropriate; if the purpose on the other hand was to investigate market conditions in general before for example choosing the appropriate procurement method, the provision should be located in chapter I, for instance in the proposed revised article 6, and should be applicable to all procurement methods. Another suggestion was to include the provisions in the Guide accompanying article 6.

44. The Working Group deferred the decision on the provision and its location in the revised Model Law, but agreed that it should remain an optional procedure, should not confer any rights on suppliers or contractors and should not impose any obligation on the procuring entity (see further paras. 54-55, 70 and 73 below).

Paragraph (3)

45. The Working Group had before it the following paragraph:

"(3) Requests for proposals must be issued to as many suppliers or contractors as practicable, but to not fewer than three."

46. In introducing the paragraph, a sponsoring delegation noted that the minimum number of suppliers from whom the procuring entity would be obliged to request proposals could vary, but should not be large. It was proposed that the Guide should explain the disadvantages and difficulties of negotiating with a large number of participants. Support was expressed for three suppliers or contractors as the appropriate minimum. However, it was queried what the options for the procuring entity would be if that minimum could not be ensured. Further support was therefore expressed for reinstating the provisions from article 48 (1) of the 1994 Model Law that referred to addressing RFP to at least three suppliers or contractors "if possible".

47. The view was expressed that a public notice of the procurement and its terms and conditions should precede the stage described in the proposed paragraph (3).

Subsequent paragraphs on the basis of draft article 39 in document A/CN.9/WG.I/WP.69/Add.4

48. The Working Group continued with its consideration of aspects of the proposed procurement method on the basis of draft article 39 as reproduced

in A/CN.9/WG.I/WP.69/Add.4. The Working Group's understanding was that the procurement method described in that article did not intend to replace article 46 on two-stage tendering of the 1994 Model Law, but rather to replace articles 48 and 49 (on request for proposals and competitive negotiations).

49. The view was expressed that request for proposals without negotiations (envisaged as an option in article 48 of the 1994 Model Law) should be preserved in the revised Model Law as a separate procurement method, since it was used in some jurisdictions and had proved to be useful. The Working Group deferred its consideration of this issue, including whether this procurement method should be included in chapter III as a method alternative to tendering rather than in chapter IV.

50. It was noted that, although the same conditions for use would apply to the proposed procurement method and two-stage tendering, one main difference between these two procurement methods would be the extent to which, and manner in which, the number of participants could be limited. While restricting the participation might be necessary for a negotiated procedure, it was observed that the proposal provided excessive discretion and insufficient objectivity in limiting the numbers of suppliers. Conversely, two-stage tendering under the 1994 provisions provided that all qualified suppliers whose tenders were not rejected would be entitled to participate. Consequently, it was stressed that an understanding of the basis upon which the current proposal had been drafted (as compared with the similar 1994 provisions) would be critical, in order to ensure coherence in the proposal.

51. It was the understanding of the Working Group that provisions setting out conditions for use of this procurement method (see para. 34 above) should be located at the beginning of the draft article. It was also suggested that the order and drafting of the provisions that would follow the conditions for use would depend on the decision of the Working Group on how to deal with the notion of RFI as discussed in paragraphs 38-44 above. Notwithstanding this, it was agreed that the chronology of the process should be clearly reflected in the article as a whole, as follows: first, a public notice of the procurement (which might take the form of an invitation to pre-qualify) including certain minimum information; second, the issue of an RFP to participating suppliers or contractors (which would include more detailed information); third, negotiations; and, fourthly, the request for BAFOs.

52. It was agreed that paragraph (1) of draft article 39 should be deleted and its substance should be reflected in the Guide.

53. The location of paragraph (2) of draft article 39 was discussed, and it was suggested that it should follow paragraph (3) of that article, unless the provisions that would appear earlier in the article indicated otherwise. Another suggestion, which ultimately gained support, was to delete the paragraph and reflect its substance later in the text. It was pointed out in particular that when prequalification or some type of pre-selection (as the term was understood in the UNCITRAL PFIPs instruments[3]) was involved, the prequalification or pre-selection documents would

[3] The UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and the UNCITRAL Legislative Guide on the same subject, available as of the date of this report at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

regulate the issue of which suppliers or contractors would receive the RFP, i.e. how the numbers of such suppliers or contractors would be limited.

