United Nations A/CN.9/664

General Assembly

Distr.: General
22 September 2008

Original: English

United Nations Commission on International Trade Law
Forty-second session
Vienna, 29 June-17 July 2009

Report of Working Group I (Procurement) on the work of its fourteenth session (Vienna, 8-12 September 2008)

Contents

V.08-56857 (E) 230908 240908

Draft report

I. Introduction

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

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

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 thirteenth session, the Working Group discussed 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.

4. At its thirteenth session, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1 and A/CN.9/WG.I/WP.56) and agreed to combine the two approaches proposed in those documents, so that the Model Law, where appropriate, would address common features applicable to all types of framework agreement together, in order to avoid, inter alia, unnecessary

repetition, while addressing distinct features applicable to each type of framework agreement separately.

5. At its thirteenth session, 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, paras. 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 (the "Guide").

6. At its thirty-eighth session, in 2005, thirty-ninth session, in 2006, fortieth session, in 2007 and forty-first session, in 2008, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17 (Part I), para. 170 and A/63/17, para. 299). 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 conflicts of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192). At 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). Pursuant to that recommendation, the Working Group adopted the timeline for its deliberations at its twelfth and thirteenth sessions (A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time.

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its fourteenth session in Vienna from 8-12 September 2008. The session was attended by representatives of the following States members of the Working Group: Algeria, Belarus, Bolivia, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Iran (Islamic Republic of), Kenya, Latvia, Lebanon, Mexico, Morocco, Nigeria, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

8. The session was attended by observers from the following States: Argentina, Belgium, Bosnia and Herzegovina, Croatia, Democratic Republic of the Congo, Dominican Republic, Haiti, Indonesia, Iraq, Ireland, Lithuania, Nicaragua, Philippines, Portugal, Romania, Slovakia, Swaziland, Sweden, Turkey, United Arab Emirates and United Republic of Tanzania.

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

(a) *United Nations system*: United Nations Industrial Development Organization (UNIDO) and World Bank;

(b) *Intergovernmental organizations*: European Commission (EC), International Development Law Organization (IDLO), Organization for Economic Cooperation and Development (OECD) and World Trade Organization (WTO);

(c) *International non-governmental organizations invited by the Working Group*: American Bar Association (ABA), Forum for International Conciliation and Arbitration (FICA), International Bar Association (IBA), International Swaps and Derivatives Association (ISDA) and the European Law Student's Association (ELSA). 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.60);

(b) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials addressing the use of electronic communications in public procurement, publication of procurement-related information, electronic reverse auctions and abnormally low tenders (A/CN.9/WG.I/WP.61);

(c) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – drafting materials for the use of framework agreements in public procurement (A/CN.9/WG.I/WP.62);

(d) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – Guide to Enactment text addressing the use of framework agreements in public procurement (A/CN.9/WG.I/WP.63); and

(e) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – Remedies, conflicts of interest and services procurement in the Model Law (A/CN.9/WG.I/WP.64).

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 fourteenth 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.62, A/CN.9/WG.I/WP.63 and A/CN.9/WG.I/WP.64, reflecting the deliberations at its fourteenth session, for its consideration at the next session.

14. The Working Group considered review provisions contained in Chapter VI of the Model Law and confirmed the decision taken at its 6th session to delete the list of exceptions to the review process. It was therefore agreed that the decision to select the winning supplier or contractor through any procurement method or a tool within a procurement method (electronic reverse auctions, framework agreement procedure) would be subject to review. The Working Group agreed to revise the provisions and procedures contained in articles 53-56 of the Model Law (paras. 28-73 below).

15. The Working Group also agreed to introduce a standstill period in article 36, to apply between the identification of the successful supplier and entry into force of the procurement contract and to provide for the possible annulment of a procurement contract following certain review procedures in certain circumstances (see paras 45-55 below).

16. The Working Group considered the drafting materials relating to framework agreement procedures contained in documents A/CN.9/WG.I/WP.62 and A/CN.9/WG.I/WP.63 and suggested revisions to those materials in the light of its decision to separate provisions in the Model Law addressing open framework agreements from those addressing closed framework agreements.

