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PROCUREMENT

Draft model law on procurement

Report of the Secretary-General

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INTRODUCTION

1. The Commission decided at its nineteenth session in 1986 to undertake work in the area of procurement as a matter of priority and entrusted this work to its Working Group on the New International Economic Order.[1/] The Working Group commenced its work at its tenth session in October 1988. It devoted that session to deliberations on the basis of a study of procurement prepared by the Secretariat that discussed possible objectives of national procurement policies and that examined national procurement laws and practices and the roles and activities of various international institutions and development funding agencies in connection with procurement (A/CN.9/WG.V/WP.22). After completing its consideration of the study the Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125). It agreed that, while the model law should not be confined to international procurement, it should take into account the particular needs and interests of foreign participants in procurement proceedings (ibid., para. 122). The Commission at its twenty-second session in 1989 expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously (A/44/17, paras. 232 and 235).

2. The present report contains the first draft of a model law on procurement as requested by the Working Group. The commentary is contained in a separate document (A/CN.9/WG.V/WP.25). Provisions concerning the right of aggrieved contractors and suppliers to claim redress for violations of the model law are not contained in the present draft text; that subject will be dealt with in a separate document.

3. The Working Group may wish to discuss the policy issues raised by the draft articles and the commentary and to instruct the Secretariat to redraft the draft articles and commentary on the basis of the discussion.

DRAFT MODEL PROCUREMENT LAW

CHAPTER I. GENERAL PROVISIONS

Article 1. Application of Law *

This Law applies to procurement by procuring entities of goods, through such means as purchase, rental or otherwise, or of construction. The procurement shall be considered to be a procurement of goods or of construction where the goods or construction constitute a substantial part of the procurement.

1/ Report of the United Nations Commission on International Trade Law on the Work of its nineteenth session (Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17)), para. 243.

*/ Article headings are for reference purposes only and are not to be used for purposes of interpretation.

Article 2. Definitions

For the purposes of this Law:

(a) "procuring entity" means:

(i) any department, agency, organ or other unit, or any subdivision thereof, of the Government or the administration;

(ii) [each State enacting this model law inserts in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity"].

(b) "goods" includes raw materials, products, equipment and other tangible objects of every kind and description;

(c) "construction" means such physical work as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, in respect of a new structure or of an existing structure;

(d) "procurement proceedings" means proceedings engaged in or measures taken by a procuring entity with a view towards entering into a procurement contract, including tendering proceedings, competitive negotiation proceedings and single source procurement;

(e) "International tendering proceedings" means the proceedings referred to in article 11, for which chapter II of this Law requires the application of particular procedures with a view towards promoting international participation in the tendering proceedings;

(f) "Tender security" includes such arrangements as bank guarantees, letters of credit, cheques on which a bank is primarily liable and cash deposits, provided by a contractor or supplier to secure obligations in respect of its tender;

(g) "Currency" includes unit of account;

(h) "Competitive negotiation proceedings" means negotiations by the procuring entity with contractors and suppliers with a view towards procurement, such negotiations being subject to rules set forth in article 34 designed to incorporate a competitive element;

(i) "Single source procurement" means procurement from a particular contractor or supplier without engaging in tendering proceedings or competitive negotiation proceedings.

Article 3. Underlying policies

(1) The underlying policies of this Law are:

(a) to maximize economy and efficiency in procurement;

(b) to foster and encourage participation in procurement proceedings by competent contractors and suppliers, including, where appropriate, international participation;

(c) to promote competition among contractors and suppliers for the supply of the goods or construction to be procured;

(d) to provide for the fair and equitable treatment of all contractors and suppliers in connection with procurement covered by this Law;

(e) to promote the integrity of, and fairness and public confidence, in the procurement process; and

(f) to achieve transparency in the procedures relating to procurement.

(2) This Law is subject to any international agreement, or any agreement with or other obligation towards an international institution or a governmental institution of another State, which has already been or may be entered into by [this State] and which contains provisions concerning the matters governed by this Law.

Article 4. Procurement regulations

The . . . [each State enacting this model law specifies the organ or authority authorized to promulgate the procurement regulations] is authorized to promulgate procurement regulations to elaborate upon or supplement this Law.

Article 5. Public accessibility of Procurement Law, procurement regulations and other legal texts relating to procurement

This Law and the procurement regulations, all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments of this Law and those regulations and administrative rulings and directives, shall be promptly made accessible to the public.

Article 6. Control and supervision of procurement

(1) The approval function referred to in articles 7(2), 7(3), 11(2), 12(2), 28(3), 28(10), 29(1), 31(1), [32(1),and] [32(4)] shall be performed by ... [each State enacting this model law specifies the organ or authority authorized to perform the approval function.]

(2) [Each State enacting this model law specifies in this paragraph and, if necessary, in subsequent paragraphs, any additional functions in connection with the control and supervision of procurement and the organ[s] or authority[ies] to perform those functions.]

