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Report of Working Group I (Procurement) on the work of its thirteenth session

(New York, 7-11 April 2008)

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I. Introduction

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

2. At its seventh to twelfth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, New York, 21-25 May 2007, Vienna, 3-7 September 2007, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623 and A/CN.9/640), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions (ERAs), including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and their procedural aspects. At its twelfth session, the Working Group came to preliminary agreement on the draft revisions to the Model Law and the Guide that would be necessary to accommodate the use of electronic communications and technologies (including ERAs) in the Model Law. At that session, the Working Group requested the Secretariat to revise the drafting materials contained in documents A/CN.9/WG.I/WP.54 and 55, reflecting the deliberations at its twelfth session, for its consideration at the next session (A/CN.9/640, para. 14).

3. At its seventh, eighth, tenth, eleventh and twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders. At its twelfth session, the Working Group considered whether the right to reject an ALT under article 12 bis should be expressly reserved in the solicitation or equivalent documents. At that session, the Working Group agreed to amend article 12 bis (a) and (b) as to provide more clarity to the term ALT, by referring to the constituent elements of tender in the context of the price that might raise concern with the procuring entity on the ability of the supplier or contractor to perform the procurement contract (A/CN.9/640, paras. 44-55).

4. At its twelfth session, the Working Group also held a preliminary exchange of views on the first part of the proposal contained in document A/CN.9/WG.I/WP.56,

addressing framework agreements. At that session, the Working Group considered that the transparency and competition safeguards should be applied to all stages of procurement, involving framework agreements, including the second stage at which the award of the procurement contract is made (A/CN.9/640, para. 93). It deferred detailed consideration of that document as well as documents A/CN.9/WG.I/WP.52 and Add.1 on framework agreements and dynamic purchasing systems and A/CN.9/WG.I/WP.45 and Add.1 on suppliers' lists to a future session (A/CN.9/640, para. 13).

5. At its thirty-eighth session, in 2005, thirty-ninth session, in 2006, and fortieth session, in 2007, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172, A/61/17, para. 192, and A/62/17 (Part I), para. 170). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192). Pursuant to that recommendation, the Working Group, at its tenth session, agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide (A/CN.9/615, para. 11). At the fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part I), para. 170).

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its thirteenth session in New York from 7-11 April 2008. The session was attended by representatives of the following States members of the Working Group: Algeria, Armenia, Austria, Belarus, Cameroon, Canada, China, Colombia, Egypt, El Salvador, Fiji, France, Germany, Guatemala, Honduras, Madagascar, Malaysia, Mexico, Namibia, Pakistan, Paraguay, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Angola, Côte d'Ivoire, Haiti, Holy See, Kuwait, Lithuania, Moldova, Nicaragua, Oman, Philippines, Romania, Slovenia, Sweden, Turkey and Yemen.

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

(a) *United Nations system*: United Nations Development Programme (UNDP) and World Bank;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO), European Space Agency (ESA), European Union (EU) and International Development Law Organization (IDLO);

(c) *International non-governmental organizations invited by the Working Group*: Center for International Legal Studies (CILS), Forum for International

Conciliation and Arbitration (FICACIC), International Bar Association (IBA), International Chamber of Commerce (ICC) and International Law Institute (ILI).

9. The Working Group elected the following officers:

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

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

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

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.57);

(b) Drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders: note by the Secretariat (A/CN.9/WG.I/WP.58);

(c) Drafting materials for the use of electronic reverse auctions in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.59);

(d) Note transmitting a proposal by the United States regarding issues of framework agreements, dynamic purchasing systems, and anti-corruption measures (A/CN.9/WG.I/WP.56) (the detailed consideration of the note was deferred to a future session at the twelfth session of the Working Group (see A/CN.9/640, para. 13));

(e) Drafting materials for the use of framework agreements and dynamic purchasing systems in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1) (the detailed consideration of the note was deferred to a future session at the eleventh and twelfth sessions of the Working Group (see A/CN.9/623, para. 12, A/CN.9/640, para. 13)); and

(f) Issues arising from the use of suppliers' lists, including drafting materials: note by the Secretariat (A/CN.9/WG.I/WP.45 and Add.1) (the consideration of the note was deferred to a future session at the previous four sessions of the Working Group (see A/CN.9/595, para. 9, A/CN.9/615, para. 10, A/CN.9/623, para. 12, and A/CN.9/640, para. 13)).

11. The Working Group adopted the following agenda:

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

[1] Elected in his personal capacity.

III. Deliberations and decisions

12. At its thirteenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group used the notes by the Secretariat referred to in paragraph 10 above as a basis for its deliberations.

13. The Working Group requested the Secretariat to revise drafting materials contained in documents A/CN.9/WG.I/WP.52 and Add 1, as well as A/CN.9/WG.I/WP.56, reflecting the deliberations at its thirteenth session, for its consideration at the next session. The Working Group agreed to combine the two approaches proposed in the documents, so that the Model Law, where appropriate, would address common features applicable to all types of framework agreements together, in order to avoid inter alia unnecessary repetitions, while addressing distinct features applicable to each type of framework agreement separately.

14. The Working Group also discussed the issue of suppliers' lists, the consideration of which was based on a summary of the prior deliberations of the Working Group on the subject (A/CN.9/568, para. 55-68, A/CN.9/WG.I/WP.45 and A/CN.9/WG.I/WP.45/Add.1). The Working Group decided that the topic would not be addressed in the Model Law, for reasons that would be set out in the Guide to Enactment.

15. The Working Group considered the drafting materials relating to electronic communications in procurement, publication of procurement-related information and abnormally low tenders, and the use of electronic reverse auctions in public procurement set out in A/CN.9/WG.I/WP.58 and A/CN.9/WG.I/WP.59 respectively, and suggested revisions to those materials.

16. The Working Group took note of the contents of A/CN.9/WG.I/XIII/INF.2, United Nations Convention against Corruption: implementing procurement-related aspects, and noted that it would form a basis for assessing the legislative requirements of the Convention, notably as regards the topic of conflicts of interest.

17. The Working Group recalled the remaining topics on its agenda (listed in A/CN.9/640, annex 1) and requested the Secretariat to propose an updated timeline for its approval.

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

A. Draft provisions to enable the use of framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.52, paras. 5-40, A/CN.9/WG.I/WP.52/Add. 1, paras. 1-19, and A/CN.9/WG.1/WP.56, paras. 2-17)

1. Types of framework agreements

18. The Working Group heard a summary of types of framework agreements.

(a) "Type 1" framework agreements, concluded with one or more suppliers or contractors, in which the specifications, evaluation criteria and all terms and conditions of the procurement were established at the first stage of the procurement, and there was no competition at the second stage. Thus the second stage would be the award of a procurement contract on the basis of the specifications, evaluation criteria and all terms and conditions concerned;

(b) "Type 2" framework agreements, which left some terms of the procurement subject to further competition and/or evaluation at the second stage. It was observed that in some systems, evaluation criteria were definitively established at the first stage, and, in others, evaluation criteria could be amended at the second stage. Thus in some systems, Type 2 framework agreements were concluded with one or more suppliers or contractors, and in others, they were concluded in all cases with more than one supplier or contractor;

(c) "Type 3" framework agreements, concluded with more than one supplier or contractor, with competition at the second stage, and with terms and conditions and specifications (and, in some systems, evaluation criteria) established in advance.

19. It was noted that the difference between Type 3 and Type 1 and 2 framework agreements was that Type 3 framework agreements were open in that suppliers or contractors could join them at any time during their operation, while Types 1 and 2 were concluded between fixed parties at their outset.