17. The Working Group also discussed the issues of conflicts of interest, the consideration of which was based on a Note by the Secretariat on the subject (A/CN.9/WG.I/WP.64) and agreed to consider expanding articles 4, 15 and 54 of the Model Law to address the requirements of the United Nations Convention against Corruption on the topic, and to explain the different approaches taken in various countries in the Guide to Enactment.

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

A. Remedies – review provisions under the Model Law, chapter VI (A/CN.9/WG.I/WP.64, paras. 5-9)

1. Introduction

18. The Working Group recalled the decisions taken at its sixth session in regard to review provisions (A/CN.9/568, para. 112) and decided to proceed with its further deliberations by reviewing each article of Chapter VI of the Model Law.

19. In considering the optional language of the footnote accompanying Chapter VI of the Model Law, which explained that for constitutional or other considerations, enacting States might not see fit to incorporate some or all of the review provisions, it was agreed that the entire footnote should be deleted. It was observed that such action would implement the Working Group's decision that the Model Law should be consistent with the mandatory language of article 9 (1) (e) of the United Nations Convention against Corruption, which required an effective system of review and appeal in procurement proceedings. It was decided that further guidance would be provided in the Guide to Enactment.

2. Article 52 (Right to review)

20. As regards article 52, it was noted that there were three main issues to be considered: who were the "suppliers or contractors" that could submit a review, in respect of what errors or omissions they could submit the review, and whether any steps in the procurement process should be exempted from review.

21. As regards the first issue, it was noted that the definition of "supplier or contractor" was set out in article 2 (f) of the Model Law, and provided that a "supplier or contractor" included, according to the context, any "potential party" to the procurement contract. It was observed that the general understanding of this definition would, for example, prevent entities that had been disqualified or excluded from non-open procurement methods from challenging their disqualification or exclusion.

22. It was observed that the "context" for article 2 (f) and review purposes would include the overall objectives of the review provisions: in particular, whether those objectives were to allow the procuring entity to correct any errors that it might have made, to protect the interests of the suppliers or contractors, to be a general forum for complaint in government contracting, or a combination thereof.

23. It was stated that the title of article 52 ("Right to review") indicated that the objective was to protect the interests of suppliers or contractors, but it was also observed that article 53 ("Review by procuring entity (or by approving authority)"), which was a mandatory first step in any review proceedings under Chapter VI, indicated that a further objective was to allow the procuring entity to correct its own decisions. It was acknowledged that the Model Law did not envisage a more general right on the part of any person to complain that a public authority had failed to act in the best interests of the state or its citizens, because of the requirement in article

52 (1) for loss or damage on the part of the challenging supplier or contractor. However, it was noted that other parts of an enacting State's law might allow such a challenge, and reference should be made to such a possibility in the Guide to Enactment.

24. It was suggested that the provisions should enable those that were affected by decisions taken in the procurement process, and could demonstrably sustain loss as a result, to challenge the decisions concerned. These persons could be described as "stakeholders", for example, or those who could show prejudice arising from the decisions of the procuring entity. Furthermore, and recalling that the Working Group had provisionally agreed that the choice of a procurement method should be subject to review, it was observed that entities that had been inappropriately excluded by the procuring entity from procurement proceedings should be able to challenge the exclusion. Thus, it was said, the current definition in article 2 (f) might be too narrow, because arguably only those that were continuing parties to the procurement process would be able to submit a claim for review. Consequently, it was agreed that the definition in article 2 (f) should be broadened to refer to a potential party to the procurement "proceedings" rather than to the procurement "contract". Together with the requirement to show actual or potential loss or damage in article 52 (1), it was considered that this formulation would also prevent the scope being extended too widely, for example to subcontractors or the general public, and would assist in preventing speculative applications. It was added that the Guide to Enactment should explain the ambit of the formulation in some detail.

25. The second issue under consideration was the grounds for review. It was observed that the term "breach of duty", which could have more than one interpretation, should be replaced with a phrase more closely aligned with the UNCAC reference to a breach of the applicable rules and procedures. Accordingly, the phrase "breach of a duty imposed on the procuring entity by this Law" in article 52 (1) would be replaced with the phrase "non-compliance with the provisions of this Law".