Article 7. Methods of procurement and conditions for their use

(1) Except as otherwise provided by this Law, a procuring entity engaging in procurement shall do so by means of tendering proceedings.

(2) Subject to approval, the procuring entity may engage in procurement by means of competitive negotiation proceedings when:

(a) the price of the procurement contract is less than the amount set forth in the procurement regulations; or

(b) tendering proceedings have been engaged in but:

(i) all tenders were rejected by the procuring entity pursuant to article 28(2) or (3) or article 29; or

(ii) the contractor or supplier whose tender has been accepted fails to sign a procurement contract with the procuring entity when required to do so or fails to supply a required security for the performance of the contract, and no other responsive tender from an eligible and qualified contractor or supplier is in effect.

(3) Subject to approval, the procuring entity may engage in single source procurement when:

(a) the price of the procurement contract is less than the amount set forth in the procurement regulations;

(b) the goods or construction is available only from the particular contractor or supplier or no reasonable alternative or substitute exists;

(c) there is an urgent need for the goods or construction making it impossible or imprudent to use tendering proceedings or competitive negotiation proceedings, as the case may be, because of the amount of time involved in using those proceedings;

(d) for reasons of standardization, or the need for compatibility with existing equipment or technology, goods must be procured from a particular contractor or supplier;

(e) the procuring entity seeks to enter into a contract with the contractor or supplier for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or

(f) for reasons of national security there is a need for secrecy in respect of the procuring entity's procurement needs.

(4) The procuring entity shall not divide its procurement of the goods or construction into separate contracts for the purpose of invoking paragraph (2)(a) or (3)(a).

(5) A procuring entity that invokes the provisions of paragraph (2) or (3) shall include in the minutes required under article 34(4) or the record required under article 35 a statement of the circumstances on which it relied and, except in respect of paragraph (3)(f), shall specify the relevant facts.

Article 8. Eligibility of contractors and suppliers

(1)(a) The procuring entity may require contractors and suppliers participating in procurement proceedings to provide such appropriate written statements, documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers:

(i) have legal capacity to enter into the procurement contract;

(ii) are not insolvent, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;

(iii) have fulfilled their obligations to pay taxes and social security contributions in [this State];

(iv) have not been convicted of any criminal offense concerning their professional conduct within a period of [5] years preceeding the commencement of the procurement proceedings;

(v) [...] [each State enacting this model law specifies any additional eligibility requirements.]

(b) The procuring entity may, in addition, investigate by any other appropriate means the eligibility of a contractor or supplier pursuant to criteria set forth in subparagraph (a).

(2) Any requirement established pursuant to paragraph (1)(a) and the eligibility criteria set forth in that paragraph shall apply equally to all contractors and suppliers. A procuring entity shall impose no eligibility criterion other than those provided for in paragraph (1)(a).

[(3) A contractor or supplier shall not be precluded from participating in procurement proceedings for the reason that it does not conform to one or more eligibility criteria set forth in paragraph (1) if the contractor or supplier undertakes to establish its conformity during the course of the procurement proceedings and if it is reasonable to expect that the contractor or supplier will be able to do so.]

Article 9. Qualifications of contractors and suppliers

The procuring entity may require contractors and suppliers participating in procurement proceeding to provide such appropriate written statements, documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers possess sufficient qualifications with respect to technical competence, financial resources, equipment and other physical facilities, and sufficient personnel, to perform the procurement contract. Any such requirement, and any criterion established with respect to those qualifications, shall apply equally to all contractors and suppliers. A procuring entity may, in addition, investigate by any other appropriate means the qualifications of a contractor or supplier.

Article 10. Rules concerning written statements and documentary evidence provided by contractors and suppliers

(1) This article applies to written statements and other documentary evidence provided by contractors and suppliers to demonstrate their eligibility and qualifications in procurement proceedings.

(2) A written statement, and documentary evidence other than that emanating from a governmental, judicial or administrative authority, shall be signed and sworn to or otherwise solemnized by the maker of the written statement or the documentary evidence before a notary or other authority competent under the law of the place where the authority serves to attest to the authenticity of

the written statement or documentary evidence and to its signature and solemnization, and the attestation of the notary or other competent authority shall be affixed or joined to the written statement or documentary evidence. The attestation by a foreign notary or other competent authority shall be acceptable if it is legalized in accordance with the law applicable in [this State] relating to the legalization of foreign public documents.

(3)(a) Documentary evidence emanating from a governmental, judicial or administrative authority outside [this State] shall be acceptable if it is legalized in accordance with the law applicable in [this State] relating to the legalization of foreign public documents.

(b) Documentary evidence emanating from a governmental, judicial or administrative authority in [this State] shall conform to the law applicable in [this State] concerning the signature, solemnization and legalization of such documents.

CHAPTER II. TENDERING PROCEEDINGS

SECTION I. INTERNATIONAL TENDERING PROCEEDINGS

Article 11. International tendering proceedings

(1) Subject to paragraph (2), a procuring entity that is required under article 7 to engage in tendering proceedings may decide to engage in international tendering proceedings, taking into account the objectives of economy and efficiency in the procurement.