20. From a drafting perspective, the Working Group noted that the Model Law should address common features applicable to all types of framework agreements together, while addressing distinct features applicable to each type of framework agreement separately.

21. It was observed that flexibility in the operation of Type 2 and Type 3 framework agreements in particular would be useful. Thus, it was suggested that at the second stage of competition, the evaluation criteria could be amended. On the other hand, it was stated that the introduction of new evaluation criteria at the second stage could introduce new terms and conditions, and be open to abuse. The Working Group noted that it was not recommending the type of framework agreement in which the evaluation criteria could be varied at the second stage.

22. It was noted that the notion of "evaluation" in this context merited clarification. The text provided flexibility in that the procuring entity could refine its needs at the second stage – by reference for example to delivery times, specific needs regarding training, invoicing arrangements, approval of methodologies or price adjustment mechanisms, but did not envisage that new evaluation criteria per se could be introduced. It was also observed that the EU Directives did not permit substantive modifications to evaluation criteria and specifications at the second stage, but only non-material refinements. Further, it was commented that as Type 1 and 2 framework agreements were closed, they could only be concluded following a complete evaluation of the submissions. It was agreed that this issue would be re-examined when the Working Group considered the text of article 22 ter (see para. ... below).

23. As regards amending the definition of the "procuring entity" to allow for multiple purchasers (and with reference to the proposals for amendment to the

definitions of "procuring entity" contained in para. 11 of A/CN.9/WG.I/WP.52), it was agreed that these questions should not be addressed in legislative text, but (as matters of national law) in the Guide to Enactment. Similarly, the use of multiple framework agreements would be addressed in the Guide.

2. Conditions for the use of framework agreements

Types of framework agreements and conditions for their use: Article [22 ter]

24. The view was expressed that positive conditions for use would be beneficial, irrespective of whether they could be legally enforced (a question for individual enacting States), because they would enhance accountability and would seek to promote good practice. Positive conditions of use were also considered to be beneficial in promoting appropriate behaviour on the part of centralized purchasing agencies and procuring entities, which might otherwise enter into framework agreements for inappropriate reasons.

25. It was observed, on the other hand, that the reason for addressing such conditions for use was because of potential abuse in the operation of framework agreements, in that procuring entities could abuse them to restrict competition. It was added that the appropriate way of addressing this concern would be to limit their duration. Further, competition could be limited in all procurement, particularly in larger and longer-term procurement, but it was not regulated through equivalent conditions for use elsewhere in the Model Law. It was stated that there would thus be no justification to add conditions for use for framework agreements beyond limiting their duration.

26. Another view expressed was that although conditions for use were in principle useful, among the conditions suggested only administrative efficiency should be stipulated, because other conditions such as economies of scale and security of supply would pertain equally to other methods of procurement, and it would be very difficult to express further appropriate conditions. Furthermore, it was observed, the criteria might be mutually exclusive if, for example, the aim was to secure supply for possible one-time purchases, rather than to conclude framework agreements for regular or periodic purchases to achieve administrative efficiency, and some framework agreements could be appropriate even in the absence of these conditions.

27. An alternative suggestion was to require the justification of recourse through a framework agreement. The requirement for justification could be optional and placed in square brackets for enacting States to choose whether it should be enacted or not. It could make express reference to the economic case for framework agreements, without setting out that case itself. Alternatively, such a requirement could be expressed as requiring the procuring entity "to include in the record required under article 11 of the Model Law a statement of the grounds and circumstances upon which it relied" to procure through a framework agreement. The Guide to Enactment could also address the justification criteria themselves, noting that enacting States should issue regulations addressing those criteria. It was recalled, however, that there was no consensus on whether the criteria themselves were appropriate, and that referring the question to the Guide would not be an effective solution.

28. In addition, it was observed that without conditions for use in the Model Law itself, the justification provisions would be of little benefit, and would make review

of the decisions concerned impracticable. Furthermore, it was stated that it would be unhelpful to the review process to have subjective criteria that were subject to challenge or review.

29. It was additionally observed that enacting States could implement the Model Law in different ways, with implications such as whether decisions regarding the use of framework agreements would be excluded from the review system. Thus, it was stated, enacting States should be given flexibility regarding the conditions for use.

30. It was also considered that instructions for use of a procurement technique, rather than provisions restricting its use, were of educational and not legislative value, and should be in the Guide to Enactment rather than the text of the Model Law. Some delegations observed that enacting States that had already provided for framework agreements had decided not to include conditions for use for these reasons.

31. It was agreed that detailed explanatory text would be required in the Guide to Enactment, including guidance to the effect that if there were an elevated risk of abuse in a particular enacting State, that State might wish to include legislative provisions on conditions for use. This formulation would also, it was said, avoid serious consequences if other relevant conditions for use were omitted from the text of the Model Law.

32. It was also stated that framework agreements were generally characterized by periodic or repeated purchases (though it was noted that these terms were difficult to define) and that this notion should be expressed in the provisions. On the other hand, it was observed that framework agreements could also be used so as to avoid the well-documented abuse of certain procurement methods such as single source procurement in urgent and emergency situations, and thus that repeated purchases should not be an absolute requirement.

33. It was subsequently considered whether the conditions for use should seek to address the risk of reducing competition in framework agreements by mandating open procedures in the absence of justification for alternative methods, as for all procurement under the Model Law, or by providing that framework agreements could follow only stated methods of procurement.

34. The view was expressed that only exceptionally should non-open procurement methods be used for the first stage of procurement using framework agreements. Where the circumstances would justify procurement methods used for complex procurement (for example, the procuring entity could not draft sufficiently precise specifications), those circumstances might generally preclude the appropriate use of framework agreements. However, it was observed that framework agreements were occasionally concluded using competitive negotiations or similar procedures.

35. It was agreed that the Guide to Enactment would stress the risks to competition inherent in procurement through framework agreements, and the desirability of ensuring full and where possible open competition, but the use of any procurement method to conclude a framework agreement would not be prohibited per se.

36. It was also agreed that the Guide would address the question of parallel framework agreements and purchasing outside the framework agreement, with a

view to providing commentary on achieving the economic benefits of framework agreements.

37. It was further observed that, with reference to situations in which there could be only one supplier because of the nature of the procurement concerned, a framework agreement with that one supplier was sometimes concluded. It was stated that a discussion of the benefits and concerns of this type of framework agreement should be included in the Guide to Enactment.

38. It was also recalled that maximum and minimum aggregate values or estimated values could be required for each framework agreement, or the solicitation documents or their equivalent could provide for minimum, maximum or estimated values, and could allow the procuring entity to set different maxima depending on the nature and potential obsolescence of the items to be procured. It was agreed that the Guide to Enactment should discuss these questions in detail, including budgetary appropriations that would have an impact on the efficacious use of framework agreements.

39. It was agreed that framework agreements were appropriate for standardized procurement, which would include some construction and services procurement as well as goods procurement. Thus the Model Law should permit them to be used in all types of procurement, with discussion regarding the nature of the procurement that would be appropriate.

40. As regards the maximum duration of a framework agreement, one view expressed was that the Model Law should make reference to a limited duration, but that the duration itself should be left for enacting States to decide, with appropriate guidance in the Guide to Enactment (also addressing the nature of the items to be procured, and changing market conditions that might justify shorter or longer periods). Thus flexibility would be accorded to the procuring entity.

41. On the other hand, it was observed that practice had demonstrated that procuring entities would generally seek to maximize the length of framework agreements, and that the level of competition in a significant proportion of procurement would accordingly be limited. It was stressed that the importance of the provision was not to limit flexibility but to prevent excessive duration in framework agreements, with a maximum but not a recommended duration. What was required was to balance the administrative efficiency that could be obtained by longer agreements with the need to ensure effective competition, in the light of the closing of competition during the term of the framework agreement. Thus an explicit limit on duration, it was said, should be set out in the Model Law itself, and this requirement should also be located early in the provisions.