3. Exception relating to the selection of the procurement method under article 52 (2) (a)

26. As regards the third issue, it was agreed that, in the light of the revisions to article 52 (1) above and of the Working Group's decision taken at its sixth session, the list of exceptions to the review process, some of which related to mandatory steps and others to discretionary decisions in the procurement process, should be deleted. It was observed that a decision to select the winning supplier or contractor through such an electronic reverse auction would therefore be subject to review (as was the choice of selection procedure under the principal method for the procurement of services).

27. It was also noted that the deletion of subparagraph (f) would require consequential changes to articles 27 (t) and 38 (s). It was agreed that the Guide to Enactment should explain the rationale for the deletions and their implications, including the standard of proof and scope of the jurisdiction conferred.

4. Review by the procuring entity (or by approving authority) (article 53)

28. Certain observed disadvantages of the mandatory peer review mechanism under article 53 were noted, including that where the procuring entity took no steps during the standstill period, further recourse to administrative or judicial review would be inevitable and the mechanism without benefit. It was suggested, therefore, that the mechanism should be optional rather than mandatory. Such a formulation, it was added, would also be consistent with the approach taken by the World Trade Organization's Agreement on Government Procurement ("GPA"). In addition, it was stated that submitting a complaint to the procuring entity, rather than to its head, should be permitted, and that the costs and benefits of the mechanism should be discussed in the Guide.

29. It was also suggested that the discussion in brackets in paragraph (1), referring to an approving authority, should be removed to the Guide, and that the words "or the approving authority" should be added at the end of the first sentence of article 53 (1).

30. In addition, it was agreed that article 53 (3) should be deleted, because it effectively repeated the requirement contained in the introduction to paragraph (1) that any challenge under article 53 should be made before the procurement contract came into force.

31. As regards paragraph 4 (b), it was agreed that the word "indicate" in the English version of the Model Law should be replaced by the word "state", requiring the decision of the procuring entity to set out the corrective action that would be taken, and the words "are to be taken" should consequently be replaced with the words "shall be undertaken".

32. It was agreed that paragraph (6) should be deleted, as the procuring entity would in any event be able to present the original complaint to an administrative or judicial body. It was agreed that the Guide to Enactment could address practical issues such as the situation where the peer review found in favour of a complaining supplier on some but not all elements of its challenge, so that any subsequent complaint to an administrative or judicial body could be limited in scope.

33. It was also agreed that the Secretariat should review the text of article 53 after making the above changes, so as to ensure that the text was coherent and consistent with the rest of Chapter VI.

5. Administrative review (article 54)

34. It was queried whether the footnote to the heading to article 54 should be deleted (which provided that where the system concerned did not have a tradition of administrative review, enacting States might wish not to enact this article). It was observed that some systems were currently engaged in setting up administrative review systems, and that guidance might both be helpful and encourage the introduction of such systems, which were generally considered to be an improvement over ad hoc reviews.

35. It was recalled that UNCAC required an independent review system, and thus that the requirement for independent administrative or judicial review systems should be discussed in the Guide. It was consequently agreed that the footnote

should be deleted and that guidance provided in the Guide on the notion of independence needed further elaboration. For example, a review body would not be considered independent if it reported to a minister or other head to which the procuring entity also reported. Questions of appointment would also be relevant, together with how the members could be dismissed. It was also proposed that the title of the article should be changed to "Review before an independent administrative body".

36. It was also agreed that paragraph (1) (a) would need to be amended to be consistent with the optional nature of article 53, following the changes set out above.

37. It was queried whether the time limit of 20 days set out in paragraph (1) (a) should be amended to start from the time when the supplier should "reasonably" have become aware of the circumstances giving rise to the complaint, rather than when it "should have" become so aware. It was observed that the notion of reasonableness would not be understood in the same way in all systems, and would be implicit in many systems in any event. It was therefore agreed that no reference to "reasonableness" should be included.