(2) Where the price of the procurement contract exceeds the amount set forth in the procurement regulations, a procuring entity that is required under article 7 to engage in tendering proceedings must engage in international tendering proceedings unless it receives approval not to engage in international tendering proceedings. The procuring entity shall not divide its procurement of the goods or construction into separate contracts for the purpose of avoiding the application of this paragraph.

SECTION II. SOLICITATION OF TENDERS AND APPLICATIONS TO PREQUALIFY

Article 12. Solicitation of tenders and applications to prequalify

(1) A procuring entity shall solicit tenders, and, where applicable, applications to prequalify, from all interested contractors and suppliers by causing a notice of proposed procurement to be published in . . .[each State enacting this model law specifies the official gazette or other official publication in which the notice of proposed procurement is to be published]. In international tendering proceedings, the notice of proposed procurement shall also be published in a newspaper or relevant trade publication or technical journal of wide international circulation. The publication shall be in a language customarily used in international trade.

(2) Where restricted participation in the tendering proceedings is more conducive to economy and efficiency, the procuring entity may, subject to

approval, solicit tenders by sending the notice of proposed procurement only to particular contractors and suppliers selected by it. The procuring entity shall select a sufficient number of contractors and suppliers to ensure effective competition, consistent with the efficient conduct of the tendering proceedings.

Article 13. Lists of approved contractors and suppliers

The procuring entity may use a list of approved contractors and suppliers as its source for the selection of contractors and suppliers from which to solicit tenders pursuant to article 12(2) only if:

(a) requests to be entered on the list are receivable at any time from any interested contractor or supplier and are acted upon within a reasonably short period of time;

(b) entry on the list is subject to no eligibility criterion more stringent than those set forth in article 8(1)(a) and is subject to no qualification criterion more stringent than those established pursuant to article 15;

(c) the existence of the list, the conditions to be satisfied by contractors and suppliers in order to be entered on the list, the methods according to which satisfaction of each of those conditions is to be verified, the period of validity of an entry on the list and the procedures for entry and for renewal of the entry have been generally publicized in a manner designed to bring them to the attention of contractors and suppliers;

(d) the conditions, methods, procedures and other matters referred to in subparagraph (c) do not discriminate against foreign contractors and suppliers with respect to entry on a list used for the solicitation of tenders in international tendering proceedings or with respect to their opportunity to participate in such proceedings; and

(e) the selection by the procuring entity from the list allows all contractors or suppliers on the list equitable opportunities to be selected.

Article 14. Contents of notice of proposed procurement

(1) The notice of proposed procurement shall contain the following information:

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

(b) the nature and quantity of the goods to be supplied or the nature and location of the construction to be effected;

(c) the desired or required time for the supply of the goods or for the completion of the construction;

(d) the eligibility criteria set forth in article 8(1)(a);

(e) the means of obtaining the procurement documents and the place from which they may be obtained;

(f) the price, if any, charged by the procuring entity for the procurement documents and, in the case of international tendering proceedings, the currency and means of payment for those documents;

(g) in the case of international tendering proceedings, the language or languages in which the procurement documents are available;

(h) the place and deadline for the submission of tenders.

(2) If prequalification proceedings are to be engaged in, the notice of proposed procurement shall so state. In such a case, the notice of proposed procurement need not contain the information referred to in paragraph (1)(e) or (g), but shall contain the following additional information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents and, in the case of international tendering proceedings, the currency and terms of payment for those documents;

(c) in the case of international tendering proceedings, the language or languages in which the prequalification documents are available; and

(d) the place and deadline for the submission of applications to prequalify.

SECTION III. QUALIFICATIONS OF CONTRACTORS AND SUPPLIERS

Article 15. Assessment of qualifications of contractors and suppliers

(1) The procuring entity shall assess the qualifications of contractors and suppliers in accordance with the qualification criteria and procedures set forth in the prequalification documents or in the procurement documents.

(2) The qualification criteria shall be objective to the extent possible and shall be limited to those which are essential to ensure that the contractors or suppliers possess sufficient technical competence, financial resources, equipment and other physical facilities, and sufficient personnel, to perform the procurement contract.

(3) In the case of international tendering proceedings, the procuring entity shall establish no criterion, requirement or procedure with respect to the demonstration or assessment of the qualifications of contractors and suppliers which unduly hinders the ability of foreign contractors and suppliers to show that they are qualified.

Article 16. Prequalification proceedings

(1) Except where participation in tendering proceedings is restricted pursuant to article 12(2), the procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, contractors and suppliers that are eligible and qualified to perform the procurement contract.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each contractor and supplier that requests them in accordance with the procedures specified in the notice of proposed procurement and that pays the price, if any, charged for those documents.