42. Some support was expressed for the four-year limit found in the EU Directives, noting that it was reasonable (even if not objectively justifiable) given the normal time of six or seven months required for conducting a tendering proceeding. Support was also expressed for a strict provision regulating duration and one that was not permissive regarding exceptions, to be supported by a discussion of the rationale behind the limits in the Guide to Enactment. In that regard, the benefits to the procuring entity of limiting the duration by permitting new prices, technologies and solutions to be sought at the end of the term, as well as mandating the periodic refreshing of competition and avoiding the perpetuation of monopolies or oligopolies of suppliers or contractors, should be stressed.

43. It was observed that procurement-related disputes in the framework agreement context arose relatively commonly regarding extensions or exceptions to the permitted duration of a framework agreement, and therefore that the risks of excessively long framework agreements were real. Longer framework agreements, it was said, also involved the risks of an inappropriate relationship developing between supplier and procuring entity. However, it was agreed that it was difficult to set one maximum that would be applicable to all enacting States in the Model Law itself.

44. It was therefore agreed that there would be no maximum duration set out in the text, but that a requirement for a maximum duration would be set out, for each enacting State to complete in accordance with prevailing local circumstances. In addition, the Guide to Enactment would discuss an appropriate range for the maximum duration as being 3-5 years, and would provide further guidance for enacting States, drawing on the issues set out above and notions such as budgetary allocation and the type of procurement concerned. It would also make reference to the utility of a maximum duration in preventing attempted justification of excessively long framework agreements.

45. Furthermore, the Model Law would not contemplate exceptions to the maximum in the text itself, or address the questions of extensions to concluded framework agreements. However, the Guide should address these questions, noting that extensions to the term of the framework agreement or exceptions to the maximum duration should not be permitted in the absence of exceptional circumstances, that extensions should be of short duration, and that guidance to avoid the issue of lengthy purchase orders or procurement contracts shortly before the end of the duration of the framework agreement itself should also be given.

46. Regarding whether to permit the use of framework agreements in the procurement of construction and services, it was noted that the aim of the provisions was appropriate construction and services procurement through framework agreements, but to ensure through the use of specifications and evaluation criteria established in advance that complex construction and services procurement would in practice be excluded. Another observation was that the Model Law could make express reference to “standardized” procurement. It was considered, however, that the use of descriptions in the Guide such as procurement of commonly used, off-the-shelf goods, straightforward, recurring services, and small-scale maintenance and repair works would adequately address this issue.

47. Recalling that a key goal for the procuring entity was a procurement contract with a fixed price, it was observed that one consequence of framework agreements could be a tendency to pricing based on an hourly rate, with negative costs consequences in the longer term. Stressing repeated needs, it was said, would tend to mitigate this risk by promoting task-based or project-based contract pricing.

48. The risks of an overly narrow approach in specifications were highlighted, for example in high technology procurement where the appropriate specifications could evolve over time, and thus a functional approach to drafting specifications would be recommended in the Guide.

49. It was queried whether Type 3 framework agreements should be required to operate electronically (as the EU Directives required for dynamic purchasing systems). The Working Group was informed that in some jurisdictions, equivalent

systems did not always function electronically. It was accordingly agreed that the reference to mandatory electronic operation should be deleted. It was also observed that Type 1 and Type 2 framework agreements could operate electronically, but that an express reference in the text was unnecessary given the deletion of the equivalent reference in Type 3 agreements. The Guide would explain that all framework agreements could operate either using traditional, paper-based systems or electronically, and that transparency in their operation would be critical.

50. It was noted that closed framework agreements should always be preceded by competitive procedures (unless the conditions for single source procurement were satisfied), but that open framework agreements must be concluded following fully open procedures, as provided for in article 51 undecies. It was agreed that further substantive provision to mandate competition in article 22 ter would therefore not be required.

51. As regards the provision that a framework agreement was not a procurement contract under the Model Law, it was recalled that the Guide to Enactment should point out that the legal effects of framework agreements were questions of national law and legal systems, for enacting States to address. The safeguards and procedures of the Model Law would continue until the issue of purchase orders under framework agreements through providing that the purchase orders would be procurement contracts. However, the drafting of the provision would be revisited. In addition, it was commented that a cross reference should be made in the Guide to Enactment to the requirements of article 51, so as to remind procuring entities that the normal publication, competition and transparency requirements nonetheless applied to framework agreements.

52. The Working Group decided that it would reconsider whether to locate this provision in article 22 ter or as a definition in article 2 of the Model Law at a later date. A full supporting discussion would be included in the Guide to Enactment in either case.

53. It was queried whether an open framework agreement could be an enforceable contract so far as later parties were concerned. In response, it was observed that later parties would become bound to the initial agreement through the mechanism of joining the agreement, and that individual enacting States would need to ensure that the mechanism operated adequately in its respective jurisdiction.

54. The Working Group agreed to continue its deliberations based on the following text:

> "Article 22 ter. Types of framework agreements and conditions for their use
>
> (1) [*to be located either in article 22 ter or article 2*] A framework agreement is a procurement conducted in two stages: a first stage to select [the] supplier(s) or contractor(s) to be the party or parties to the framework agreement, and a second stage to award procurement contracts under the framework agreement in accordance with the procedures set out in [Section/Chapter **]. A framework agreement is not a procurement contract within the meaning of article 2 (g) of this Law. Purchase orders issued under a framework agreement are procurement contracts within that meaning.
>
> (2) A framework agreement shall set out the terms and conditions upon which supplier(s) or contractor(s) is/are to provide the goods, construction or

services and the procedures for the award of procurement contracts under the framework agreement.

(3) A framework agreement shall be concluded for a given duration, which is not to exceed [the enacting State specifies a maximum] years.

(4) A procuring entity may enter into a framework agreement with one or more suppliers or contractors, in accordance with articles [51 octies to 51 seddecies]:

(a) where the procuring entity intends to procure the goods, construction or services concerned on a repeated basis during the term of the framework agreement; or

(b) where the procuring entity anticipates that by virtue of the nature of the goods, construction or services to be procured that the need for them will arise on an urgent basis during the term of the framework agreement.

(5) A framework agreement shall be one of the following types:

(a) A closed framework agreement structure involving one or more suppliers or contractors without second stage competition;

(b) A closed framework agreement structure involving more than one supplier with second stage competition;

(c) An open framework agreement structure involving more than one supplier with second stage competition.

(6) A closed framework agreement is an agreement to which any supplier or contractor who is not initially a party to the framework agreement may not subsequently become a party.

(7) An open framework agreement is an agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties.

(8) The procuring entity shall include in the record required under article 11 of this Law a statement of the grounds and circumstances upon which it relied to procure using the mechanism of a framework agreement."

3. Procedures for the use of framework agreements

Article [51 octies]. Procedures for setting up framework agreements

55. The Working Group considered the following proposed provisions:

"Article [51 octies]. Procedures for setting up framework agreements

(1) Where the procuring entity intends to enter into a framework agreement, it shall:

(a) Select the type of framework agreement to be concluded from among the types set out in article 22 ter;

(b) Subject to the provisions of article […] below, and so as to select the supplier(s) and contractor(s) to be the party or parties to the framework

agreement, choose a procurement method for solicitation of tenders, proposals, offers or quotations (collectively referred to as "submissions" in this section).

(2) The procuring entity shall include in the record required under article 11 of this Law a statement of the grounds and circumstances upon which it relied to select the type of the framework agreement specified in article 22 ter."