38. It was also noted that the administrative system in an enacting State should also address the risk of collusion and fraud in the conclusion of a procurement contract, and in this context the deadlines set out in article 43 might not be appropriate. It was observed that these issues were very important, but that the solution to them (such as the annulment of a contract) might be found in branches of the law other than the procurement legislation in the enacting State concerned. The review provisions, it was observed, were aimed at issues arising out of possible breaches of the rules and procedures set out in the Model Law, in which deadlines would be appropriate and necessary. Fraudulent and other abusive activity, which might ultimately lead to the annulment of a contract, would not need to be subject to the same time limits.

39. Noting that article 53 would become optional in accordance with the decisions of the Working Group (para. 28 above), it was agreed that in order to promote amicable settlement of disputes, the timely submission of a complaint under article 53 would suspend the deadline for submission of a request for administrative review under article 54. It was also agreed that article 54 would be amended generally so as to reflect the optional nature of article 53 as revised.

40. As regards the time limits for submission of review under articles 53 and 54, it was recalled that, in accordance with the provisions of both articles, a complaint should be submitted within 20 days from when the supplier became aware (or should have become aware) of the facts or circumstances giving rise to the complaint. These time limits were contrasted with the provisions of article 28, under which the supplier or contractor could seek clarification of the solicitation documents at any time, with the caveat that the procuring entity was required to respond only to those requests received within a "reasonable" time before the deadline for submission of tenders or other offers.

41. As regards article 54 (1), it was queried whether the deadline for a challenge to the terms of the solicitation should be aligned with the provisions of article 28, that is, until the deadline for submissions (or shortly before), a possibility that might also facilitate maximum clarity in the solicitation documents. Other challenges, such

as to the results of prequalification proceedings, or to the choice of procurement method, would need to be submitted within the current 20-day deadline.

42. In response, it was stated that permitting a request for clarification under article 28 and enabling challenges under articles 53 and 54 were entirely different aspects of the procurement process, and there was therefore no need to align their provisions as regards time limits.

43. It was recalled that after the deadline for submission of tenders or other offers, the procuring entity would be able only to reject all tenders under article 12 of the Model Law, but a successful challenge might also lead to remedies such as termination of the procedure. It was observed that post-submission challenges might compromise the procurement itself if it were subsequently terminated, because at that stage the prices and details of the submitting suppliers would be publicly known. Thus, it was said, there should be no challenge to the terms of the solicitation entertained after the deadline for submissions.

44. After debate, it was decided that the deadline to a challenge to the terms of the solicitation only would be set as the deadline for submissions, and article 54 (1) would be modified accordingly. The 20-day deadline would remain unchanged for other challenges.

45. As regards article 54 (3), it was queried whether the remedies that the administrative body could grant or recommend should include the annulment of a contract that had been awarded. It was observed that some systems prohibited the annulment of a contract that had been awarded (as did article 54 of the Model Law), but, in others, annulment was a possible remedy. The attention of the Working Group was drawn to the recent European Commission Remedies Directive that envisaged the annulment of contracts in circumstances in which there had been significant non-compliance with applicable procurement procedures (such as unjustified failure to announce the procurement), but only prior to the publication of the procurement award. Reference was also made to the financial costs and time implications of any such annulment.

46. It was observed that a procurement contract that had been properly concluded, i.e. following the applicable procedures including review procedures where relevant, should not be annulled. However, a standstill period between selection of the supplier and award of the contract could be used to ascertain whether the procedures had been followed, prior to the expiry of which the procurement contract would not come into force. Such a standstill period, it was noted, might avoid the need for any annulment as errors could be possibly corrected prior to the conclusion of the procurement contract, and it could also avoid the complication of having to set aside an executed procurement contract. However, it was recalled that there was no equivalent provision in the Model Law.

47. The Working Group was informed that in the system contemplated by the European procurement Directives, there was a 10-day mandatory standstill period between the identification of the successful supplier and the award of the contract (known in European circles as an “Alcatel standstill” following a case heard by the European Court of Justice), during which a complaint could be brought. (In addition, there was a further opportunity to challenge the procurement during a maximum period of 2 months after the award, and the possibility of challenge before the award.)