(3) The prequalification documents shall contain all information necessary to enable contractors and suppliers to prepare and submit applications to prequalify, including, but not limited to, the information required to be included in the notice of proposed procurement pursuant to article 14(1), except subparagraph (e) thereof, plus the following information:

(a) instructions for preparing and submitting prequalification applications;

(b) any additional information concerning the goods to be supplied or the construction to be effected that would be useful to contractors or suppliers in preparing their prequalification applications;

(c) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the tendering proceedings;

(d) any written statements, documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their eligibility and qualifications;

(e) the criteria and procedures to be used for assessing the qualifications of contractors and suppliers;

(f) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for contractors and suppliers to prepare and submit their applications, paying particular regard, in the case of international tendering proceedings, to the time needed by foreign contractors and suppliers;

(g) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings;

(h) references to this Law, to the procurement regulations and to all other laws and regulations of [this State] directly pertinent to the prequalification proceedings.

(4) The procuring entity shall promptly notify all contractors and suppliers submitting applications to prequalify whether or not they have been prequalified and shall make available to the general public the names of all contractors and suppliers that have been prequalified. All contractors and suppliers that have been prequalified shall be entitled to submit tenders.

(5) The procuring entity shall upon request communicate to contractors and suppliers that have not been prequalified the grounds therefor, but the procuring entity shall not be required to give reasons to substantiate those grounds.

(6) A procuring entity that has engaged in prequalification proceedings is not precluded from re-assessing at a later stage of the tendering proceedings the eligibility and qualifications of contractors and suppliers that have been prequalified.

SECTION IV. PROCUREMENT DOCUMENTS

Article 17. Provision of procurement documents to contractors and suppliers

The procuring entity shall provide a set of the procurement documents to contractors and suppliers in accordance with the procedures and requirements specified in the notice of proposed procurement. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of the procurement documents to each contractor and supplier that has been prequalified and that pays the price, if any, charged for those documents.

Article 18. Contents of procurement documents

The procurement documents shall contain all information necessary to enable contractors and suppliers to prepare and submit responsive tenders, including, but not limited to, the following information:

(a) instructions for preparing tenders;

(b) the eligibility criteria set forth in article 8(1)(a);

(c) if the qualifications of contractors and suppliers are to be assessed or re-assessed after the opening of tenders, the criteria and procedures to be used for the assessment or re-assessment;

(d) any written statements, documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their eligibility and qualifications;

(e) the nature and required technical and quality characteristics of the goods or construction to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;

(f) the required terms and conditions of the procurement contract to be entered into as a result of the tendering proceedings;

(g) whether alternatives to the characteristics of the goods or construction, contractual terms and conditions or other requirements set forth in the procurement documents are solicited;

(h) if contractors and suppliers are permitted to submit tenders for only a portion of the goods or construction to be procured, a specification of the portion or portions for which tenders may be submitted;

(i) the manner and, in international tendering proceedings, the currency or currencies in which the tender price is to be formulated and expressed;

(j) any applicable maximum or minimum tender price, or any applicable range within which tender prices must fall or the formula to be used to establish such range;

(k) in international tendering proceedings, the language or languages in which tenders are to be prepared;

(l) any requirements of the procuring entity with respect to the nature, amount and other principal terms and conditions of any tender security to be provided by contractors and suppliers submitting tenders and of any security for the performance of the procurement contract to be provided by the contractor or supplier that enters into the procurement contract, and with respect to the type or types of institutions or entities from which such securities will be acceptable;

(m) the manner, place and deadline for the submission of tenders;

(n) the means by which, pursuant to article 24, contractors and suppliers may seek clarifications of the procurement documents and the place and time of any meeting of contractors and suppliers convened by the procuring entity;

(o) the period of time during which tenders shall be in effect;

(p) the place, date and time for the opening of tenders, the procedures to be followed for opening, examining, evaluating and comparing tenders and for ascertaining the most advantageous tender, and the criteria to be used for evaluating and comparing tenders and for ascertaining the most advantageous tender, including, but not limited to, such factors as how the criteria will be quantified or otherwise applied, the relative weight or other indication of the degree of importance that each criterion will have, the manner in which the criteria will be combined and in which the tenders will be compared in order to ascertain the most advantageous tender, and any margin of preference that will be applied, its amount and the manner of its application;

(q) in international tendering proceedings, the currency that will be used for the purpose of evaluating and comparing tenders and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate issued by a specified financial institution prevailing on a specified date will be used;

(r) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to the tendering proceedings;

(s) references to this Law, to the procurement regulations and to all other laws and regulations of [this State] directly pertinent to the tendering proceedings [, and references to tax, social security, safety, environmental protection, health and labour laws and regulations of [this State] pertinent to the performance of the procurement contract];

(t) the name(s) and address(es) of the person or persons authorized to communicate with contractors and suppliers in connection with the tendering proceedings and to whom communications from contractors and suppliers should be addressed.

Article 19. Charge for procurement documents

The procuring entity may charge contractors and suppliers a sum for procurement documents provided to them. The sum shall reflect only the cost of printing the procurement documents and providing them to contractors and suppliers.