54. It was suggested that the option given to the procuring entity in paragraph (3) of draft article 39 (to decide not to publish a notice seeking expressions of interest) should be deleted. In the light of the distinct meaning agreed to be attached to an RFI (see paras. 38-44 above), and in order to avoid confusion, it was agreed, that paragraph (3) would require and regulate "the first notice of the procurement." The Working Group considered which minimum information should be included in such a notice on the basis of the following proposal:

> "(…) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation the first notice soliciting submittals of proposals. The notice must set out, at least:
>
> (a) The subject matter of the procurement in detail appropriate to ensure maximum practicable market participation by potential vendors;
>
> (b) What the procedure will consist of [here describe intended stages ending with competitive negotiations, including, if the procuring entity intends to limit the number of offerors, a statement to that effect];
>
> (c) The means of obtaining the solicitation documents and the place from which they may be obtained;
>
> (d) The fee (if any) to obtain the solicitation documents; and
>
> (e) The deadline for submitting responses."

55. The Working Group agreed to consider at a later stage whether these provisions could be merged with the provisions on RFI as envisaged in this session (see paras. 38-44 above), and if so, a cross-reference in the article on competitive negotiations to those RFI provisions would suffice. The Working Group's understanding was that regardless of what form the first notice of the procurement took, it should be a public document, and should contain minimum information about the procurement procedures (including pre-selection if it were envisaged), all applicable qualification and evaluation criteria, and a description of the subject matter of the procurement. It was also agreed that an RFP, issued later in the process, would contain more detailed information. It was suggested that any provisions on pre-selection included in the Model Law should be aligned with the UNCITRAL PFIPs instruments.

56. A query was made about the nature of the criteria that the procuring entity would be able to use to limit the number of suppliers or contractors to whom an RFP could be addressed. It was stressed that these criteria should be non-discriminatory.

57. The Working Group agreed to replace paragraph (4) of draft article 39 with the following text:

> "The procuring entity shall establish criteria for evaluating the proposals in accordance with article 12". (See however further para. 90 below.)

58. The Working Group considered the following wording to be inserted before paragraph (4) of draft article 39:

"(…) The solicitation documents must set out the process by which the procuring entity will determine which suppliers or contractors will sufficiently meet the qualification criteria in order to pass into the competitive negotiation phase. Where there is more than a sufficient number of suppliers or contractors suitable to be selected to participate in the negotiations, the procuring entity may limit the number of suppliers or contractors which it intends to invite to participate in the negotiations provided that the solicitation documents specify:

(a) The objective and non-discriminatory criteria to be applied in order to limit the number of suppliers or contractors in accordance with this paragraph; and

(b) The minimum number of suppliers or contractors, which shall be not less than three, [if possible,] which the procuring entity intends to invite to participate in the negotiations and, where appropriate, the maximum number."

59. It was suggested that paragraph (5) (c) of draft article 39 should be replaced with the following wording:

"(c) The criteria for evaluating the proposal in accordance with article 12, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal."

60. It was suggested that paragraphs (6) to (13) of draft article 39 should be replaced with the following wording:

"(…) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (__) of this article, shall be communicated to all suppliers or contractors participating in the proceedings. Such modifications or clarifications must be in writing and must be given to all prospective suppliers or contractors to whom a request for proposals was issued under paragraph (__) sufficiently before the submission deadline to allow the suppliers or contractors to address them in their proposals.

(…) Consistent with the provisions of article 21, a procuring entity must keep confidential all submissions, information and documents provided by a supplier or contractor to the procuring entity, or obtained by the procuring entity, during the procurement process unless the supplier or contractor consents to their disclosure, they are in the public domain or are required to be disclosed by law.

(…) The procuring entity shall engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(…) Competitive negotiations must be concurrent (that is, by conducting negotiations separately but roughly simultaneously with every supplier or

contractor qualified for competitive negotiations after the prequalification stage).