48. It was observed, on the other hand, that an "Alcatel standstill" would be undesirable as it would impose costs on the procurement and on suppliers (on both the successful and other suppliers), and delay the start of the procurement contract concerned. It was added that an "Alcatel standstill" would also introduce a degree of uncertainty into the procurement process, which was not present in the private sector. In response, it was said that these issues were unlikely to be significant in the context of a 10-day standstill period. The Working Group agreed to include transparency provisions drawing on the provisions found in the EU Directives.

49. The Working Group therefore considered two interlinked questions, first, whether the Model Law should provide for a standstill period, and, secondly, whether the Model Law should contemplate annulment of a concluded procurement contract.

50. The current text of the Model Law, it was noted, was not complete in this regard because it provided for neither annulment nor this type of standstill. It was added that the Guide could set out the benefits of an "Alcatel standstill" period, which for costs and efficiency reasons should be a short period of up to 10 days, as per the European system.

51. It was recalled that the Working Group had decided to comply with the mandatory requirements for an effective review under UNCAC, and that an "Alcatel standstill" period might be viewed as an essential component of an effective review system. It was underscored that the standstill period would be an important tool in the fight against corruption in that it would facilitate a credible and effective system by permitting reviews before the entry into force of the contract.

52. It was also observed that the significant differences among various States indicated that there might not be one optimal solution, and some flexibility should be afforded to enacting States. Some delegates cautioned that introducing an unlimited right to annul procurement contracts could increase the risks of corruption. It was therefore suggested the possibility of annulment should be limited to exceptional circumstances. On the other hand, the difficulties of defining what should constitute those circumstances were underscored.

53. In this light, concern was also expressed that in some legal systems only a judicial body has the prerogative to annul a procurement contract, and that permitting annulment only through a lengthy judicial process could create delays and these delays could lead to the risk of fraud. In addition, it was cautioned that reliance on annulment through criminal or other branches of law might not provide a sufficiently robust system. Accordingly, it was suggested that article 54 (3) be modified to permit annulment of the procurement contract in administrative review procedures, without defining the circumstances in which annulment might be possible.

54. It was further commented that the possibility of annulment would be a necessary complement to the introduction of an effective "Alcatel standstill" period, to avoid procuring entities from permitting the standstill period to elapse without further action.

55. It was therefore agreed that an "Alcatel standstill" period should be introduced in article 36, to apply between the identification of the successful supplier and entry into force of the procurement contract. In addition, an unrestricted possibility to

annul the contract would be introduced into article 54 (by deleting the qualification "other than any act or decision bringing the procurement contract into force" in paragraphs 3 (d) and (e)). Appropriate guidance regarding these provisions would be included in the Guide.

56. It was also agreed that the above changes would necessitate a change to the chapeau to paragraph (3) of article 54 to delete the word "recommend" and the accompanying footnote, so that the text would refer to the independent administrative review body being able to "grant" and not merely "recommend" the relief concerned. The Guide would explain how these provisions could be tailored to suit those systems in which a decision of a government authority, once taken, could not be overturned by that authority, but only by a judge. Further guidance for the administrative review body could address appropriate remedies, including the impact of any remedy on the procurement concerned and on future competition, on the actual or perceived integrity of the procurement process, the costs that any remedy might impose on all parties, and to encourage generally as conservative an approach as possible (because the full extent of those costs might not be readily apparent).

57. It was observed that the annulment could refer to the decision of the procurement to select the winning tender or the procurement contract if executed, and that the laws of different states could restrict the ability of administrative body to annul a procurement contract. It was also noted that such annulment might lead to damages claims (by comparison with article 12, where there would be no liability on the part of the procuring entity). The question of the extent of damages that the administrative review body could award would be left to the enacting State, together with any question of the award of costs. It was stressed that the aim of the provisions was to provide sufficient recompense to provide an incentive to participate in the procurement process. It was noted, in this regard, that a pre-determined amount could be recommended for the Model Law with a maximum cap depending on the nature and size of procurement. In addition, even where an enacting State's administrative law might permit the award of costs, the Guide would encourage caution so as to avoid the procedures operating as disincentive to participation both in review proceedings and procurement generally, particularly where small and medium-sized enterprises were concerned. It was also observed that any fees levied for submitting complaints should be treated in similar fashion.