56. As regards paragraph (1)(b), it was noted that the formulation of the paragraph accommodated the use of any procurement method to select the suppliers to be parties to the framework agreement, as agreed upon by the Working Group, subject to justification under article 18 where required. It was noted that an express cross-reference to article 18 should therefore be made.

57. As regards paragraph (2), it was recalled that article 22 ter would address the criteria for justification of the use of a framework agreement. The proposal in paragraph (2) would add a further element of justification, but based on technical rather than legislative criteria. It was further noted that it would be difficult to define the criteria against which justification could be measured. It was therefore suggested that paragraph (2) should be deleted from the proposed text.

58. On the other hand, it was considered that there were several reasons for including paragraph (2), in that there would be benefit for both transparency and oversight reasons to require procuring entities to record their decision-making under article 11 of the Model Law, and so as not to facilitate the ex post facto justification of decisions in the procurement process. It was recalled that article 11 was included to facilitate review as well as oversight, and some information was made publicly available for that purpose. It was agreed that it would be appropriate to use information regarding selection of the type of framework agreement for internal purposes only, and not for the purpose of review. Thus it was agreed that paragraph (2) should be retained, but subject to the question of whether the selection of the type of framework agreement would be subject to review in due course.

Information to be specified when first soliciting participation in procurement involving framework agreements: Article [51 novies]

59. The Working Group considered the following proposed provisions:

"Article [51 novies]. Information to be specified when first soliciting participation in a framework agreement procedure

When first soliciting the participation of suppliers or contractors in the procurement involving framework agreements, the procuring entity shall specify all information required for the chosen procurement method under this Law, except to the extent that those provisions are derogated from in this article, and in addition the following information:

(a) A statement that the procurement will involve a framework agreement, of the type of framework agreement to be concluded and whether the framework agreement will take the form of an individual agreement with each supplier or contractor, or whether it will take the form of one agreement between all parties;

(b) The total quantity of, the nature of, and desired places and times of delivery of, the purchases envisaged under the framework agreement to the extent that they are known at this stage of the procurement;

(c) If suppliers or contractors are to be permitted to submit offers for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which offers may be submitted;

(d) Whether the framework agreement is to be concluded with one supplier or contractor or several and in the latter case the number, the minimum or maximum or the minimum and the maximum number of suppliers or contractors to be parties to the framework agreement;

(e) The criteria to be used by the procuring entity in the selection of the supplier(s) or contractor(s) to be the party or parties to the framework agreement, including their relative weight and the manner in which they will be applied in the selection;

(f) If the procuring entity intends to enter into a framework agreement with more than one supplier or contractor, a statement that the suppliers or contractors that are parties to the framework agreement will be ranked according to the selection criteria specified;

(g) The terms and conditions of the framework agreement upon which supplier(s) or contractor(s) is/are to provide the goods, construction or services, including the duration of the framework agreement;

(h) Whether a written framework agreement will be required [and the manner of entry into force of the framework agreement];

(i) In the case of closed framework agreements, whether the selection of the supplier(s) or contractor(s) with which it will enter the framework agreement will be based on lowest price or lowest evaluated submission;

(j) The procedure for the award of procurement contracts under the framework agreement;

(k) If the procuring entity intends to enter into a framework agreement with second-stage competition, the criteria for selecting the supplier or contractor to be awarded the procurement contract, their relative weight, the manner in which they will be applied in the evaluation of the submissions, and whether the award of procurement contracts will be based on lowest price or lowest evaluated submission; and

(l) If an electronic reverse auction will take place to award the procurement contract under a framework agreement with second-stage competition, the information referred to in article [cross-reference to the relevant provisions on electronic reverse auctions].”

60. Regarding paragraph (a), it was queried whether one common agreement with all suppliers should be required, or whether individual agreements with each supplier should be permitted and, if so, whether the solicitation documents should set this out.

61. It was observed that there were benefits to individual agreements, for example in that minor variations in terms and conditions could be accommodated,

intellectual property rights or confidential information could be protected, so as to reflect framework agreements concluded with suppliers that have submitted offers for part only of the procurement, and in order to guard against the collapse of the entire framework agreement if the agreement with one supplier was avoided. It was commented that individual agreements would be possible in some, but not necessarily all, jurisdictions. It was also observed that the form of the agreement should not inadvertently create rights between suppliers and contractors.

62. It was added that it would be important for suppliers and contractors to be aware that elements such as intellectual property and confidential information could be individually accommodated, and that the requirement should be retained in the solicitation documents.

63. On the other hand, it was stated that individual agreements would undermine the aim of equal treatment in the preamble to the Model Law. This notion, it was stressed, would be particularly important in Type 3 framework agreements. It was agreed to redraft the provision for further consideration by the Working Group at a later date.

64. As regards paragraph (b), it was stated that the procuring entity should provide as much information as possible to suppliers or contractors. It was observed, however, that the requirements of paragraph (g) would include the information in paragraph (b) and that the latter paragraph should therefore be deleted. In addition, discussion of the information to be made available should be set out in the Guide.

65. As regards paragraph (d), it was agreed that the requirement for a statement of the maximum and minimum number of parties to the framework agreement would assist in guaranteeing competition, but that the drafting should be clarified. The Guide to Enactment would also address the question of how to address amendments to those numbers where necessary during a particular procurement.

66. It was queried whether the first element of paragraph (h) was necessary. It was stated that it would be undesirable to indicate that an oral agreement would be possible. It was agreed that the definition of a framework agreement would refer to a written agreement (in article 2 or 22 ter, see paragraph … above). As regards the second element of the paragraph, it was decided to retain the reference to the manner of entry into force of the framework agreement pending the Working Group's revisions of articles 13 and 36 of the Model Law.

67. As regards paragraph (i), it was queried whether the paragraph was necessary in the light of paragraph (e). It was agreed that paragraph (e) should be expanded to incorporate the aim of requiring the selection criteria to be disclosed in advance, with appropriate discussion in the Guide to Enactment. The notions of selection criteria and the identification of successful tender or other offer should be clarified, and the application of the Model Law terms "lowest" price or evaluated tender to framework agreements should be considered.

68. It was recalled that the operation of framework agreements involved the selection of the suppliers and contractors to be parties to the framework agreement as a first stage, and the evaluation or selection criteria for the award of the procurement at the second stage. Considering that paragraph (k) would address the second stage for Types 2 and 3 framework agreements, it was agreed that a new paragraph would be included to address the award criteria for procurement contracts

under Type 1 framework agreements. It was also agreed that all such information should be recorded in the framework agreement itself, and that appropriate provision to this effect would be made.

69. As regards paragraph (j), it was observed that details of the procedure for the award should be addressed in the framework agreement as well as the solicitation documents.

70. As regards paragraph (k), and the notion of relative weight, it was queried whether relative weight for the second stage could be established at the first stage. On the one hand, it was said, it might be difficult to do so given that multiple purchasers might use a framework agreement and the 3-5 year duration of a framework agreement. On the other hand, it was stated that it would be critical for transparency reasons to establish the award criteria in advance, as for all procurement, because flexibility at the second stage would enable the misuse of the framework agreement – to select favoured suppliers, for example.

71. Regarding paragraph (k), it was observed that different purchasers or procuring entities under a framework agreement might wish, when applying the selection criteria at the second stage, to use different relative weights, such as quality or experience of suppliers. It was added that there would be an obligation to treat all suppliers equally, that this obligation could be enforced through legal remedies in many jurisdictions, that the relative weight would be set out at the beginning of each second stage, and thus that the procedure would have to be transparent and objective. Additionally, it was said, requiring one common need for all users of framework agreements would lead to a proliferation of parallel framework agreements, which would defeat the purpose of administrative efficiency upon which they were based. It was added that the most efficient result would be obtained where the ultimate user could set its needs and evaluation criteria shortly before purchasing.