(…) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(…) Following the negotiations the procuring entity must request all suppliers or contractors with whom it has negotiated to submit a best and final offer in respect of the solutions or solution identified through the negotiation process. The request must be in writing, must specify the date and time by which offers must be submitted. Based upon the evaluation criteria, the procuring entity must determine [which supplier or contractor it will recommend be awarded [to which supplier or contractor it will award] the procurement contract on the basis of the best and final offers.]"

61. The understanding in the Working Group was that the proposed text (which would replace draft article 39) envisaged a procurement method that would apply to the procurement of complex goods, works and services. A further understanding was that the proposed procurement method did not apply to cases when negotiations were required because of urgency (i.e., the conditions for use stipulated in article 19 (2) of the 1994 Model Law) or when there was an insufficient competitive base. It was suggested that article 49 of the 1994 Model Law, containing provisions on flexible competitive negotiations, should be retained in the revised Model Law to accommodate those situations. It was also pointed out that provisions on framework agreements added to the Model Law would also aim at dealing with this type of situation.

62. Support was expressed for adding the new proposed procurement method in the revised Model Law. It was suggested that in order to avoid confusion over terminology and the choice of procurement methods in those States that enacted their procurement legislation on the basis of the 1994 Model Law, the revised Model Law should use a distinct term to identify this new procurement method and should set out clear guidance on when it could be used. In subsequent discussion, it was agreed to refer to the proposed procurement method as "competitive dialogue."

63. In response to a concern that it was not clear in which situations competitive dialogue rather than two-stage tendering would be used, the suggestion was made that the revised Model Law should take a "toolbox approach" and give discretion to the procuring entity to choose among all available tools, as appropriate for the situation in hand. It was emphasized that this approach was not intended to undermine the primacy of open tendering and thus would be appropriate only with respect to methods alternative to tendering (chapter III of the revised Model Law) or distinct from tendering as involving negotiations (chapter IV of the revised Model Law). The Working Group also noted that in two-stage tendering, suppliers or contractors in the end bid against one single solution while in competitive dialogue the procuring entity would evaluate BAFOs submitted with respect to each individual supplier's proposal. It was therefore suggested that this distinction – the feasibility of formulating a single set of specifications after negotiations – could

become a criterion upon which the choice between competitive dialogue and two-stage tendering should be made.

64. Concern was expressed that competitive dialogue involved a risk of disclosure of commercially sensitive information, such as price. It was reiterated that the Guide should emphasize that this procedure should not be used in the absence of sufficient capacity to provide adequate safeguards against this and other risks of improprieties inherent in this procurement method (see paras. 16-19 above). Two-stage tendering, while aimed at accommodating similar situations as competitive dialogue, it was said, provided better safeguards against abuse by following open tendering principles with marginal modifications. It was noted that two-stage tendering would allow the procuring entity, through the examination of technical proposals and optional negotiations with any supplier that submitted acceptable technical proposals, to finalize the specifications that the procuring entity had not been able to formulate adequately at the outset of the procurement.

65. Support was thus expressed for retaining two-stage tendering as a separate procurement method in the revised Model Law. It was said that the method had stood the test of time and was successfully used for procurement for example of information technology systems and infrastructure. Concern was expressed that if this method were deleted, enacting States that had concerns about the integrity of their procurement systems and would be reluctant to allow the use of competitive dialogue would not have any alternative.

66. The Working Group reiterated its understanding that the proposed procurement method was not intended to replace two-stage tendering.

67. The observer from the World Bank explained that the Bank might have difficulty with using the proposed procurement method for quantifiable (or non-intellectual) types of services and intellectual services that might be more appropriately procured through consecutive rather than simultaneous negotiations. It was also emphasized that transparency was a paramount consideration, and that it might be desirable to establish a threshold for the use of the method.

68. In response to these concerns, it was pointed out that the conditions for use of competitive dialogue might mitigate concerns over its inappropriate use, by effectively preventing its use to procure items that should be procured through tendering. It was also reiterated that the Guide text accompanying provisions of the Model Law on competitive dialogue should also contain necessary explanations of the conditions for use and procedures.

