### Article 11 *Bis*[7]

### Rejection of tenders, offers, proposals and quotations

Article 33 of the previous Model Law was limited to the tendering method. The present article extends the scope to rejection of tenders, proposals, offers or quotations because of the incorporation of the procurement of services in the revised text.

### Article 14[8]

### Rules concerning description of goods, construction or services

Drafting changes were inserted in paragraphs (1), (2) and (3) in view of the inclusion of procurement of services in the revised Model Law.

### Article 15

### Language[9]

Addition of the wording 'or services' in sub-paragraph (b).

### Article 16

### Methods of Procurement[10]

Article 16 has been substantially modified. It lays down the ground rules as to the type of the procurement method to be used irrespective of whether the procurement is of goods, construction or services. Article 16 establishes the rule that for the procurement of goods or construction, tendering is the method of procurement to be used normally, while request for proposals for services, as set out in Chapter IV *Bis*,[11] is the method to be used normally for procurement of services. For those exceptional cases of procurement of goods or construction in which tendering, even if feasible, is not judged by the procuring entity to be the method most apt to provide the best value, Article 16 provides a number of other methods of procurement. In the case of services, the procuring entity may use tendering when it is feasible to formulate detailed specifications and the nature of services allow for tendering; otherwise it may use of the other methods of procurement available under the Model Law if the conditions for its use are met.

Paragraph (4) sets forth the requirement that a decision to use a method of procurement other than tendering in the case of goods or construction, or, in the case of services, a method of procurement other than request for proposals for services, should be supported in the record by a statement of the grounds and circumstances underlying the decision.

7. Renumbered as Article 12 in the final text.
8. Renumbered as Article 16 in the final text.
9. Renumbered as Article 17 in the final text.
10. Renumbered as Article 18 in the final text.
11. Renumbered as Chapter IV in the final text.



### Article 17

### Conditions for use of two-stage tendering; Article 19 : Conditions for use of request for quotations; and Article 20 : Conditions for use of single-source procurement.[12]

Wordings were adjusted to reflect their application to services.

### Article 23

### Contents of invitation to tender and invitation to prequalify :[13]

In order to adjust this provision to the procurement of services, the wordings "or the nature of services and the location where they are to be provided" were inserted in paragraph 1(b) and "or the timetable for the provision of services" in paragraph (1)(c).

### Article 25

### Contents of solicitation documents[14]

Drafting changes were incorporated in paragraphs (d), (g), (h), (i) and (x) to adjust their application to the procurement of services.

### Article 32

### Examination, evaluation and comparison of tenders[15]

Drafting changes were made in paragraph (4)(c)(ii) and (iii) and (d) to adjust their application to procurement of services.

### Article 36

### Two-stage tendering[16]

Paragraph (2) was amended to provide that if relevant, the solicitation documents should seek the professional qualifications of the service providers. Paragraph (3) was amended to clarify that the negotiations referred to therein were part of the first stage of the two-stage tendering.

### Article 38

### Request for proposals[17]

Drafting change was made in paragraph (4)(b) to adjust its application to the procurement of services.

12. Renumbered as Articles 19, 21 and 22 respectively in the final text.
13. Renumbered as Article 25 in the final text.
14. Renumbered as Article 27 in the final text.
15. Renumbered as Article 34 in the final text.
16. Renumbered as Article 46 in the final text.
17. Renumbered as Article 43 in the final text.

**Article 40**
**Request for quotations and**

**Article 41**
**Single-source procurement**[18]

Drafting changes were made in these provisions so as to adjust their application to procurement of services.