72. A practical example was given: the use of ecological criteria for vehicle purchases that might vary between ministries within one government. It was queried whether policy decisions regarding such criteria could mask inappropriate selection criteria that were based on, for example, connections between procuring entities and suppliers.

73. It was observed that experience had showed that centralized purchasing agencies sought to set up broad and vague criteria at the first stage, without identifying the real needs of their client procuring entities, so as to maximize use of framework agreements. Requiring those agencies to establish selection criteria at the first stage would be beneficial, but there would be disadvantages to setting relative weight at that stage in terms of allocative efficiency, and it was recalled in this regard that the procuring entity would probably not have a perfect knowledge of the appropriate relative weight at the first stage.

74. The use of competition at the second stage was considered to be very important. A dialogue with suppliers at the second stage, it was said, would allow the appropriate relative weights to be ascribed and effective competition facilitated. As regards Type 3 framework agreements, it was added that there would be no real price competition at the first stage because they would be open agreements. Hence the Guide to Enactment should stress the importance of real price competition at the second stage, and the need to ensure that the second stage should involve effective

second stage competition. Should the relative weights be fixed at the first stage, it was added, the result might be so inflexible that there would remain only one supplier at the second stage.

75. On the other hand, while noting the need for a measure of flexibility, it was observed that in those jurisdictions where there were insufficiently strong controls and safeguards, the risk of abuse through manipulation of the relative weight so as to predetermine the outcome at the second stage was significant, and would defeat the purpose of open and competitive first stage procedures. This risk would be elevated because of the recurrent nature of purchases under framework agreements and because the agreements themselves would run over three to five years. It was observed that there had been documented cases of abuse of framework agreements and the risks were therefore real.

76. It was noted, in addition, that UNCAC article 9 (1)(b) required the establishment and disclosure of selection and award criteria in advance, and it was queried whether any adaptation of relative weight at the second stage might be inconsistent with the UNCAC requirements. Additionally, it was observed that such adaptation would inevitably raise the risk of manipulation, even if the legislative requirement was for any possible variations to be objective, within a predefined range or margin of variation and not material or substantive.

77. It was therefore suggested that all relative weights should be published at the first stage, and a selection between them, where necessary, would be made at the second stage. An alternative proposal was that, the procuring entity should be required to set out both the fixed relative weights and those that could be varied in the initial solicitation, but the latter would additionally be required to be non-material.

78. It was observed that enabling appropriate flexibility within the parameters of UNCAC need not require one common relative weight for all purchasers but a set or range of relative weights could be set out (for example using a matrix). Such an approach, it was added, would promote appropriate procurement planning and avoid individual procuring entities being able to defer the definition of their requirements until the second stage. On the other hand, it was observed that the use of a range of relative weights could be manipulated to predetermine the selection of a favoured supplier.

79. It was recalled that the EU Directives addressing the equivalent of the Type 2 framework agreement limited the flexibility of the procuring entity to vary the selection criteria at the second stage, by providing that the second stage award must be made “on the basis of the award criteria set out in the specifications of the framework agreement,” with more precisely formulated terms if necessary, and that no material change to the specifications was permitted. It was observed that this provision, nonetheless, would permit a range of relative weights to be specified.

80. It was stressed that objectivity was critical and support for flexibility should be given subject to the publication of objective and predetermined criteria, so as to prevent any form of manipulation. It was emphasized that the Model Law should not be drafted in such a way that it could be used to justify manipulation.

81. It was suggested that the Model Law itself should take a conservative approach, with all relative weights being fixed in advance, but the Guide would

recognize that individual enacting States could permit more flexibility in their own legislation, but if they chose to do so, it would have to be in accordance with the safeguards set out above.

82. After discussion, it was agreed that paragraph (k) would be amended by providing that relative weights at the second stage could be varied within a pre-established range set out in the solicitation documents, provided that the variation could not lead to a material change to the specifications and overall evaluation criteria, and that there could be no change in minimum quality requirements. Consequential changes elsewhere in the text would be made if necessary. Examples of possible risks of this approach, and guidance that this flexibility should be the exception rather than the rule, should also be set out in the Guide.

83. As regards paragraph (l), it was agreed that its requirements would be addressed in paragraph (j) and the provisions governing electronic reverse auctions, and so that paragraph should be deleted.

Additional information to be specified when first soliciting participation in procurement involving open framework agreements: Article [51 decies]

84. The Working Group agreed to consider the following proposed provisions:

> "Article [51 decies]. Additional information to be specified when first soliciting participation in procurement involving open framework agreements
>
> When first soliciting the participation of suppliers or contractors in the procurement involving open framework agreements, the procuring entity shall specify in addition to the information set out in the preceding article:
>
> (a) All necessary information concerning the electronic equipment to be used and the technical connection arrangements;
>
> (b) The [website or other electronic] address at which the specifications, the terms and conditions of the procurement, notifications of forthcoming procurement contracts and other necessary information relevant to the operation of the framework agreement may be accessed;
>
> (c) A statement that suppliers or contractors may [apply to become parties] to the framework agreement at any time during the period of its operation, subject to the maximum number of suppliers or contractors, if any."

85. It was agreed that paragraphs (a) and (b) were no longer necessary in the light of the removal of the requirement for Type 3 framework agreements to operate electronically, but that article 51 novies should be amended to include a requirement that all information necessary for the use of electronic framework agreements would be set out in the solicitation documents, supported by appropriate text in the Guide.

86. As regards paragraph (c), it was queried whether there should be a limit on the maximum number of suppliers that should be parties to a Type 3 framework agreement. It was agreed that any such limit should be recorded in the solicitation documents. The Working Group agreed to consider the question of a limit in the context of article 51 duodecies, governing the operation of Type 3 framework agreements.

87. It was agreed that the remaining requirements of article 51 decies should be incorporated into article 51 novies.

First stage of procurement involving framework agreements: Article [51 undecies]

88. The Working Group agreed to consider the following proposed text:

> "Article [51 undecies]. First stage of procurement involving framework agreements
>
> (1) The first stage of procurement proceedings under closed framework agreements shall be conducted in accordance with the provisions of one of [identify relevant methods] of this Law.
>
> (2) The first stage of procurement proceedings under open framework agreements shall be conducted in accordance with the provisions of Chapter III of this Law.
>
> (3) The procuring entity shall select the supplier(s) or contractor(s) with which to enter into the framework agreement on the basis of the specified selection criteria, and shall promptly notify the selected supplier(s) or contractor(s) of their selection and, where relevant, their ranking.
>
> (4) [The framework agreement, on the terms and conditions of the selected submission(s), comes into force as specified in accordance with the requirements of article […] above].
>
> (5) The procuring entity shall promptly publish notice of the award of the framework agreement, in any manner that has been specified for the publication of contract awards under article 14 of this Law. [The notice shall identify the supplier(s) or contractor(s) selected to be the party or parties to the framework agreement.]"

89. As regards paragraph (1), it was agreed that as any appropriate procurement method could be used for the first stage of closed framework agreements, the text in square brackets would be replaced by a reference to the procurement method chosen under article 51 octies.

90. It was queried whether paragraph (2) should be limited to open procurement methods under Chapter III (and Chapter IV for services). It was suggested that open publication requirements should be applied to all first stage of framework agreements, but that the other elements of open procurement methods would not apply. On the other hand, it was observed that this approach might not be consistent with the Model Law's procurement methods. It was accordingly agreed that reference would be made to the procurement method chosen under article 51 octies, with the qualification that the method should be open and competitive. It was agreed that the Working Group would revisit the details of the procedures to be followed at a future session.