69. The Working Group noted the similarities between steps in open tendering and competitive dialogue. The major differences were noted to arise at the stage of the provision of solicitation documents (competitive dialogue allowed limiting the number of suppliers to whom the RFP was provided) and at the negotiations stage. The Working Group was invited to consider which aspects of proposals should be allowed to be negotiated in competitive dialogue, only technical and quality aspects or price in addition.

3. Consideration of the revised proposal by the Working Group

Paragraphs (1)-(3)

70. The Working Group proceeded with the consideration of the following aspects of the revised proposal:

> "(1) *Conditions for Use*. [Subject to approval by … (the enacting State may designate an authority to issue the approval)], a procuring entity may engage in procurement by means of a request for proposals (RFP) with competitive dialogue if it is not feasible for the procuring entity to formulate a sufficiently comprehensive description, in order to obtain the most satisfactory solution to its procurement needs.
>
> [(2) *Requests for Expression of Interest*. A procuring entity may issue a request for expressions of interest (RFI) as part of the planning process before initiating a procurement under this Law. Any notice seeking expressions of interest must be published in a newspaper or relevant trade publication or relevant technical or professional journal of wide international circulation. Neither the notice nor any response shall confer any rights on suppliers or contractors, including any right to have a proposal evaluated; nor does the notice obligate the procuring entity to issue a solicitation.]
>
> (3) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation the first notice soliciting submittals of proposals. The notice must set out, at least:
>
> (a) The subject matter of the procurement in detail appropriate to ensure maximum practicable market participation by potential vendors;
>
> (b) What the procedure will consist of [here describe intended stages ending with competitive negotiations, including, if the procuring entity intends to limit the number of offerors, a statement to that effect];
>
> (c) The means of obtaining the solicitation documents and the place from which they may be obtained;
>
> (d) The fee (if any) to obtain the solicitation documents; and
>
> (e) The deadline for submitting responses."

71. It was suggested that in paragraph (1) a reference to "complex procurement" should be added. The prevailing view was that the paragraph should not make such a reference.

72. It was suggested that in paragraphs (2) and (3) and elsewhere in the Model Law in similar context, the reference to "a contracts bulletin" should be added. The alternative view was that this reference could be made in the revised Guide as an example of publications where the relevant notices were usually published.

73. The prevailing view was that paragraph (2) should be removed from the provisions on competitive dialogue and be discussed separately at a later stage.

74. It was suggested that some aspects reflected in the last sentence of the proposed paragraph (2) should be repeated in the chapeau provisions of paragraph (3). In particular, it was noted that responses to the first public notice of

the solicitation might reveal that it would not be feasible or desirable to carry out the procurement as advertised. In such situations, it was said, the procuring entity should have the right to cancel the procurement. The point was made that this proposition was valid not only to competitive dialogue but to all procurement methods in the Model Law. The suggestion was made therefore that the provisions to that effect should be reflected in chapter I, preferably with the provisions enabling rejection of all submissions (draft article 16).

75. It was further suggested that paragraph (3) should provide the possibility for the procuring entity to reduce the number of participants during competitive dialogue, and consequently that the first notice of solicitation should alert suppliers or contractors as to this possibility. The suggestion was therefore that the provisions should remain as they were, and that the procuring entity should be able to reduce the number of participants in the procurement process only through prequalification.

76. Some delegates recognized that there might be circumstances justifying exclusions of suppliers or contractors during dialogue, such as on the basis that they were not any longer qualified (for example in the case of bankruptcy) or were not responsive to the needs of the procuring entity (for example materially deviating during dialogue from key elements that were identified as non-negotiable at the outset of the procurement).

77. At the same time, it was recognized that giving the right to the procuring entity to exclude during the dialogue stage suppliers or contractors without imposing some conditions might lead to abusive practices. The Working Group noted the provisions in international instruments, such as the GPA and the United Nations Convention Against Corruption (New York, 31 October 2003) (UNCAC),[4] requiring disclosure of the criteria for exclusion from the outset of the procurement. It was agreed that the Model Law should impose an equivalent obligation.