## CHAPTER IV BIS : REQUEST FOR PROPOSALS FOR SERVICES[19]

This chapter, which is made up of six articles, namely Article 41 bis,[20] 41 ter,[21] 41 quater,[22] 41 quinnies,[23] 41 sexies[24] and 41 septies,[25] has been added to the Model Law and is entirely a new set of provisions. It sets forth a set of procedures especially designed for the procurement of services. The main differences between the procurement of goods or construction and procurement of services are as follows: (i) Unlike the procurement of goods or construction, procurement of services typically involves the supply of an intangible commodity whose quality and enact content are often difficulty to quantify. The quality of services is largely dependent on the skill and expertise of the supplier or contractor, (ii) while in the case of procurement of goods and construction, price is often the main criterion in the selection process, it is not considered as important a criterion in the evaluation process as the qualifications and competence of the supplier or contractor. Chapter IV *Bis* has been structured to reflect these differences.

In the normal circumstances, the Model Law mandates the use of tendering in the procurement of goods or construction, while in the procurement of services, it prescribes the use of request for proposals for services so as to give due weight in the evaluation process to the qualifications and expertise of the service provider. For the exceptional circumstances in which tendering is not found to be appropriate for procurement goods or construction, the Model Law offers other methods of procurement. It also does so for the circumstances in which the special

18. Renumbered as Articles 50 and 51 respectively in the final text.
19. Renumbered as Chapter IV entitled, "Principal method for procurement of Services".
20. Renumbered as Article 37 in the final text.
21. Renumbered as Article 38 in the final text.
22. Renumbered as Article 39 in the final text.
23. Renumbered as Article 40 in the final text.
24. It has been restructured into four articles, namely articles 41, 42, 43 and 44.
25. Renumbered as Article 45 in the final text.



procedure laid down in chapter IV *Bis* is not found appropriate or feasible for the procurement of services.

The main features of this specialized method for the procurement of services include unrestricted solicitation of suppliers and contractors as a general rule and predisclosure in the solicitation of proposals of the criteria for evaluation of the proposals, and use of one of the three optional selection methods as provided for in Article 41 *sexies*.[26] These optional selection methods are set out in paragraphs (2), (3) and (4) of Article 41 *sexies*.[27] In the first method, which is similar to tendering, there is no negotiation and the procuring entity subjects all the proposals that have obtained a technical rating above a set threshold, to a straightforward competition. Under this method, the successful proposal will be the one with the lowest price or one with the best combined evaluation in terms of both non-price criteria and the price. The second optional method is one in which the procured entity negotiates with the suppliers and contractors, after which they submit their best and final offers. In the third method, the procuring entity holds negotiations solely on price with the supplier or contractor who has obtained the highest technical rating.

Chapter IV *Bis* (Chaper IV in the final Text) sets out the procedural modalities for the exercise of the request for proposal for services, the principal method designated by the Model Law for procurement of services. Article 41 *Bis* on *Solicitation of proposals*[28] aims at ensuring the widest possible participation by suppliers and contractors in the procurement proceedings. However, in cases where resort to open solicitation would appear to be unwarranted or defeat the objectives of economy and efficiency, paragraph (3) permits the procuring entity not to engage in open solicitations.

Article 41 *ter*[29] contains a list of the minimum information that should be contained in the request for proposals in order to assist the suppliers and contractors in preparing their proposals and to enable the procuring entity to compare those proposals on an equal basis. Paragraphs (h) and (i) reflect the fact that, in many instances of procurement of services, the full nature and characteristics of the services to be procured might not be known to the procuring entity. Since price might not always be a relevant criterion in the procurement of services, paragraphs (k) and (l) are only applicable if price is a relevant criterion in the selection process.

*Article 41 quater on Criteria for the evaluation of proposals*[30] sets

26. Restructured into Articles 41, 42, 43 and 44.
27. These are now contained in Articles 42, 43 and 44.
28. Renumbered as Article 37.
29. Renumbered as Article 38.
30. Renumbered as Article 39.

out the permissible range of criteria that the procuring entity may apply in evaluating the proposals. The procuring entity is not, however, required to apply each of these criteria in every instance of procurement. In the interests of transparency, however, it is required to apply the same criteria to all proposals. It is precluded from applying criteria that have not been predisclosed to the suppliers and contractors in the request for proposals.

