

is a framework law setting forth basic rules governing procurement and would, therefore, need to be supplemented by detailed regulations. There are a number of provisions in the Model Law which expressly envisage supplementation by procurement regulations.

*Article 5 on Public accessibility of legal texts* requires the enacting State to ensure public accessibility of the Model Law, procurement regulations and other legal texts. This provision is intended to promote transparency of the national legal infrastructure relating to procurement.

*Article 6 on qualifications of suppliers or contractors* is purported to create a procedural climate conducive to participation by qualified suppliers or contractors in procurement proceedings. It does so by strictly specifying the criteria and procedures that the procuring entity must use to assess the qualifications of suppliers and contractors. The aim of the procedure laid out in Article 6 is to help ensure that all suppliers and contractors are treated on an equal footing and to avoid arbitrariness in the evaluation of qualifications of contractors and suppliers.

*Article 7 on Prequalification proceedings* is intended to eliminate at the initial stage of the procurement proceedings suppliers and contractors who are not suitably qualified to perform the contract and thus to narrow down the number of tenders, proposals or offers that the procuring entity must evaluate and compare. The prequalification procedures set forth in this article are made subject to a number of important safeguards. These include the subjugation of prequalification procedures to the limitations contained in Article 6, in particular as to the assessment of qualifications and the procedures stipulated in paragraphs (2) and (7) of this article. The inclusion of these safeguards is intended to ensure that prequalification procedures are conducted on a non-discriminatory basis and on conditions that are fair and transparent. Paragraph (8) of Article 7 entitles the procuring entity to obtain, at a later stage of prequalification proceedings a reconfirmation of the qualifications from the suppliers and contractors who had prequalified. The purpose of this provision is to enable the procuring entity to ascertain whether the qualification information submitted by a supplier or contractor at the time of prequalification was authentic.

*Article 8 on Participation by suppliers or contractors* stipulates that contractors and suppliers should, subject to limited exceptions, be permitted to participate in the procurement proceedings without regard to their nationality. Such exceptions are not to be taken informally or secretly, but must be based on the grounds specified in the procurement regulations or according to other provisions of law. This approach appears to be the best possible compromise, in particular from the standpoint of striking a proper balance between the progressive fostering of non-discrimination and the need to recognise that enacting states would, at least, for

the foreseeable future, continue, to one degree or another, to apply measures designed to favour national suppliers and contractors.

*Article 9 on Form of communications* is intended to provide certainty as to the required form of communication between the procuring entity and suppliers and contractors. The essential requirement as to the form of such communications, subject to other provisions of the Model Law, is that they must be in a form that preserves a record of the content of the communication. This is not only confined to paper-based communications, but also enables the use of electronic data interchanges (EDI) in procurement proceedings. This provision also permits certain specified types of communications to be made on a preliminary basis through means that do not leave a record of the content of the communications provided that the preliminary communication is immediately followed by a confirming communication in a form that leaves a record of the communication. Article 9 forbids the procuring entity to discriminate between suppliers and contractors on the basis of the form of communications received from them.

*Article 10 on Rules concerning documentary evidence provided by suppliers or contractors* forbids the imposition of any requirements by the procuring entity as to the legalization of documentary evidence provided by suppliers and contractors as to their qualifications other than those provided in the laws of the enacting State relating to the legalization on such documents so as not to discriminate against the foreign suppliers and contractors. It should, however, be noted that this provision does not take care of the situation of unequal treatment of foreign suppliers and contractors which might arise in instances where the enacting State is a party to a treaty regulating the legalization of documents with the countries of origin of some and not of all foreign suppliers and contractors and the enacting State is, therefore, obliged to apply less strenuous procedures only to some suppliers and contractors.

*Article 11 on Record of procurement proceedings* requires the procuring entity to maintain a record of the procurement proceedings so as to promote transparency and accountability in relation to procurement proceedings. Such a record may be prepared by another Government agency, but the procuring entity is obliged to maintain this record so as to make it available to suppliers and contractors. A key question addressed by this Article is the extent of disclosures by the procuring entity and who would be entitled to that disclosure. Two kinds of disclosure are provided. Disclosure of basic information geared to the accountability of the procuring entity is mandated to the general public. Disclosure of more detail information concerning the conduct of the procurement on request. Such information is necessary to enable them to monitor their relative performance in the procurement proceedings and the conduct of the procuring entity.