78. A query was made as to whether termination of competitive dialogue with some suppliers or contractors would be possible on the basis of criteria other than qualification or the responsiveness of their proposals to the needs of the procuring entity. Reference in this context was made to the provisions of article 44 (e) of the 1994 Model Law, which permitted terminating negotiations with a supplier if it became apparent to the procuring entity that the further negotiations would not result in a procurement contract. The Working Group noted the distinct circumstances in which article 44 (e) applied – consecutive negotiations on price only – that allowed exclusion on a relatively objective basis (the price alone).

79. Support was expressed for allowing the procuring entity to terminate competitive dialogue with suppliers or contractors that in the view of the procuring entity would not have a realistic chance of being awarded the contract. It was recognized that this approach would allow both sides to avoid wasting time and resources. It was stated that competition might be substantially reduced in future similar procurements if suppliers or contractors incurred unnecessary costs, which could turn out to be very high in this type of procurement.

80. On the other hand, concern was expressed that this approach was inherently subjective and would undermine transparency, objectivity and fairness in the process. It was explained that competitive dialogue would involve constant

[4] General Assembly resolution 58/4.

modification of solutions and it would be unfair to eliminate any supplier only because at some stage of dialogue a solution appeared not acceptable to the procuring entity. The point was reiterated that the most objective, transparent and fair way of reducing the number of participants would be through prequalification alone, but that other criteria pertaining to responsiveness might be considered at a later date.

81. The Working Group after deliberations agreed to replace in the chapeau provisions of paragraph (3) reference to "the first notice soliciting submittals of proposals" with reference to "the first notice soliciting participation in the procurement", in order to extend the requirement of the minimum content of the notice to both RFI or an invitation to pre-qualify, as applicable. It was noted that a similar change might be necessary throughout the Model Law where the same considerations applied. It was also agreed that paragraph 3 (b) should be replaced with the following wording: "(b) what the procedure will consist of [here describe the intended stages of competitive dialogue, including if the procuring entity intends to limit or reduce the number of proponents, a statement to that effect, and criteria it intends to use]."

Paragraph (4)

82. The Working Group considered the following paragraph:

> "[4] As an optional matter, the procuring entity may pre-qualify suppliers or contractors before engaging in negotiations in accordance with articles 10 and 15, regarding prequalification."

83. The suggestion was made that these provisions should appear earlier in the text, according to the chronology in the process. Another suggestion was to delete the paragraph. Yet another suggestion was to move the paragraph and replace its text with the text that would permit the procuring entity to start the procurement process with either RFI, invitation to pre-qualify or both or neither. It was agreed that a future draft would be presented at a later stage, to align the provisions with other methods in the Model Law.

Paragraph (5)

84. The Working Group considered the following paragraph:

> "[5] The solicitation documents must set out the process by which the procuring entity will determine which suppliers or contractors will sufficiently meet the qualification criteria in order to pass into the competitive negotiation phase. Where there is more than a sufficient number of suppliers or contractors suitable to be selected to participate in the negotiations, the procuring entity may limit the number of suppliers or contractors which it intends to invite to participate in the negotiations provided that the solicitation documents specify:
>
> (a) The objective and non-discriminatory criteria to be applied in order to limit the number of suppliers or contractors in accordance with this paragraph; and
>
> (b) The minimum number of suppliers or contractors, which shall be not less than three, [if possible,] which the procuring entity intends to invite to participate in the negotiations and, where appropriate, the maximum number."

85. The suggestion was made to add: (i) in the end of the first sentence in the chapeau provisions, the phrase "and, where appropriate to pass from one stage to another stage within that phase"; and (ii) in the end of paragraph (b), the words "at the start of the phase and at each stage within the phase." The view was expressed that these amendments were too detailed for the Model Law to regulate, and it would be more appropriate to address stages and phases of competitive dialogue in the Guide.

86. Another suggestion was to delete some provisions in the proposed paragraph so that the entire paragraph would read as follows: "The solicitation documents must set out the minimum number of suppliers or contractors, which shall be not less than three, [if possible,] which the procuring entity intends to invite to participate in the negotiations and, where appropriate, the maximum number." This suggestion was not supported, since the provisions proposed to be deleted set out procedures not found in any other provisions of the Model Law. Support was thus expressed for retaining the provisions, but aligning them with similar provisions found in the UNCITRAL PFIPs instruments relating to prequalification and pre-selection, and ensuring that all methods of limiting or reducing numbers were addressed.