Paragraph (1)(a) lists as one of the criteria the qualifications and abilities of the personnel who will be involved in providing the services. This criterion would be particularly relevant in the procurement of those services that require a high degree of skill and knowledge on the part of service providers. By establishing the effectiveness of the proposal in meeting the needs of the procuring entity as one of the possible criteria, paragraph (1)(b) enables the procuring entity to disregard a proposal that has been inflated with regard to technical and quality aspects beyond what is required by the procuring entity in an attempt to obtain a high ranking in the selection process, thereby artificially attempting to put the procuring entity in the position of having to negotiate with the proponent of the inflated proposal. Paragraphs (1)(d) and (e) and paragraph (2) are similar to provisions applicable to tendering by way of Article 32(4)(c)(iii), (iv) and (d).[31] (Impact on local economy; national defence and security considerations; margin of preference for domestic suppliers).

**Article 41 quinnies : Clarification and modifications of request for proposals**[32] reproduces the provisions of Article 26[33] on corresponding matter in the context of tendering.

*Article 41 sexies on Selection procedures*[34] provides for three optional procedures for the selection and evaluation of the proposals in the case of procurement of services. The first method provided for in (Article 42) is more price-oriented and does not involve any negotiations. This is particularly suitable for cases where services to be procured are of fairly standard nature where no great personal skill or expertise is required. However, to ensure that the suppliers or contractors possess sufficient experience and expertise, the procuring entity is required to establish a threshold level by which to measure the non-price factors of the proposals. If this threshold is set at a sufficient high level, then all the suppliers or contractors whose proposals attain a ranking at or above the set threshold level would qualify as potential suppliers or contractors. From amongst

31. Renumbered as Article 34.
32. Renumbered as Article 40.
33. Renumbered as Article 28.
34. Restructured into Articles 41, 42, 43 and 44.



these, the procuring entity will select the supplier or contractor whose proposal is of the lowest value or is deemed best based on a combined evaluation of price and non-price factors.

Articles 43 and 44 provide for methods in which personal skill and expertise of the supplier or contractor will be of critical consideration. Greater emphasis to be placed on those criteria and provide for negotiation. Article 43 sets forth a method of selection that corresponds to the request for proposals method under Article 39.[35] It is, therefore, best suited in those circumstances where the procuring entity seeks various proposals on how best to meet its procurement needs. By allowing for early negotiations with all suppliers and contractors, the procuring entity is able to determine its actual needs which then can be taken into account by suppliers and contractors when preparing their best and final offers. Paragraph (3) has been included in order to ensure that the price of the proposal is not given undue weight in the evaluation process to the detriment of the evaluation of the technical and other aspects of the proposal including the evaluation of the competence of those who will be involved in providing the services.

In the third method set forth in Article 44 the procuring entity sets a threshold on the basis of the quality and technical aspects of the proposals, and then ranks those proposals that are rated above the threshold, ensuring that the suppliers and contractors with whom it will negotiate are capable of providing the services required. The procuring entity then holds negotiations with those suppliers or contractors, one at a time, starting with the supplier or contractor that was ranked highest in the procurement proceedings on the basis of their ranking until it concludes a procurement contract with one of them. The negotiations are aimed at ensuring that the procuring entity obtains a fair and reasonable price for the services to be provided. This is particularly useful for the procurement of intellectual services.

It should, however, be noted that in this procedure the procuring entity is not allowed to reopen negotiations with suppliers and contractors with whom it has already negotiated and terminated negotiations even if at a later stage it becomes apparent that dealing with them would have been more profitable. This has been provided to obviate open-ended negotiations and their possible abuse and resultant unnecessary delays.

Article 41(3) permits the use of an impartial panel of experts in the selection procedure by a procuring entity. Whether such a panel would

35. Renumbered as Article 48.

have the power to bind the procuring entity or have only advisory jurisdiction has been left to the States enacting the Model Law.