*Article 12 on Public notice of procurement contract awards* obligates the procuring entity to publicise the notice of procurement contract awards. This requirement is, however, not applicable to cases where the contract price is less than a prescribed amount.

*Article 13 on Inducement from suppliers or contractors* provides an important safeguard against corruption: requirement of rejection of a tender proposal, offer or quotation if the supplier or contract in question attempts to improperly influence the procuring entity. However, to ensure a check against the abusive application of this provision, the rejection is made subject to approval of higher authorities, a record requirement and a duty of prompt disclosure to the alleged wrong-doer.

*Article 14 on Rules concerning description of goods or construction* is intended to make it clear that the prequalification and solicitation documents should be formulated in a clear, complete and objective manner, particularly with respect to the description of goods or construction to be procured, it also frames an important rule that these specifications should be written in such a way so as not to favour particular contractors or suppliers. The principle of objectivity in the description of goods or construction enshrined in this provision is applicable to all methods of procurement so as to foster competition, to limit abusive resort to single-resource procurement and to facilitate the choice of the most competitive method of procurement.

*Article 15 on Language* stipulates that the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations should be formulated in the official language of the enacting State and in a language customarily used in international trade. This rule is intended to help make the solicitation documents understandable to foreign suppliers and contractors. However, this requirement is not to be invoked where the procurement proceedings are confined solely to domestic suppliers or contractors and where the procurement contract would be of low value. Further, the bilingual requirement may not be necessary where the official language of the enacting State is one customarily used in international trade.

*Chapter II entitled Methods of procurement and Their Conditions* contains Articles 16 to 20. *Article 16 on Methods of Procurement* enumerates the important principle underlying the Model Law that tendering should be the normally used methods of procurement. However, the Model Law also provides a number of other methods of procurement for exceptional circumstances in which tender proceedings would not be feasible, or even if feasible, would not be the procurement method most likely to provide the best value. It also lays down a further requirement that a decision by the procuring entity to use a procurement

method other than tendering should be supported by a statement of grounds and circumstances justifying the use of the selected method.

*Article 17 on Conditions for use of two-stage tendering, request for proposals or competitive negotiation* permits the enacting State to employ three different methods of procurement other than tendering, viz. two-stage tendering, request for proposals, and competitive negotiations, in the circumstances referred to in this article. These circumstances include the case which it would not be feasible for the procuring entity to formulate detailed specifications for the goods or construction and to obtain the most satisfactory solution to its procurement needs. The foregoing methods of procurement employ different procedures for selecting a supplier or contractor. In the first stage of a two-stage tendering proceedings, the procuring entity solicits proposals from suppliers and contractors as to various possible ways of meeting its procurement needs and consults with them concerning the details and possible modifications of those proposals, upon the completion of the first-stage, the procuring entity decides what exactly it wants to procure and formulates a set of final specifications that form the basis of an ordinary tender proceeding. In the second method of procurement, request for proposals, the selection of a winning proposal from among the proposals, offering varied solutions is based on the effectiveness of that proposal in meeting the needs of the procuring entity and the cost. In the third method, competitive negotiation, the procuring entity is permitted to conduct negotiations except for compliance with the requirements of 'best and final offer' procedure mandated in Article 39. Paragraph (2) of this article also permits the use of competitive negotiation in two types of cases of urgency: (i) the case of urgent circumstances that neither foreseeable nor were a result of dilatory conduct on its part; and (ii) the case of urgency caused by a catastrophic event.

*Article 18 on Conditions for use of restricted tendering* lays down the conditions for the use of restricted tendering by a procuring entity. These conditions are (i) when the goods or construction by reason of their highly complex or specialized nature are available from only a limited number of suppliers or contractors; and (ii) when the time and cost required to examine and evaluate a large number of tenders would not be commensurate with the value of goods or construction to be procured. The modalities for engaging in restricted tendering are laid down in Article 36.

*Article 19 on Conditions for use of request for quotations* prescribes the conditions for use of request for quotations. This procurement method is appropriate for low value purchases of standardized goods. In such cases, engaging in tender proceedings, which can be costly and time-consuming, may not be justified. However, the use of this method is made subject to the principle

that procuring entities should abstain from artificially deriving procurement packages in order to avoid tendering.