87. The Working Group agreed that paragraphs (3) and (5) of the revised proposal should be aligned. In this regard, the difference between the paragraphs was noted: whereas paragraph (3) dealt with the content of the first notice of the procurement, which by nature was supposed to be brief and contain only the minimum essential information about the procurement, paragraph (5) dealt with the content of the RFP that should contain all the required information about the procurement, including elaboration of the information contained in the notice. The Working Group decided to defer its consideration on whether the provisions in both paragraphs should also refer to elimination of solutions.

88. It was also agreed that the term "competitive negotiation" should be replaced throughout the article with the term "competitive dialogue" in the light of the Working Group's decision to use that latter term when referring to this new procurement method (see para. 62 above).

89. It was agreed that the phrase in the chapeau provisions reading "the process by which suppliers or contractors will sufficiently meet the qualification criteria in order to pass into the competitive negotiation phase" should be replaced with the following phrase: "the process by which suppliers or contractors will pass into the competitive dialogue phase."

Paragraph (6)

90. The Working Group considered and agreed to delete the following paragraph:

> "[6] The procuring entity shall establish the criteria for evaluating the proposals in accordance with article 12."

Paragraph (7)

91. The Working Group considered the following paragraph:

> "[7] A request for proposals issued by a procuring entity shall include at least the following information:

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

(b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;

(c) The criteria for evaluating the proposal in accordance with article 12, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal; and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal."

92. It was agreed that: (i) subparagraph (c) should be amended to read "the criteria for evaluating the proposal"; and (ii) the word "proposal" in the end of subparagraph (d) should be replaced with the words "procurement process".

93. The suggestion was made that the provisions should allow for meaningful review of complaints by aggrieved suppliers, by providing for formal notification to suppliers of the procuring entity's decision to terminate negotiations and grounds for that decision.

Paragraph (8)

94. The Working Group considered the following paragraph:

"[8] Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (…) of this article, shall be communicated to all suppliers or contractors participating in the proceedings. Such modifications or clarifications must be in writing and must be given to all prospective suppliers or contractors to whom a request for proposals was issued under paragraph (…) sufficiently before the submission deadline to allow the suppliers or contractors to address them in their proposals."

95. The suggestion was made that the word "initial" should be added before the word "proposals" in the end of the paragraph and that the word "prospective" should be deleted. Another suggestion was that the entire paragraph should be redrafted to accommodate modification or clarification at any stage in competitive dialogue, whether at the instigation of the procuring entity or of the supplier. Support was expressed for the suggestion to add the words "at the same time" after the word "communicated".

96. The Working Group noted that similar provisions were contained in article 28 of the 1994 Model Law, and the Working Group might consider at a future date how to deal with these repetitive provisions in a consistent way in the revised Model Law.

97. The point was made that if there were changes in evaluation criteria or modifications resulting in a substantive change to what was originally published, those changes would not be acceptable unless they were notified in the same manner as the original notice. In response to that concern, it was proposed that the words "within the stated scope of the procurement" should be added in the provision in

order to limit the extent to which evaluation and other essential criteria of the procurement could be changed. Concern was expressed that the proposed wording would address only a change in the subject matter of the procurement and not a change in evaluation criteria.

98. Reference was made to the existing provisions in the 1994 Model Law (article 48 (5)) that were restated in the proposed text. The Working Group also noted that article 28 of the 1994 Model Law dealt similarly with the same subject. Both provisions were based on the premise that modifications were communicated only to those to whom the solicitation documents were provided. It was questioned whether this premise should be changed throughout the revised Model Law.

99. A proposal to restrict permissible changes to minor changes did not gain support. It was emphasized that more flexibility should be preserved, but that the Model Law should not permit fundamental changes in the solicitation documents. The Working Group recalled its preliminary decision at the previous session to add a definition of "material change" to article 2. Support was expressed that the proposed paragraph should be redrafted to align its content with that definition, and that the same principle should be applied to all procurement methods.