*Article 41 septies on Confidentiality*[36] has been included in order to prevent abuse of the selection procedures and to promote confidence in the procurement process. It requires all parties in the procurement proceedings to maintain confidentiality especially where negotiations are involved.

### Article 42
### Right to Review[37]

Sub-paragraph (a) *Bis* was added in paragraph (2) of this article to make it clear that in the procurement of services, the choice of any one of the three procedures provided for in (Article 42, 43 and 44) would not be the subject-matter of review. Also, in sub paragraphs (c) and (e) the language was modified to preclude from review a decision by the procuring entity to reject all tenders, offers or quotations under Article 11 *Bis*[38] and an omission on the part of the procuring entity to make a reference as envisaged in paragraph(s) of Article 41 *ter*.[39]

All the aforesaid amendments, revisions and additions made by the Working Group were approved by the Commission and the revised text was formally adopted as the "UNCITRAL Model Law on Procurement of Goods, Construction and Services".[40] The Commission also approved the draft amendments proposed by the Secretariat to the *Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction* so as to render it a Guide on the UNCITRAL Model Law on Procurement of Goods, Construction and Services. The Commission, in a resolution adopted by it, has requested the Secretary-General of the United Nations

36. Renumbered as Article 45.
37. Renumbered as Article 52.
38. Renumbered as Article 12.
39. Renumbered as Article 38.
40. The Model Law on Procurement of Goods, Construction and Services has 57 articles divided into six Chapters. Chapter I, consisting of Articles 1 to 17, sets forth the general provisions which are equally applicable to the procurement of goods and constructions as well as the procurement of services. Chapter II, consisting of Articles 18 to 22, lists out the various methods of procurement and the conditions for their use. Chapter III consisting of Articles 23 to 36 focusses on tendering proceedings. Chapter IV, made up of Articles 37 to 45, deals with the principal method for the procurement of services. Chapter V, consisting of Articles 46 to 51, sets out the procedural modalities for the use of methods of procurement other than tendering and the principal method for the procurement of services, namely, two-stage tendering, restricted tendering, requests for proposals, competitive negotiation, request for quotations and single-source procurement. The final chapter, Chapter VI, sets forth provisions establishing a right of review of acts and decisions of the procuring entity and governs its exercise.



to transmit the text of the UNCITRAL Model Law on Procurement Goods, Construction and Services together with its companion Guide to Governments and interested bodies and to recommend to States to give consideration to the Model Law when they enact or revise their laws on procurement in view of the desirability of improvement and uniformity of the laws of procurement and the specific needs of procurement practice.

### General Observations

Procurement expenditure represents a significant portion of the overall development expenditure in the developing and other countries transiting to market-oriented economies. However, few of these countries have adequate legal frameworks for procurement while in most of the other countries the matter is regulated by rules and regulations which differ, not only from one State to another, but also from one government agency to another in the same State. It has also been the general impression in some quarters that these rules and regulations are often titled in favour of national suppliers and contractors and biassed against their foreign counterparts. Since procurement of goods and services should be quality-oriented and cost-effective and procurement procedures fair and transparent, sound laws and practices for public procurement are *sine qua non* for all countries.

In 1993, the Commission had adopted a Model Law on Procurement of Goods and Construction along with a companion Guide, intended to assist States in updating and modernizing their existing laws or for the enactment of new legislation where none existed in the area of the procurement of goods and construction.

While the procurement of goods and construction constitutes a bulk of the procurement budgets of most public entities, services has also acquired a significant component of the total Government procurement in most countries. Moreover, the procurement of services has already become an area of rapid development and increasing importance in view of the current trends towards liberalization and globalization of national economies. Furthermore, the recent trend towards privatization worldwide is also bound to lead to the transfer to the private sector of services previously performed exclusively by Governments. However, many of these countries lack a well regulated system for the procurement of services.