91. As regards paragraph (3), it was observed that the term "ranking" might be misleading and that the formulation of the paragraph would be reconsidered.

92. It was also suggested that paragraphs (1), (2), (4) and (5) could alternatively be located in the Guide. Other views were that they should be retained in the text.

93. It was subsequently agreed that paragraph (4) was unnecessary because the framework agreement was not a procurement contract, and should be deleted. It was agreed that an equivalent deletion would be made from article 51 novies (h).

94. As regards paragraph (5), it was agreed that the square brackets should be deleted to provide an obligation to publish the identities of the parties. It was also agreed that the information to be published under article 14 would be revisited at a future session, and the Working Group would consider whether these requirements should apply also to framework agreements although they were not procurement agreements as defined by the Model Law.

95. It was agreed that the paragraphs (1), (2), (3) and (5) should be retained, as amended, and that the Working Group would consider the amended provisions at a future session.

Additional provisions regarding the first stage of procurement involving open framework agreements: Article [51 duodecies]

96. The Working Group considered the following proposed provisions:

"Article [51 duodecies]. Additional provisions regarding the first stage of procurement involving open framework agreements

(1) The procuring entity shall, during the entire period of the operation of the open framework agreement, ensure unrestricted, direct and full access to the specifications and terms and conditions of the agreement and to any other necessary information relevant to its operation.

(2) Suppliers and contractors may [become a party to the open framework agreement] at any time during its operation. [Applications to become parties] shall include all information specified by the procuring entity when first soliciting participation in the procurement.

(3) The procuring entity shall evaluate all such submissions to the framework agreement received during the period of its operation [within a maximum of […] days] in accordance with the selection criteria set out when first soliciting participation in the framework agreement.

(4) Subject to any maximum number of suppliers or contractors to be parties to the open framework agreement, and the criteria and procedure for the selection of that number, in each case as specified when first soliciting participation in the procurement involving the framework agreement, the framework agreement shall be concluded with all suppliers or contractors satisfying the selection criteria and whose submissions comply with the specifications and any other additional requirements pertaining to the framework agreement.

(5) The procuring entity shall promptly notify the suppliers or contractors whether they are to be parties to the framework agreement or of the rejection of their tenders.

(6) Suppliers or contractors that are admitted to the framework agreement may improve their submissions at any time during the period of operation of the framework agreement, provided that they continue to comply with the specifications pertaining to the procurement."

97. As regards paragraph (4), it was queried whether an open framework agreement with a maximum number of suppliers would in effect be a closed rather than an open framework agreement, particularly if the maximum were attained at the initial offer stage. Thus, it was asserted, there should be no maximum number of suppliers, also so as to encourage as many suppliers to participate. On the other hand, it was stated that Type 3 framework agreements were normally run by electronic systems with limited capacities, and those capacities should be publicized. It would be important for transparency reasons and also to avoid suppliers spending considerable sums on preparing submissions that could not be accepted.

98. It was agreed that where there were transparent and objective criteria that were predisclosed (as article 51 novies (d) stipulated), based on the notion of technical or other reasonable operational constraints, a limitation on numbers would be acceptable, but it would need to be assessed on a case-by-case basis and the Guide to Enactment should in any event discuss the importance of avoiding the creation of effectively a closed framework agreement. It was suggested that the provisions could be revised to reflect this notion, confirming that there was no requirement for a maximum, but if technology placed a limit on the number of suppliers, it should be predisclosed.

99. On the other hand, it was observed that this formulation would lead to two types of open framework agreements – those that were genuinely open and those that were semi-open, and that it would involve significant drafting difficulties.

[n2]100. It was observed that the procuring entity also should be given the flexibility to reduce the maximum number of suppliers during the operation of the framework agreement if the procuring entity determined that a reduction would be necessary, and that a discussion to such effect should be included in the Guide. It was confirmed that this would not involve changing the criteria for limiting the number themselves, but would allow for evolution of the detailed requirements underlying the criteria. It was commented that before the second stage, the requirements should not change and therefore it should not be necessary to reduce the numbers.

101. After discussion, it was agreed that the current drafting could be considered to invite the use of a maximum, and therefore that the provisions should be redrafted to state that, for open framework agreements only, where there would be technical or other capacity limitations to the framework agreement, the limitations should be set out in the solicitation documents. The reference to a maximum in paragraph (4) would be deleted, and article 51 novies would be amended to provide that any capacity limitations to the open system should be set out in the solicitation documents, drawing on similar provisions in article 51 bis regarding electronic reverse auctions. This formulation would be supported by discussion in the Guide.

102. As regards paragraph (6), it was agreed that suppliers could revise any element of their submissions during the operation of the framework agreement. However, it was queried whether an improvement would add value in the context of second stage competition, how an improvement would affect ranking or an equivalent term and how this might operate in the context of a limitation on numbers in the framework agreement. It was also observed that any consequent re-ranking should be re-notified to participants. It was agreed that the Working Group would

reconsider at a future session whether paragraph (6) should be retained in its current formulation, whether ranking or an equivalent concept should be required in open framework agreements, or whether it might be permitted where appropriate but not required.

103. It was suggested that the Guide to Enactment should encourage procuring entities to assess on a periodic basis whether the prices and terms and conditions of offers remain current. The Working Group also agreed to consider the issue whether suppliers should be able to exit a framework agreement or compelled to continue participation at a future session.

104. As regards paragraph (6), it was agreed that the text should be amended to provide that the offer should continue to conform to "the terms and conditions of the framework agreement" and not "the specifications pertaining to the procurement".

105. It was queried whether paragraph (6) was necessary in the light of second-stage competition under Types 2 and 3 framework agreements. It was explained that this provision was derived from a similar provision in the EU Directives, the aim of which was to enable the conditions of an offer, including price, to be improved during the operation of the framework agreement. For example, a supplier could augment the quantities of its offer so that it would be capable of fulfilling and invited to compete for a greater range of future purchase orders.

106. It was also queried whether the term "improve" should be replaced by the term "change", as suppliers might wish to increase their price or otherwise negatively change their submissions. It was considered that suppliers should not be able to do so, because otherwise there could be no security of supply, thus defeating one of the main purposes of a framework agreement. A contrary view was that the purpose would not be defeated if the procuring entity were required to agree to any such increase.

107. The concern was also raised that permitting suppliers to improve their submissions without the agreement of the procuring entity could lead to changes to the framework agreement itself. It was observed, on the other hand, that the obligation upon suppliers to continue to comply with the specifications would prevent any such change.

108. It was added the procuring entity should be the party that decided whether a revised submission was a genuine improvement and whether it wanted the purported improvement concerned. The procuring entity would also be required to assess whether the improved offer would comply with the terms and conditions of the framework agreement.

109. It was agreed that these questions should be discussed in the Guide to Enactment, including that the procuring entity retained the option not to accept any improvement, but that the text of paragraph (6) would not incorporate further amendments in this regard at this stage.

Second stage of procurement involving closed framework agreements without second-stage competition

110. The Working Group considered the following proposed provisions:

> "Article [51 terdecies]. Second stage of procurement involving closed framework agreements without second-stage competition
>
> (1) The procuring entity may award one or more procurement contracts under the framework agreement in accordance with the terms and conditions of the framework agreement and the provisions of this article.
>
> (2) No procurement contract under the framework agreement may be awarded to suppliers or contractors that were not originally party to the framework agreement.
>
> (3) The terms of a procurement contract under the framework agreement may not materially amend or vary any term or condition of the framework agreement.
>
> (4) If the framework agreement is entered into with one supplier or contractor, the procuring entity shall award any procurement contract on the basis of the terms and conditions of the framework agreement to the supplier or contractor party to that agreement by the issue of a purchase order [in writing] to that supplier or contractor.
>
> (5) If the framework agreement is entered into with more than one supplier or contractor, the procuring entity shall award any procurement contract on the basis of the terms and conditions of the framework agreement by the issue of a purchase order [in writing] to the highest-ranked supplier(s) or contractor(s) [with the resources at the time to fulfil] [capable of fulfilling] the contract. The procuring entity shall notify in writing all other suppliers or contractors that are parties to the framework agreement of the name and address of the supplier(s) or contractor(s) to whom the purchase order has been issued."