Paragraph (9)

100. The Working Group considered the following paragraph:

> "[9] Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article […], one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party."

101. It was noted that the provisions were based on article 49 (3) of the 1994 Model Law. The Working Group recalled that it considered a draft article 21 that would appear in chapter I and would deal with the confidentiality provisions applicable to all procurement methods. The need for provisions on confidentiality in the article on competitive dialogue in the light of the proposed article 21 was queried. It was suggested that the provisions should be deleted, but the proposed article 21 should be modified explicitly to refer to competitive dialogue. Another view was that provisions on confidentiality should appear in the proposed article because of their special importance in the context of competitive dialogue.

102. The view prevailed that repetitions in the Model Law should be avoided, and thus a cross-reference to article 21 as amended would suffice. In the light of particular concerns about confidentiality in competitive dialogue, it was agreed that the Guide should highlight the importance of preserving the confidentiality of the dialogue.

Paragraph (10)

103. The Working Group considered the following paragraph:

> "[10] The procuring entity shall engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is

extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected."

104. It was proposed that the Model Law or the Guide should require the procuring entity to maintain a comprehensive written record of the dialogue with each supplier and to provide a copy of that record at the end of each phase of the dialogue to the supplier or contractor concerned. It was suggested that this obligation should be incorporated in draft article 22 of the proposed revised Model Law (which dealt with the record of procurement proceedings). Another view was that the point should be reflected in the Guide not in the Model Law, as a guide to best practice.

105. It was suggested that the phrase "whose proposals have not been rejected" should be replaced with the phrase "that have passed into the competitive dialogue phase according to the procedures set out in the solicitation documents." Concern was expressed that the provision should reflect the fact that the group of suppliers entering the dialogue at the first phase might change throughout the process. Consequently, it was suggested that the text in question should be redrafted to convey reference to "remaining participants".

Paragraph (11)

106. The Working Group considered the following paragraph:

"(11) Competitive negotiations must be concurrent (that is, by conducting negotiations separately but simultaneously with every supplier or contractor qualified for competitive negotiations after the prequalification stage)."

107. The Working Group's understanding was that the phrase "qualified for competitive negotiations after the prequalification stage" would be changed in the light of outcome of the previous deliberations on the same subject in the Working Group (see paras. 82 and 83 above).

108. A suggestion was made to replace the word "simultaneously" with the words "in parallel" or "practicably simultaneously". Concern was expressed that the proposed terms and suggested alternatives implied that dialogue was conducted at the same time with all suppliers or contractors, which would presuppose that different procurement officials or negotiating committees composed of different procurement officials were engaged in dialogues. Such a stance, it was said, was undesirable as it would lead to the unequal treatment of suppliers. The suggestion was made that the Guide would explain the meaning behind the term "simultaneous" or "concurrent" with reference to the key features of the intended type of negotiations.

109. Support was expressed for the following revised wording: "Competitive dialogue must be concurrent (that is by conducting dialogues separately but in parallel with every supplier or contractor …)". Another suggestion, which also gained support, was to replace the text with the text reading: "Competitive dialogue must be concurrent," and to explain in the Guide the meaning of the term "concurrent". It was suggested that the Guide in this respect should draw a distinction between negotiations that had to be held with all suppliers or contractors before the award of the procurement contract, and consecutive negotiations, in which the procurement contract could be awarded upon completion of the dialogue with any supplier or contractor.

110. Support was expressed that the provisions in the Model Law as revised should be supplemented by the statement: "Competitive dialogue must be conducted by the same procurement official or by a committee composed of the same people." Addition of such a statement, it was said, would avoid any ambiguity in the terms "concurrent" or "simultaneous" negotiations. The other view was that the proposed addition addressed procedural aspects that could more appropriately be dealt with in the Guide.

Paragraph (12)

111. The Working Group considered the following paragraph:

> "(12) There shall be no modifications to the evaluation criteria after the initial proposals are submitted. Any other modification shall be within the stated scope of the procurement. Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor [but which are not specific or exclusive to that supplier or contractor] shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement."