*Article 20 on Conditions for use of single-source procurement* lays down the conditions for the use of single-source procurement. In view of the non-competitive character of this procurement method, this article strictly limits its use to the exceptional circumstances set forth in paragraph (1) of this article. Paragraph (2) permits the use of this method in cases of serious economic exigency in which such procurement would avert serious harm to the national economy.

*Chapter III on Tendering Proceedings* has three sections. Section I entitled "*Solicitation of Tenders and of Applications to Prequalify*" consists of Articles 21 to 26. Section II entitled "*Submission of Tenders*" consists of Articles 27 to 30. Section III entitled "*Evaluation and Comparison*" is made up of articles 31 to 35.

*Article 21 on Domestic Tendering.* Domestic tenderings are those procurement proceedings in which participation is limited solely to domestic suppliers or contractors either because the procuring entity has so decided or because in view of the low value of the goods or construction, foreign suppliers or contractors would not be interested in participating in the tender proceedings. Article 21 specifies the exceptional cases in which measures designed to solicit foreign participation in the tender proceedings will not have to be employed in the case of domestic tendering.

*Article 22 of Procedures for soliciting tenders of applications to prequalify* sets forth the procedures for publication of solicitation of tenders and applications to prequalify as widely as possible. It obliges the procuring entity to publicise the invitation to tender or invitation to prequalify in a publication having international circulation.

*Articles 23 on Contents of invitation to tender and invitation to prequalify* requires that invitations to tender as well as invitations to prequalify contain the information required by suppliers and contractors to enable them to ascertain whether the goods or construction being procured are of a type they can provide, and if so, how they can participate in tender proceedings. The specified information requirements are only the required minimum so as not to preclude the procuring entity from including additional information that it considers appropriate.

*Article 24 on Provision of Solicitation documents* requires the procuring entity to ensure that all suppliers and contractors who have indicated an interest in participating in the procurement proceedings and comply with the procedures set forth by the procuring entity are provided with solicitation documents on

payment. The price to be charged for these documentation should reflect only the cost of their printing and providing them to suppliers or contractors.

*Article 25 on Contents of solicitation documents* contains a listing of information required to be included in the solicitation documentation. This would enable the suppliers or contractors to submit tenders that meet the needs of the procuring entity and to enable the procuring entity to evaluate them in an objective and fair manner. Many of the items listed in this article are regulated or deal with in other provisions of the Model Law.

*Article 26 on Clarifications and modifications of solicitation documents* establishes procedures for clarification and modification of the solicitation documents for the successful conduct of tender proceedings. The right of the procuring entity to modify the solicitation document is fundamental in order to enable it to obtain goods or construction that meet its needs. The article provides that clarifications together with questions that gave rise to the clarifications and modifications must be communicated by the procuring entity to all suppliers and contractors to whom the procuring entity provided solicitation documents. Further, the procuring entity is required to respond promptly to a clarification sought by a contractor or supplier in order to enable him to take the clarification into account in the preparation and submission of his tender or to modify withdraw his tender. Similarly, minutes of meetings held by the procuring entity with the contractors and suppliers and required to be communicated promptly so that those too could be taken into account in the preparation of tenders.

*Article 27 on Language of Tenders* provides that tenders may be formulated and submitted in a language in which the solicitation documents have been issued or in any other language specified in the solicitation documents. This rule has been included in order to facilitate participation by foreign suppliers and contractors.

*Article 28 is entitled Submission of Tenders.* Paragraph (1) of this article leaves it to the procuring entity to fix the place for and the deadline for the submission of tenders. Paragraph (2) requires the procuring entity to extend the deadline for submission of tenders in to exceptional case of late issuance of clarifications and modifications of the solicitation documents, or of minutes of a meeting of suppliers and contractors. Paragraph (3) gives a discretionary power to the procuring entity to extend the deadline for submission of tenders in case where one or more suppliers or contractors are unable to submit their tenders on time due to any circumstances beyond their control. Under paragraph (4), notice of extension of the deadline for the submission of tenders is required to be given promptly to each contractor or supplier to which the procuring entity had sent the solicitation documents. Paragraph 5(a) lays down the requirement that tenders are

to be submitted in writing, signed and in a sealed envelope. However, paragraph 5(b) permits the submission of tender in an EDI form provided it is so specified in the solicitation document and a degree of security, confidentiality and authenticity comparable to the degree of security, confidentiality and authenticity offered by a written tender in a sealed envelope is assured. Paragraph (6) prohibits the consideration of late tenders and they are required to be returned unopened to the suppliers or contractors that had submitted them.