Article 20. Rules concerning formulation of prequalification documents and procurement documents

(1) Specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, shall not be included or used in the prequalification documents or in the procurement documents with a view to creating obstacles to participation by contractors or suppliers in tendering proceedings including, in the case of international procurement proceedings, foreign contractors and suppliers, nor shall such specifications, plans, drawings, designs, requirements, symbols or terminology be included or used which have the effect of creating unnecessary obstacles to such participation.

(2) To the extent possible, specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods or construction to be procured shall be used, where available, in formulating the specifications, plans, drawings and designs to be included in the prequalification documents and in the procurement documents.

(b) Standardized trade terms shall be used, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents and of the procurement documents.

(c) In the case of international procurement proceedings, internationally standardized features, requirements, symbols, terminology and trade terms shall be used, where available; if they are not available, nationally standardized features, requirements, symbols, terminology and trade terms shall be used, where available.

(4) In the case of international procurement proceedings, the prequalification documents and the procurement documents shall be formulated in . . . [each State enacting this model law specifies its official language or languages] [and in a language customarily used in international trade]. [In the event of a variation or conflict between language versions, the version in the language customarily used in international trade shall prevail.]

[Article 21. New or amended laws or regulations relating to taxes, customs duties or similar charges, or affecting performance of procurement contract]

[The procurement contract shall provide for the procuring entity to bear any extra costs incurred by the contractor or supplier that becomes a party to the procurement contract due to new or changes in laws or regulations of [this State] relating to taxes, customs duties or similar charges, or affecting the performance by the contractor or supplier of the procurement contract, that come into force after the date [30] days prior to the deadline for submission of tenders.]

Article 22. Clarifications and modifications of procurement documents

(1) A contractor or supplier requiring a clarification of the procurement documents shall communicate a request for such clarification to the procuring entity. The procuring entity shall respond promptly to any request for clarification that is received by it prior to the deadline for submission of tenders. Copies of the response by the procuring entity, which shall not identify the source of the request, shall be communicated to all contractors and suppliers to which the procuring entity provides the procurement documents.

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether at its own intiative or in response to a clarification requested by a contractor or supplier, modify the procurement documents by issuing an addendum thereto. The addendum shall be communicated promptly to all contractors and suppliers to which the procuring entity sends the procurement documents and shall be binding on them.

(3) Any request for clarification and any response thereto by the procuring entity and any addendum to the procurement documents shall be made in writing or in any other form that preserves a record of the request, response or addendum.

(4) If the procuring entity convenes a meeting of contractors and suppliers, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the procurement documents, without identifying the sources of the requests, and its responses to those requests. The minutes shall be prepared in writing or in any other form that provides a record of the information contained therein and shall be communicated to all contractors and suppliers to which the procuring entity provides the procurement documents.

SECTION V. TENDERS

Article 23. Language of tenders

Tenders shall be formulated and submitted in . . .[each State enacting this model law specifies its official language or languages]. In international tendering proceedings, at the option of the contractor or supplier, tenders may be formulated and submitted in any language in which the procurement documents have been issued.

Article 24. Submission of tenders

(1) The procuring entity shall fix a specific date and time as the deadline for the submission of tenders. The deadline shall allow sufficient time for

contractors and suppliers to prepare and submit their tenders, paying particular regard, in the case of international tendering proceedings, to the time needed by foreign contractors and suppliers.

(2) (a) The procuring entity may, prior to the deadline for submission of tenders, extend the deadline:

(i) in order to afford contractors and suppliers reasonable time to take into account in their tenders a response by the procuring entity to a request for clarification of the procurement documents or a modification of those documents, or

(ii) if, due to unforeseen circumstances, it is not possible for contractors or suppliers to submit their tenders by the deadline.

(b) Notice of any extension of the deadline shall be given promptly in writing or in any other form that provides a record of the information contained therein to each contractor and supplier to which the procuring entity provides the procurement documents.

(3) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened or considered and shall be returned to the contractor or supplier that submitted it. [However, a tender submitted after the deadline may be considered if the contractor or supplier was not able to submit its tender by the deadline due to reasons beyond its control.]

(4) Tenders shall be submitted in writing and in sealed envelopes. [However, the procuring entity may give contractors and suppliers the option to submit tenders by any other means that provides a record of the information contained in the tender.] The procuring entity shall provide to the contractor or supplier a receipt showing the date and time when the tender was received.

Article 25. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the procurement documents. The period of time shall commence at the deadline for submission of tenders.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request contractors or suppliers to extend the period for an additional specified period of time. A contractor or supplier may refuse the request without forfeiting its tender security. The request and the responses thereto shall be made in writing or by any other means that provides a record of the information contained therein.

(b) The procuring entity may require contractors and suppliers that agree to the extension to extend or to procure an extension of the period of effectiveness of tender securities provided by them or, if it is not possible to do so, to provide new tender securities, to cover the extended period of effectiveness of their tenders.