112. In introducing the proposed paragraph, it was explained that its intended scope was different from the proposed paragraph discussed in paragraphs 94-99 above. The Working Group noted that while that latter paragraph dealt with the modifications to the RFP before the proposals were submitted, the current paragraph dealt with modifications after submission. The importance of the provisions in the light of the flexible nature of competitive dialogue was emphasized. It was explained that the aim was to ensure that, while variation in technical aspects were permissible within the stated scope of the procurement, changes in evaluation criteria were not allowed after the proposals were submitted.

113. The Working Group's understanding was that the wording of the first two sentences of the proposal would be aligned to the outcome of the Working Group's earlier deliberations on permissible deviations (see para. 99 above).

114. Support was expressed for a revised wording of the proposal, reading: "After the initial proposals are submitted, any modification shall be within the stated scope of the procurement; provided however that there shall be no modifications to the qualification or evaluation criteria[, or to the criteria used to define the competitive group]."

115. The suggestion to add the notion that only those modifications that were justified in the light of negotiations did not gain support. It was explained that some changes might need to be made in the light of circumstances not related to negotiations (such as administrative measures).

116. Support was expressed for including in the provisions confidentiality requirements, with reference to article [21] of the revised Model Law as appropriate.

Paragraph (13)

117. The Working Group considered the following paragraph:

> "(13) Following the negotiations, the procuring entity must request all suppliers or contractors with whom it has negotiated to submit a best and final offer in respect of the solutions or solution identified through the dialogue process. The request must be in writing, must specify the date and time by which offers must be submitted. Any award by the procuring entity shall be [based upon the best and final offers, and shall be] made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals."

118. Support was expressed for the use of the term "final offer" instead of "best and final offer". The latter was considered to be misleading since it was the procuring entity who determined the best offer on the basis of the evaluation of final offers. The alternative view was that the latter was the term used in the 1994 Model Law and widely known in public procurement. The prevailing view was that references to "a best and final offer" and "the best and final offers" should be replaced with reference to "their best and final offers" indicating that offers were best and final with respect to each supplier's proposal.

Possible new paragraph in the end of the proposed article

119. The suggestion was made that a separate paragraph should be added in the proposed article referring to the publication of the procurement contract award. The Working Group in this respect recalled that proposed article 20 dealt with the subject of the public notice of procurement contract awards, and a cross-reference to that article could be sufficient. The Working Group agreed to examine in the context of draft article 20 whether the latter adequately covered the content of information that had to be published upon the award of the procurement contract through the competitive dialogue.

Article as a whole

120. The Secretariat was requested to align the text of the proposed article on competitive dialogue with the rest of the Model Law.

V. Other business

121. The Working Group was briefed about the upcoming consideration of the revised Model Law during the Commission's forty-second session (Vienna, 29 June–17 July 2009). It was noted that the Commission would consider the agenda item on procurement from 2 to 10 July. The Commission was expected to consider in plenary policy issues, such as the fulfilment of the mandate by the Working Group, an enlarged scope of the Model Law and treatment of socio-economic policies in the revised Model Law. It was also expected that provisions of the revised Model Law would be examined by the Committee of the Whole.

122. The Working Group noted that the Commission would have before it for the consideration of the item, in addition to the reports of the Working Group's fourteenth to sixteenth sessions, all documents that were submitted by the Secretariat to the Working Group at the current session. The Secretariat was also

expecting to prepare a conference room paper for the Commission that would incorporate revised provisions related to chapter IV of the Model Law.

123. The observer from the World Bank stated that the Bank had followed the discussions of the Working Group with great interest. Observing that the Model Law was a very important tool for the Bank in technical assistance to developing countries on procurement reform, the Bank looked forward to further progress in promoting transparency, open competition, non-discrimination and accountability. While its position on competitive negotiations and the rationale therefore, it was said, remained the same at present as in 1994, the Bank would consider new procurement methods and other innovations in procurement.

VI. Adoption of the report of the Working Group

124. The Working Group adopted this report subject to confirmation of the exact text of the proposed article 40 in all languages.