*Article 29 on Period of effectiveness of tenders: modification and withdrawal* frames the rule that the procuring entity should stipulate in the solicitation document the period of time for which tenders should remain in effect. Where a request is made by the procuring entity to extend the period of effectiveness of tenders prior to the period of expiry of effectiveness and such request is refused by the supplier or contractor, the effectiveness of the tender will terminate upon the expiry of the unextended period without entailing forfeiture of the tender security. However, if the contractor or supplier agrees to such an extension, he will be required to have the effectiveness of his tender security extended correspondingly or to provide a new tender security. A default in this regard will tantamount to refusal on the part of the contractor/supplier to extend the period of effectiveness of his tender. Paragraph (3) of this article permits modifications and withdrawal of tenders prior to the deadline for submission of tenders. This is desirable because restricting modifications or withdrawals would discourage participation by suppliers and contractors in tender proceedings and would run counter to widely accepted practice under most national procurement laws. At the same time, it permits the procuring entity to depart from this general rule and to impose a penalty of forfeiture of tender security for modifications and withdrawals prior to the deadline for the submission of tenders, but only if so stipulated in the solicitation documents.

*Article 30 on Tender securities* authorizes the procuring entity to require all suppliers and contractors participating in the tender proceedings to provide a tender security. Tender securities are insisted upon by the procuring entities to recoup the costs to tender proceedings and to discourage the suppliers and contractors from defaulting (withdrawal of tender, refusal to conclude the procurement contract). Tender securities are usually important when procurement is of high value goods. The article contains safeguards to ensure that the tender securities are imposed fairly and for the intended purposes which are to secure the obligations of suppliers or contractors to enter into procurement contracts on the basis of tenders submitted by them and to provide a security for the performance of the procurement contract if required to do so.

Paragraph 1(c) has been included to remove unnecessary obstacles to the participation of foreign suppliers and contractors that could arise if they were

restricted to providing securities issued by institutions in the enacting State. However, flexibility is provided to procuring entities in States in which acceptances of tender securities not issued in the enacting State would be a violation of law.

The reference in paragraphs (c) through (f) of paragraph (1) to confirmation of tender security is intended to take account of the practice in some States of requiring local confirmation of a tender security issued abroad. This inclusion, however, is not intended to encourage such a practice in particular since the requirement of local confirmation could constitute an obstacle to participation by foreign suppliers and contractors in tender proceedings.

Paragraph (2) is purported to provide clarity and certainty as to the point of time after which the procuring entity may not make a claim under the tender security.

*Article 31 deals with the Opening of Tenders.* The rule framed in paragraph (1) of this article is intended to prevent time gaps between the deadline for submission of tenders and the opening of tenders by stipulating that tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders or at the extended deadline. This requirement appears to be too onerous and there should be some lapse of time between these two events.

Paragraph (2) frames the rule that the procuring entity must permit all suppliers and contractors or their representatives to be present at the opening of tenders. This is intended to ensure transparency in the tender proceedings.

Paragraph (3) requires that at the opening of tenders, the names of all suppliers and contractors that have submitted tenders as well as prices of their tenders should be announced to those present. It also requires communication of this information to participating suppliers and contractors who were not present or represented at the opening of tenders.

*Article 32 is addressed to the examination, evaluation and comparison of tenders.* Paragraph 1(a) entitles the procuring entity to seek from suppliers or contractors clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders, while making it clear that this should not involve changes in the substance of tenders. Paragraph 1(b), however, entitles the procuring entity to correct purely arithmetical errors that are discovered during the examination of tenders which it is required to promptly notify to the concerned supplier or contractor.

Paragraph (2) frames a rule for determining whether tenders are responsive

and permits a tender to be regarded as responsive even if it contains minor deviations.

Under paragraph (3), the procuring entity is authorised to reject a tender if: (i) the supplier or contractor that submitted the tender is not qualified; (ii) the supplier or contractor does not accept the correction of an arithmetical error; (iii) the tender is not responsive; and (iv) the supplier or contractor attempts to improperly influence the procuring entity.