At present, national laws on the procurement of services are widely divergent. While the laws of some States do contain provisions on the procurement of services, the laws in some other States do not clearly distinguish between the procurement of goods or construction and the procurement of services, and therefore, fail to take account of the specific

circumstances relevant to procurement of services. The laws in yet other States do not deal with the procurement of services at all. It would, therefore, be fair to conclude that the procurement of services is, in many instances, not subject to procedures that are sufficiently open, fair and competitive to ensure adequate quality and a fair price for the public purchaser. In this context, the Model Law on Procurement of Goods, Construction and Services, consolidated in one text by the Commission at its twenty-seventh Session (1994) is bound to serve as a handy tool for States to assess the adequacy of their existing legislation and as a readily available text for new legislation where none presently exists.

It should, however, be noted that both the Model Laws, i.e. the UNCITRAL Model Law on Procurement of Goods and Construction and the UNCITRAL Model on Procurement of Goods, Construction and Services, are framework legislation which do not set forth all the rules and regulations that may be necessary to implement the procurement procedures in an enacting State. Accordingly, both the Model Laws envisage issuance of procurement regulations by an enacting State to fill in the procedural details for the procedures authorized by these models and also to take account of the local conditions obtaining therein. In this regard; assistance could be taken from the companion Guides to these Models in identifying the areas in which the national law would need to be supplemented by procurement regulations.

In the view of the Secretariat, both the Model Laws represent a fair balance between the interests of the procuring entities and those of suppliers and contractors. To ensure that this balance is preserved, it is utmost essential that there are in place adequate institutional and bureaucratic structures and an impartial review machinery in the enacting States. At the same time, special Measures should be worked out to guarantee the realization of the transparency and the accountability in the procurement proceedings.

## II. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 to promote international cooperation in trade and development and the economic development of developing countries. It is composed of 187 member States. Its institutional set-up comprises the Conference, the Trade and Development Board (TDB) and a number of subsidiary bodies serviced by a permanent Secretariat.

Held every four years, the Conference is the organisation's highest



policy-making body. It formulates policy guidelines and decides on the programme of work. Eight Conferences have been held so far: Geneva (1964), New Delhi (1968), Santiago (1972), Nairobi (1976), Manila (1979), Belgrade (1983), Geneva (1987) and Cartagena de Indias, Colombia (1992).

UNCTAD's early years were marked by high rates of economic growth particularly in developed countries, worsening terms of trade for developing country commodity exports and widening income disparity between them and the developed countries. Recognition of these factors led to consensus on the need to increase financial flows to developing countries, strengthen and stabilise commodity markets and support developing country participation in world trade.

The 1970s witnessed a roll-back of the multilateral trading system and a slowdown in world economic rates with adverse consequences for the trade and economic development of developing countries. Significant decisions were taken as a result of negotiations under UNCTAD auspices on commodity market stabilisation and preferential treatment for the exports of developing countries. The Group of 77 also put forward the call for a New International Economic Order (NIEO) leading to tensions among the North and South countries.

The situation deteriorated in the 1980s which came to be known as "the lost decade for development". In mid-1980s dialogue and negotiations became deadlocked in most forums. However, the momentous changes that took place in the world the late 1980s forced a reassessment of international economic cooperation. A fresh consensus emerged in the early 1990s on the need for new actions to support the international trade and economic development of developing countries. This consensus took shape at UNCTAD VIII held at Cartagena in February 1992. UNCTAD VIII took a giant step towards laying to rest the reciprocal misgivings between the North and South countries which had caused deadlock in the economic cooperation dialogue during the 1980s. In the *Cartagena Commitment* adopted at UNCTAD VIII all participants pledged a *New Partnership for Development* expressing their political will to translate words into reality. The Conference endorsed UNCTAD'S functions of:

- Policy analysis;
- Intergovernmental discussion, negotiation and consensus building;
- Monitoring, implementation and follow-up of agreements; and
- Technical cooperation.