111. It was agreed that paragraph (1) should be replaced with the following text: "Any procurement contract issued shall be in accordance with the terms and conditions of the framework agreement and the provisions of this article".

112. As regards paragraph (2), it was agreed that the word "may" should be replaced by the word "shall", and the word "party" by "parties".

113. As regards paragraph (3), it was agreed that the phrase "amend or vary" should be replaced by a reference to "departing from" the terms and conditions of the framework agreement, and that the text should then be conformed to similar text in article 34 (4) (2) (b). It was also agreed that the Guide should explain that this provision (which allowed non-material amendments) did not permit amendments to the framework agreement.

114. As regards paragraph (4), it was agreed that a purchase order should be required to be in writing (and the square brackets in the text accordingly deleted), and that the reference to "the purchase order" should be broadened to provide for other types of documents issued to award procurement contracts.

115. As regards paragraph (5), it was suggested that the first sentence should end with the words "framework agreement". It was also observed that the Guide should

set out in detail how the selection of the supplier would be selected (best value, rotation, or on other grounds). As regards the final sentence, the suggestion was made that the notification should be made "promptly", and that the basic details of the award should be included in the notification, such as the contract price. The Working Group agreed to amend the text accordingly.

116. It was agreed that equivalent changes to those agreed for paragraphs (1), (3) and (5) would be made to article 51 quaterdecies onwards.

Second stage of procurement involving closed framework agreements with second-stage competition

117. The Working Group considered the following proposed provisions:

"Article [51 quaterdecies]. Second stage of procurement involving closed framework agreements with second-stage competition

(1) The procuring entity may award one or more procurement contracts under the framework agreement in accordance with the terms and conditions of the framework agreement, subject to the provisions of this article.

(2) No procurement contract under the framework agreement may be awarded to suppliers or contractors that were not originally party to the framework agreement.

(3) The terms of a procurement contract under the framework agreement may not materially amend or vary any term or condition of the framework agreement.

(4) The procuring entity shall award any procurement contract on the basis of the terms and conditions of the framework agreement, and in accordance with the following procedures:

(a) The procuring entity shall invite in writing all suppliers or contractors that are parties to the framework agreement, or where relevant those parties [with the resources at the time to fulfil] [capable of fulfilling] the contract, to present their submissions for the supply of the items to be procured;

(b) The invitation shall restate the terms and conditions of the framework agreement, and unless already specified in the framework agreement shall set out the terms and conditions of the procurement contract that were not specified in the terms and conditions of the framework agreement, and shall set out instructions for preparing submissions;

(c) The procuring entity shall fix the place for and a specific date and time as the deadline for presenting the submissions. The deadline shall afford suppliers or contractors sufficient time to prepare and present their submissions;

(d) The successful submission shall be determined in accordance with the criteria set out in the framework agreement;

(e) Where an electronic reverse auction is held, the procuring entity shall comply with requirements during the auction set out in article [cross references to the relevant provisions]; and

(f) Without prejudice to the provisions of article [proper cross reference to the provisions on award of contracts through electronic reverse auction] and subject to articles [12, 12 bis and other appropriate references] of this Law, the procuring entity shall accept the successful submission(s), and shall promptly notify in writing the successful supplier(s) or contractor(s) accordingly. The procuring entity shall also notify in writing all other suppliers and contractors that are parties to the framework agreement of the name and address of the supplier(s) or contractor(s) whose submission(s) was or were accepted and the contract price."

118. It was observed that the word "submission" in paragraph (4) should be replaced with the word "tender". It was also observed more generally that the term "tender" might be misunderstood to mean a reference to tendering proceedings, which would be inaccurate, and misleading, as a framework agreement could also be used for the procurement of services. Additionally, it was stated that the terms for submissions under the first stage and second stage of framework agreements should be different, such as by using "offer" or "proposal". A further proposal was to use the term "second stage submissions". It was agreed that suitable generic terms should be found.

119. As regards paragraph 4 (a), it was noted that the reference to "those parties" might be ambiguous and imply that the framework agreement could become an open agreement. It was agreed that the reference should be amended to remove any ambiguity. It was also agreed to replace the phrases in square brackets with a statement that the procuring entity should invite all the parties that met its needs at the time of the second stage competition, and that this notion should be further elaborated in the Guide.

120. As regards paragraph 4 (b), it was agreed that the reference to "unless specified" should be to "to the extent not already notified".

121. As regards paragraph (4) (d), it was agreed that the phrase "criteria set out in the framework agreement" should be replaced by "terms and conditions of the framework agreement and any other information contained in the second-stage invitation in paragraph (b)". An alternative proposal, to add a reference to "relative weight" at the end of the paragraph as currently formulated, was considered but not adopted. It was agreed that the Guide would explain that, for transparency reasons, the framework agreement and the invitation would record all specifications, criteria, relative weight, and terms and conditions.

122. It was agreed that paragraph 4 (e) should be deleted, in conformity with the Working Group's decisions to delete references to electronic procurement in articles 22 ter and 51 bis onwards.

123. As regards paragraph 4 (f), it was noted that the notification envisaged would be in addition to the publication of the contract award under article 14 and notification to the successful supplier. It was observed the Guide should discuss the need to ensure that, following the award of the procurement contract, notice to unsuccessful parties to the framework agreement was given in an effective and efficient manner, such as by individual notification in electronic or small-scale systems and by a general publication in others.

124. It was observed that the question of ensuring effective ongoing participation in a framework agreement was an important issue that could not appropriately be addressed in the text, but should be considered in the Guide.

125. It was also stressed that the need to ensure effective and sufficient second-stage competition was critical. It was stated in this regard that some systems required that a minimum number of invitations be issued (to which a minimum number of participants had responded) before the second stage competition could take place. On the other hand, it was observed that a more general requirement for effective competition could be set out in the article, also so as to avoid manipulation of numerical requirements. In addition, it was commented that the appropriate number of participants to ensure effective competition would depend on the nature of the procurement.

126. It was considered that the requirement to issue invitations at the second stage to all or to all suppliers that can meet the procuring entity's needs, as the case may be, would be sufficient to ensure effective competition (and it was noted that whether or not the procuring entity had satisfied this requirement would be subject to review). In addition, it was agreed that the procuring entity should be able to cancel the procurement if there was insufficient competition (as was also the case in ERAs). Accordingly it was agreed that no further provision was necessary in the text, but that the Guide to Enactment should address the topic of effective competition in detail. Furthermore, it was agreed that the Guide to Enactment text that addressed article 51 octies should cross-refer to the general obligation to ensure effective competition at the first stage, where that stage was being conducted in accordance with alternative procurement methods.