Paragraph (4) outlines the modalities for ascertaining the successful tender. Although ascertaining the successful tender on the basis of tender price alone is the widely accepted norm, in some tender proceedings the procuring entity may wish to select a tender not purely on the price factor. Accordingly, paragraph (4)(b)(ii) enables the procuring entity to select the "lowest evaluated tender", i.e. one that is selected on the basis of criteria in addition to price. Sub-paragraphs (4)(c)(i) through (iv) list out these criteria. The criteria in (4)(c)(iii) related to economic development objectives have been included because in most developing countries it is important for procuring entities to be able to take into account criteria that permit the evaluation and comparison of tenders in the context of economic development objectives, paragraph (4)(d) permits a procuring entity to grant a margin of preference to domestic tenders, but makes its availability contingent upon rule for calculation and application of the margin of preference to be set forth in the procurement regulations.

*Article 33 on Rejection of Tenders* authorises the procuring entity to reject all tenders at any time prior to the acceptance of a tender. Paragraph (1) does not require the procuring entity to justify the grounds it cites for rejection of all tenders. However, under paragraph (3), it is obligated to notify the rejection to all suppliers or contractors that had submitted the tenders. Paragraph (2) exempts the procuring entity from any liability on this score towards contractors or suppliers. However, this blanket power given to the procuring entity can take effect only if such power had been vested in it in the solicitation documents.

*Article 34* entitled '*Prohibition of negotiation with supplier or contractor*' contains an explicit prohibition against negotiations between the procuring entity and a supplier or contractor concerning a tender submitted by him. This is because once suppliers or contractors know that negotiations would take place after submission of tenders, they would have little incentive to offer their best prices instead, they would increase their tender prices measurably in anticipation of being persuaded to reduce them and procuring entities would in the end pay more than necessary.

*Article 35* relates to *Acceptance of tender and entry into force of procurement contract*. Paragraph (1) of this article enunciates the rule that the tender determined

to be successful pursuant to Article 32 (4) (b) is to be accepted and that notice of acceptance is to be given promptly to the supplier or contractor that submitted the tender. The article then sets forth three different methods of entry into force of procurement contract. Under one method, (paragraph (4)), unless provided otherwise in the solicitation documents, the procurement contract enters into force upon dispatch of the notice of acceptance to the supplier or contractor that submitted the successful tender of a written procurement contract conforming to the tender. The second method (paragraph (2)) links the entry into force of the procurement contract to the signature by the supplier or contractor submitting the successful tender of a written procurement contract conforming to the tender. A third method of entry into force (paragraph (3)) provides for the entry into force of the procurement contract upon its approval by a higher authority. The requirement in paragraph (3) that the solicitation document disclose the estimated period of time required to obtain the approval and the provision that a failure to obtain the approval within the specified period would not extend the period of effectiveness of the successful tender or of any tender security furnished are designed to strike a balance between the rights and obligations of suppliers and contractors. In the event the supplier or contractor whose tender the procuring entity has selected fails to sign a procurement contract, paragraph (5) clarifies, the procuring entity shall be within its right to select another tender from among the remaining tenders in accordance with the provisions normally applicable to the selection of tenders subject to the right of the procuring entity to reject all tenders. Paragraph (6) requires the procuring entity to notify other suppliers and contractors that participated in the tender proceedings about the award of the procurement contract, the name and address of the successful supplier or contractor and the contract price. This requirement is intended to promote transparency of the tender proceedings.

Chapter VI entitled *Procedure for Procurement Methods other than Tendering* is made up of Articles 36 to 41. These articles outline the procedures to be used for the methods of procurement other than tendering. It should be noted that Chapter IV does not provide as full a procedural framework as Chapter III does with respect to tendering proceedings. This is presumably because the procurement methods other than tendering need more flexibility. It should further be noted that Chapters I and V are also generally applicable to procurement methods other than tendering.

*Article 36* on *Restricted tendering* prescribes the procedure to be followed while engaging in restricted tendering. Under the Model Law, a procuring entity can use restricted tendering in two circumstances: (1) when the goods or construction by reason of their highly complex or specialized nature are available from only a limited number of suppliers or contractors; and (ii) when the time and