(3) A contractor or supplier may modify or withdraw its tender prior to the deadline for the submission of tenders by communicating the modification or a notice of withdrawal to the procuring entity in writing or in any other form that provides a record of the information contained therein. The modification

or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for submission of tenders.

SECTION VI. TENDER SECURITIES

Article 26. Tender securities

(1) If the procuring entity requires contractors and suppliers submitting tenders to provide a tender security:

(a) the requirement shall apply to all such contractors and suppliers;

[(b) in international tendering proceedings, a contractor or supplier shall not be precluded from providing a tender security issued by a foreign institution or entity of the type or a type, if any, specified in the procurement documents, unless the issuance of the security would otherwise be in violation of the law of [this State]].

(2) The procuring entity shall make no claim to the amount of the tender security, and shall, without delay, return or procure the return of the tender security to the contractor or supplier that supplied it, after the earliest to occur of:

(a) the expiry of the tender security,

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required, or

(c) The rejection by the procuring entity of all tenders pursuant to article 28(2) or (3) or article 29.

SECTION VII. OPENING, EXAMINATION, EVALUATION AND COMPARISON OF TENDERS

Article 27. Opening of tenders

(1) Tenders shall be opened at the time set forth in the procurement documents as the deadline for the submission of tenders or an extension thereof, at the place and in accordance with the procedures specified in the procurement documents.

(2) All contractors and suppliers that have submitted tenders or their representatives shall be permitted to be present at the opening of tenders.

(3) The name and address of each contractor or supplier whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders.

Article 28. Examination, evaluation and comparison of tenders

(1) (a) To assist in the examination, evaluation and comparison of tenders, the procuring entity may ask contractors and suppliers for clarifications of their tenders. Any request for clarification and any response to such a request shall be in writing or in any other form that provides a record of the information contained therein. No change in the tender price or other matter of substance in the tender shall be sought, offered or permitted, except as provided in subparagraph (b).

(b) The procuring entity shall correct purely arithmetical errors discovered in a tender. Any such correction shall be binding on the contractor or supplier that submitted the tender if accepted by that contractor or supplier.

(2) The procuring entity shall reject a tender:

(a) if the contractor or supplier that submitted the tender is not eligible [, subject to article 8(4),] or is not qualified to perform the procurement contract;

(b) if the contractor or supplier submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1)(b);

(c) if the tender is not responsive, except as provided in paragraph (6) of this article and in article 29(1)(a).

(3) Subject to approval, the procuring entity may reject a tender if the contractor or supplier that submitted it attempts improperly to influence the procuring entity in the process of examining, evaluating or comparing tenders or ascertaining the most advantageous tender.

(4) (a) A tender is responsive if it conforms to the required characteristics of the goods or construction to be procured, contractual terms and conditions and other requirements set forth in the procurement documents. However, the procuring entity may regard a tender as responsive if it contains only minor deviations that do not materially alter or depart from those characteristics, terms, conditions and other requirements. Those permitted deviations shall be quantified and appropriately taken account of in the evaluation and comparison of tenders.

(b) Alterations of or departures from required characteristics, terms, conditions and other requirements of the procurement documents are material if they concern, among other things, the nature and technical and quality characteristics of the goods or construction; the quantity of the goods; the location where the construction is to be effected; the time when the construction is to be completed; the place or time when the goods are to be delivered; the terms of the procurement contract relating to the price or payment thereof; the extent of liability of one party to the other; the settlement of disputes; the tender security; the security for performance of the procurement contract; or the quality guarantee in respect of the goods or construction.

[(5) If the procurement documents solicit tenders for alternatives to the characteristics of the goods or construction, contractual terms and conditions or other requirements set forth in the procurement documents, the procuring entity shall evaluate and compare such alternative tenders together with the tenders based on the characteristics, contractual terms and conditions and other requirements set forth in the procurement documents in order to ascertain the most advantageous tender.]

(6) [Alternative 1]

[A contractor or supplier wishing to submit an unsolicited tender for an alternative to the technical characteristics of the goods or construction set

forth in the procurement documents must also submit a tender conforming to the technical characteristics set forth in the procurement documents. An alternative tender may be considered by the procuring entity only if it was submitted by the contractor or supplier whose tender based on the technical characteristics set forth in the procurement documents has been found to be the most advantageous of such tenders.]

[Alternative 2]

[The procuring entity may consider an unsolicited tender for an alternative to the technical characteristics of the goods or construction set forth in the procurement documents if a reasonable opportunity is provided to all eligible and qualified contractors and suppliers that have submitted tenders conforming to the technical characteristics set forth in the procurement documents to alter their tenders or to submit additional tenders based on the alternative tender. The procuring entity shall evaluate and compare the alternative, altered and additional tenders together with the unaltered tenders in order to ascertain the most advantageous tender.]