The Conference redefined UNCTAD's activities until 1996 on four broad themes:

- A New international partnership for development;

— Global interdependence

— Paths to development

— Sustainable development.

In an overhaul of UNCTAD machinery, the Conference re-focussed the Trade and Development Board (TDB) on policy issues and reorganised its work while completely restructuring the intergovernmental machinery. While retaining the Special Committee on Preferences and the Inter-governmental Group on Restructurings Business Practices, the Conference established four Standing Committee for a duration of four years. These were the Committee on Commodities, on Poverty Alleviation, on Economic Cooperation among Developing Countries and on Developing Services Sectors. In addition thereto, five *Ad Hoc* Working Groups were established for a duration of two years; on Investment and Financial Flows; Trade Efficiency; Comparative Experiences with Privatization; Expansion of Trading Opportunities for Developing Countries; Inter-relationships between Investment and Technology Transfer.

A Mid-term Review, which took place in May 1994, decided to wind up the five *Ad Hoc* Working Groups and created three new ones. These are on Trade, Environment and Development; the Role of Enterprises in Development; and Trading Opportunities in the New International Trading Context. The U.N. General Assembly assigned to the UNCTAD Secretariat responsibility for the substantive service of two subsidiary bodies of ECOSOC, namely, the Commission on International Investment and Transnational Corporations, and Commission on Science and Technology.

## An Overview of the Work of UNCTAD

### International Trade

In the early years, efforts were concentrated on securing preferential treatment for developing country exports, which led in 1971 to the establishment of the Generalized System of Preferences (GSP). Work on eliminating restrictive business practices and reducing non-tariff barriers to trade had also begun. Since UNCTAD-VIII, the scope has been expanded to include trade in services, intellectual property and environment-related issues, trade policy reforms, improving competiton, facilitating structural adjustment and optimizing the relationships between investment and technology.

**Generalized System of Preferences (GSP) :** The GSP is a preferential tariff system under which very low or zero tariffs are placed by developed



countries on many developing country exports without seeking trade concessions in return. Currently, there are 166 beneficiary countries, including 27 Central and Eastern European economies in transition. In May 1994, UNCTAD's Special Committee on Preferences agreed that a policy review of the GSP scheduled for 1995 should discuss all critical issues and seek to revitalise the GSP.

**Restrictive Business Practices :** UNCTAD's initiatives to improve competition in world trade led to the adoption by the UN General Assembly in 1980 of a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (RBPs). The Set was the first unanimously adopted multilateral instrument relating to the control of restrictive business or anti-competitive practices. The Intergovernmental Group of Experts on RBPs, established in 1981, monitors the Set's implementation and meets annually to discuss relevant issues. A third Review Conference of the Set is scheduled for 1995.

**Trading Opportunities :** Since UNCTAD VIII, expanding trading opportunities for developing countries is one of the its main tasks. The Working Group on the Expansion of Trading Opportunities for Developing Countries held four sessions from 1992 to 1994 to identify national measures to enhance the competitiveness of industries with export potential and to find ways of improving opportunities for developing country exports. The Group adopted its final report in July 1994, containing its findings and recommendations for actions at the national, regional and international levels, including technical cooperation activities. This Working Group has been replaced by the *Ad Hoc* Working Group on Trading Opportunities in the New International Trading Context.

**Economies in Transition :** UNCTAD is entrused with the task of enhancing technical cooperation for the development of trade between economies in transition and developing countries. It is also involved in projects for computerizing customs procedures and the establishment of Trade Points in the economies in transition.

**Trade and Environment :** UNCTAD VIII and Agenda 21 gave UNCTAD a broad mandate in the areas of trade, environment and development. The TDB has defined that role as lying in "policy analysis and debate, a conceptual work, the building of consensus among member States on the interaction between environmental and trade policies, the dissemination of information of policy-makers and the encouragement and provision of assistance in capacity building with emphasis on problems of the developing countries and the least developed among them as well as countries in transition." The *Ad Hoc* Working Group on Trade,