Second stage of procurement involving open framework agreements with second-stage competition

127. The Working Group considered the following proposed provisions:

> "Article [51 quindecies]. Second stage of procurement involving open framework agreements
>
> (1) The procuring entity may award one or more procurement contracts under the framework agreement in accordance with the terms and conditions of the framework agreement and the provisions of this article.
>
> (2) The procuring entity shall publish a notice that it intends to award a procurement contract in accordance with the terms and conditions of the framework agreement at the [website or other electronic] address set out in [article 51 decies (b) above].
>
> (3) Each potential procurement contract shall be the subject of an invitation to tender. The procuring entity shall invite all suppliers or contractors that are parties to the framework agreement to submit tenders for the supply of the items to be procured for each procurement contract it proposes to award. The invitation shall:
>
> (a) Restate, [or formulate where necessary more precisely, information referred to in article [cross reference] of this Law], [or restate the specifications and delivery requirements for the items being procured and, if necessary, provide greater detail in this respect than was given to suppliers or

contractors when first soliciting their participation in the framework agreement];

(b) Restate or set out the terms and conditions of the procurement contract;

(c) Restate the procedure for the award of a procurement contract resulting from the invitation to tender; and

(d) Include instructions for preparing tenders.

(4) The procuring entity shall fix a specific date and time as the deadline for submitting tenders. The deadline shall afford suppliers or contractors sufficient time to prepare and submit their tenders.

(5) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria set out in the invitation to submit tenders under paragraph (3) (a) of this article.

(6) Subject to articles [12, 12 bis and other appropriate references] of this Law, the procuring entity shall accept the successful tender(s), and shall promptly notify the successful supplier(s) or contractor(s) that it has accepted their tender(s). The procuring entity shall also notify all other suppliers and contractors that submitted tenders of the name and address of the supplier(s) or contractor(s) whose tender(s) was or were accepted and the contract price."

128. As regards paragraph (2), it was queried whether the notice envisaged in the provision as currently drafted would satisfy transparency requirements and be effective without a deadline, set out in the notice, which would have to expire before the procuring entity could proceed to a second-stage competition. It was observed that provisions to such effect in the EU Directives had been considered by some commentators to operate as a disincentive to the use of a similar system.

129. After discussion, it was agreed that the provision, which sought to encourage new entrants to the framework agreement during its operation, should be moved to article 51 duodecies. It was also agreed to amend the text to provide that, where the framework agreement was paper-based, the initial notice to participate in the framework agreement should be republished periodically in the same journal in which the initial publication was made. In electronic systems, the notice would be available permanently on the relevant website and so further publication would not be necessary.

130. It was agreed that provisions relating to the second stage of Type 2 and Type 3 framework agreements should be conformed, as both types could now be conducted electronically or in paper-based form. Thus the procedures applying to the second stage Type 2 framework agreements in article 51 quaterdecies, incorporating the Working Group's deliberations as set out above, would be repeated for Type 3 framework agreements in article 51 quindecies, with the exception that paragraph (2) in article 51 quaterdecies would not apply to Type 3 framework agreements.

Award of the procurement contract under a framework agreement

131. The Working Group considered the following proposed provisions:

"Article [51 seddecies]. Award of the procurement contract under a framework agreement

(1) The procurement contract, on the terms and conditions of the framework agreement, comes into force when a purchase order as provided for in [articles …] or the notice of acceptance to the successful supplier(s) or contractor(s) as provided for in [articles …] is issued and dispatched to the supplier or contractor concerned.

(2) Where the price payable pursuant to a procurement contract concluded under the provisions of this section exceeds [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations], the procuring entity shall promptly publish notice of the award of the procurement contract(s) in any manner that has been specified for the publication of contract awards under article 14 of this Law. The procuring entity shall also publish, in the same manner, [quarterly] notices of all procurement contracts issued under a framework agreement."

132. As regards paragraph (1), it was noted that the framework agreement in some systems might provide that orders over a certain size need not be accepted by a supplier. It was added that there might be other circumstances in which the supplier should be permitted not to accept a purchase order, and thus, it was suggested, that the solution provided in the current article 13 would be a better one.

133. In response, it was noted that the purchase order would be an acceptance of the supplier's offer, which could not exceed the supplier's offer, and therefore it was queried whether this concern could arise in practice. It was observed that a second-stage competition would, in any event, mean that the suppliers would have tendered for the amount concerned and so the concern would not arise in Types 2 and 3 framework agreements. On the other hand, in a Type 1 framework agreement, an order might exceed the amount of the supplier's capacity and it was agreed that provision should be made to address this risk. It was therefore agreed that the following words should be added to the end of paragraph (2) "or in any other manner set out in the framework agreement".

B. Issues arising from the use of suppliers' lists (A/CN.9/WG.I/WP.45 and A/CN.9/WG.I/WP.45/Add.1)

134. It was observed that the concerns previously considered by the Working Group relating to the use of suppliers' lists (A/CN.9/568, paragraph 59) had been considered to be such that the disadvantages of suppliers' lists might outweigh any possible benefits. Additionally, the flexible provisions proposed by the Working Group relating to framework agreements, it was said, would provide for the benefits that suppliers' lists could bring.

135. It was observed that the proper use of suppliers' lists, for example by ensuring that they were open and accessible, would not inevitably lead to abuse or misuse. It was suggested that the Model Law might address the topic in order to seek to prevent inappropriate use and ensure that they were not abused. On the other hand, it was suggested that the Model Law should not provide for the use of suppliers' lists at all because of the concerns their use raised and given the better alternative of

framework agreements, and the Guide to Enactment could explain this stance. In addition, it was stated that any provisions to address the use of suppliers' lists would be excessively lengthy and complex.

136. It was agreed that there should not be provisions in the Model Law to address suppliers' lists for the above reasons, but that there should be a discussion of the issues in the Guide to Enactment, addressing the interaction with Type 3 framework agreements in addition. Thus the discussion would draw on A/CN.9/568 paras. 55-68 and A/CN.9/WG.I/WP.45/Add.1 paras. 10-17, supplemented with additional detail where necessary. In summary, it was agreed, that the discussion would focus on the following elements: a description of suppliers' lists; their purported benefits, concerns observed as to their use, and safeguards and controls to be exercised in any compilation of a suppliers' list that might take place prior to a procurement using one of the Model Law's alternative procurement methods. It was added that the Guide should emphasize that the use of a suppliers' list would not replace any step in procurement proceedings under the Model Law, and that no list should operate as a mandatory list. To require registration on a list as a precondition to participation in procurement, it was noted, would contradict the provisions in article 6 of the current Model Law. Those provisions prohibited the imposition of any criterion, requirement or procedure for participation in procurement other than those in article 6 itself (and article 6 did not include registration on a list).

C. Drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders (A/CN.9/WG.I/WP.58)

137. As regards A/CN.9/WG.I/WP.58, the Working Group considered the draft text for the Guide to Enactment addressing publication of procurement-related opportunities, provisions addressing the use of electronic communications in procurement (including electronic submission and opening of tenders) and those addressing abnormally low tenders. The Working Group made drafting suggestions to those materials.

D. Drafting materials for the use of electronic reverse auctions in public procurement (A/CN.9/WG.I/WP.59)

138. As regards A/CN.9/WG.I/WP.59, the Working Group considered the draft text for the Guide to Enactment addressing the conditions for use of electronic reverse auctions, and the revised text for the Model Law addressing the procedures in the pre-auction and auction stages of procurement through electronic reverse auctions. The Working Group made drafting suggestions to those materials.

Annex

Tentative timetable and agenda for the Working Group's fourteenth to fifteenth sessions agreed at the Working Group's thirteenth session

Session	*Day 1*	*Day 2*	*Day 3*	*Day 4*	*Day 5*
14th, Autumn 2008	Remedies	Remedies	Remedies/ Framework agreements	Framework agreements	Conflict of interest/ Services and goods
15th, Spring 2009	Conflict of interest/ Services and goods	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment	Overall review of revisions made to the Model Law and relevant provisions of the Guide to Enactment