(7) (a) The procuring entity shall evaluate and compare tenders that have not been rejected pursuant to paragraph (2) or (3) in order to ascertain the most advantageous tender in accordance with the procedures and criteria set forth in the procurement documents.

(b) The evaluation and comparison of tenders shall be carried out in an objective manner.

(c) The most advantageous tender shall be either:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, or

(ii) the most economically advantageous tender, which shall be ascertained on the basis of objective and quantifiable criteria, to the extent possible, including, in addition to the tender price, subject to any margin of preference applied pursuant to subparagraph (e) of this paragraph, such criteria as: the costs of operating, maintaining and repairing the goods or construction over its expected useful life; the functional characteristics of the goods or construction; the efficiency and productivity of the goods or construction; the time for delivery of the goods or completion of the construction; the terms of payment; and the terms and conditions of the quality guarantee in respect of the goods or construction; in so far as such criteria are not the subjects of required characteristics of the goods or construction or required contractual terms or conditions set forth in the procurement documents.

[(d) In addition to criteria of the nature referred to in subparagraph (c)(ii) of this paragraph, the procuring entity may apply criteria directed to ascertaining the impact of tenders in relation to specific Government programmes or policies for the promotion of national economic development, economic development of particular regions within [this State] or development of particular industries or economic sectors. To the extent possible, such criteria shall be expressed in the procurement documents in objective and quantifiable terms.]

(e) In evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors and suppliers or for the benefit of tenders for domestically produced goods. The margin of preference shall be applied by adding to the tender prices of all tenders other than those that are to benefit from the margin of preference the amount provided for in the procurement regulations.

(8) When tender prices are expressed in two or more currencies, the tender prices shall be converted to a single currency for the purpose of evaluating and comparing tenders.

(9) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to contractors or suppliers or to any other person not officially involved in the examination, evaluation or comparison of tenders or in the decision of which tender should be accepted, except as provided in article 33(2).

[(10) The ascertainment by the procuring entity of the most advantageous tender is subject to approval.]

Article 29. Rejection of all tenders

(1) Subject to approval, the procuring entity may, at any time prior to the entry into force of the procurement contract, reject all tenders for any reason other than those set forth in article 28(2) or (3). However, the procuring entity may not reject all tenders for the purpose of invoking article 7(2)(b)(i) or for any fraudulent purpose.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1), towards contractors and suppliers that have submitted tenders nor any obligation to inform them of the grounds for its action.

(3) Notice of the rejection of all tenders pursuant to this article shall be given promptly, in writing or by any other means that provides a record of the information contained therein, to all contractors and suppliers that submitted tenders.

Article 30. Negotiations with contractors and suppliers

(1) No negotiations shall take place between the procuring entity and a contractor or suppliers with respect to a tender submitted by the contractor or supplier except that:

(a) if the procurement documents specify a maximum price for the goods or construction or a range of prices within which tender prices must fall, and all otherwise responsive tenders from eligible and qualified contractors and suppliers exceed that maximum price or range or prices, the procuring entity may negotiate with the contractor or supplier submitting the tender with the lowest price with a view towards reducing its tender price;

(b) if it appears from the evaluation and comparison of tenders that no one tender is obviously the most advantageous, the procuring entity may negotiate with contractors and suppliers whose tenders appear to be more advantageous than others with a view towards the modification of one of those tenders so that it is more advantageous than the others.

(2) No negotiations permitted by paragraph (1) shall take place concerning any required characteristics of the goods or construction, or any required contractual term or condition, set forth in the procurement documents.

SECTION VIII. SPECIAL TENDERING PROCEDURES FOR SOLICITATION OF PROPOSALS

Article 31. Special tendering procedures for solicitation of proposals

(1) Subject to approval, the procuring entity may employ the procedures provided for in this article in cases where it seeks proposals from contractors and suppliers with respect to the technical characteristics of the goods or construction to be procured because multiple alternative technical solutions might meet the needs of the procuring entity or because, due to the nature of the goods or construction, the procuring entity is unable to formulate detailed technical characteristics.

(2) The provisions of chapter II of this Law shall apply to tendering proceedings in which the procedures provided for in the present article are employed except to the extent those provisions are derogated from in the present article.

(3) The procurement documents shall call upon contractors and suppliers to submit initial tenders containing their proposals without a tender price.

(4) The procuring entity may engage in discussions with any contractor or supplier whose tender has not been rejected pursuant to article 28(2) or (3) or 29 concerning any aspect of its tender, other than a required characteristic of the goods or construction or a required contractual term or condition set forth in the procurement documents.

(5) The procuring entity shall invite contractors and suppliers whose tenders have not been rejected to submit final tenders with prices. A contractor or supplier not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting its tender security. The final tenders shall be evaluated and compared in order to ascertain the most advantageous tender.

(6) The procuring entity shall include in the minutes required under article 33 a statement of the circumstances on which it relied in invoking the provisions of this article, specifying the relevant facts.

SECTION IX. ACCEPTANCE OF TENDER AND ENTRY INTO FORCE OF PROCUREMENT CONTRACT; MINUTES OF TENDERING PROCEEDINGS

Article 32. Acceptance of tender and entry into force of procurement contract

(1) [Subject to approval,] the tender that has been ascertained to be the most advantageous shall be accepted. Notice of acceptance of the tender shall be given promptly to the contractor or supplier that submitted the tender.

(2) A procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) is [dispatched to] [received by] the contractor or supplier that submitted the tender, provided that it is [dispatched] [received] while the tender is in force and effect.

(3) (a) Notwithstanding the provisions of paragraph (2), the notice referred to in paragraph (1) may require the contractor or supplier whose tender has been accepted to sign a written procurement contract conforming to the tender. The contractor or supplier shall sign the written procurement contract within a reasonable period of time after the notice is [dispatched to] [received by] it.

(b) The procurement contract enters into force when the written procurement contract is signed by the contractor or supplier and by the procuring entity. Between the time when the notice referred to in paragraph (1) is [dispatched to] [received by] the contractor or supplier until the entry into force of the procurement contract, the contractor or supplier shall take no action which interferes with the entry into force of the procurement contract or with its performance.

(4) If the contractor or supplier whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the tender that is ascertained to be the next most advantageous tender and that is in force and effect may be accepted [,subject to approval]. The notice provided for in paragraph (1) shall be given to the contractor or supplier that submitted that tender.

(5) Upon the entry into force of the procurement contract and the provision by the contractor or supplier of a security for the performance of the contract, if required, notice of the procurement contract shall be given to other contractors and suppliers, specifying the name and address of the contractor or supplier that has entered into the contract and the price of the contract.

(6) (a) The notices referred to in this article may be given in writing or by any other means that provides a record of the information contained therein.

(b) [Alternative 1: The notice under paragraph (1) is "dispatched" when it is properly addressed or otherwise directed and transmitted to the contractor or supplier, or conveyed to an appropriate authority for transmission to the contractor or supplier, by a mode authorized by paragraph (6)(a).]

[Alternative 2: The notice referred to in paragraph (1) is "received" by the contractor or supplier when it is received by it personally or at its place of business or mailing address.]

Article 33. Minutes of tendering proceedings

(1) The procuring entity shall prepare minutes of the tendering proceedings, including the opening, examination, evaluation and comparison of tenders. The minutes shall contain a brief description of the goods or construction to be procured, the names and addresses of contractors and suppliers that submitted tenders; information relative to the eligibility and qualifications, or lack thereof, of those contractors and suppliers; the price and a summary of the other principal terms and conditions of each tender and of the procurement contract; a summary of the evaluation and comparison of tenders; if all tenders were rejected pursuant to article 29, a statement to that effect; and, where applicable, the statement required by article 31(6).

(2) The minutes of the tendering proceedings shall be made available for inspection by the general public after a procurement contract has entered into force and the contractor or supplier has supplied a security for the performance of the contract, if required, or after tendering proceedings have been terminated without resulting in a procurement contract. However, no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

CHAPTER III. PROCUREMENT OTHER THAN BY MEANS OF TENDERING PROCEEDINGS

Article 34. Competitive negotiation proceedings

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of contractors and supplier to ensure effective competition, but in any case with at least [3] contractors and suppliers unless negotiations with [3] contractors and suppliers are not possible or are not practicable.

(2) Any requirements, guidelines, documents or other information relative to the negotiations that are communicated by the procuring entity to a contractor or supplier shall be communicated on an equal basis to all other contractors and suppliers engaging in negotiations with the procuring entity relative to the procurement; provided, however, that the foregoing provision shall not apply to documents or other information that is particular to negotiations with an individual contractor or supplier or to documents or information the disclosure of which would be contrary to any law of [this State] relating to confidentiality.

(3) Negotiations between the procuring entity and a contractor or supplier shall be confidential, and except as provided in paragraph (4), one party to those negotiations shall not reveal or disclose to any third person any documentation or information relating to those negotiations without the consent of the other party.

(4) (a) The procuring entity shall prepare minutes of the competitive negotiation proceedings. The minutes shall contain the names and addresses of contractors and suppliers with which the procuring entity has engaged in negotiations; the price and a summary of the other principal terms and conditions of the procurement contract; if the proceedings did not result in a procurement contract, a statement of the reasons therefor; and the statement and facts required by article 7(5).

(b) The minutes of the competitive negotiation proceedings shall be made available for inspection by the general public after a procurement contract has entered into force, except that no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

Article 35. Record of single source procurement

(1) The procuring entity shall prepare a record of the single source procurement. The record shall contain the name and address of the contractor or supplier from which the procuring entity procured the goods or construction, the price and a summary of the other principal terms and conditions of the procurement contract and the statement and facts required by article 7(5).

(2) The record shall be made available for inspection by the general public after the procurement contract has entered into force; provided, however, that no information shall be disclosed contrary to any law of [this State] relating to confidentiality.