58. Noting that one reason for awarding costs against unsuccessful suppliers would be to discourage frivolous complaints, it was agreed that the Guide would address various mechanisms that might achieve this end.

6. Certain rules applicable to review proceedings (article 55)

59. It was noted that these rules would be amended so as to be consistent with the revised articles 53 and 54. The Working Group was also informed that the GPA contained certain procedural requirements akin to those set out in article 55 of the Model Law, and it was agreed that these requirements should be reflected in the Model Law and supporting guidance both for consistency's sake and in order to ensure the continuing relevance of the texts for all enacting States, particularly those in transition or developing countries that might become parties to the GPA. In particular, the provisions of article 18 (6) of the GPA, which set out due process requirements (such as the need for the record of the procurement to be produced to

the administrative review body), should be incorporated into article 55 of the Model Law.

60. It was also suggested that the procuring entity should be obliged to produce the record of the procurement to the reviewing agency, and that article 55 should provide for such an obligation.

7. Suspension of procurement proceedings (article 56)

61. The suspension periods provided for under article 56 were considered in the light of experience that the normal time provided for review of a complaint could be up to 90 or 100 days in some systems, as compared with a period of between 7 and 30 days contemplated under article 56. In this regard, it was recalled that paragraph (4) of article 56 permitted the procuring entity to override the suspension period in cases justified on the basis of urgent public interest. It was also observed that the 7-day suspension period might not always be extended to the full review period permitted of 30 days, perhaps for political reasons.

62. The costs and benefits of suspension were considered, including the disruption and delay that might be caused by an interruption of the procurement, whether a suspension would be effective if a procuring entity could simply wait for a suspension period to pass and then conclude the procurement contract (even where the review was still ongoing), the need to protect the rights of suppliers or contractors pending the review period, and the alternative costs that might arise if the alternative to suspension was the subsequent annulment of a procurement contract or the termination of the procurement (leading to new procurement proceedings).

63. The extent of a presumed or automatic suspension under article 56 was discussed.

64. It was agreed that the period of suspension should be aligned with the period required for the reviewing body to issue its decision.

65. As a complaint to the procuring entity under article 53 could be submitted only up to the date of submission of tenders or other offers, it was noted that a suspension might postpone the date for submissions, but would not otherwise raise consequences of significant concern. Accordingly, it was agreed that the procuring entity should be given the flexibility to decide the appropriate suspension period. It was also agreed that the procuring entity should be required to publicize the suspension or inform identified participating suppliers or contractors of its existence, as the case may be, and of the duration of the suspension where known, and of the resumption of the procurement. Procuring entities would be able to determine the most efficient manner of providing the notification or publication in the circumstances of the procurement concerned. In addition, and because a complaint would involve the conduct of the procuring entity, it was agreed that the procuring entity should not be given the power under article 53 to terminate the procurement.

66. The consequences of any suspension under article 54, it was noted, could be more severe than those in article 53, and hence such a suspension should be both regulated and approached in a conservative manner. There were two steps that the independent reviewing body would need to take: first, to assess whether the

complaint was frivolous, to consider the need to preserve the rights of the supplier during the review process and to consider whether there existed any urgent public interest that would require the procurement to continue without suspension. (The second step was to conduct the review.) It was agreed that a suspension that came into effect as a result of the first step should be implemented and publicized with the minimum of delay.

67. It was observed that practical experience in one jurisdiction indicated that there were merits to an automatic suspension, which the procuring entity could override upon appropriate justification. The advantage of such a system, it was said, was that it freed the procuring entity from being required to assess the merits of a suspension. In response, it was noted that this was not the approach of the current Model Law, which provided for a presumptive suspension (article 56 (1)) and an automatic suspension (article 56 (2)).

68. After debate, it was agreed that the Model Law's approach would not be amended, so that a suspension would be granted unless urgent public interest considerations required otherwise, or unless the complaint were frivolous, and provided that the procedural requirements set out in paragraph (1), regarding the information to be submitted by the supplier, were complied with. Thus, the administrative review body would not have a general discretion to deny a suspension. The Guide, it was observed, should emphasize that the submission of a complaint would be timely if presented by the deadline set out in article 54, but it should be presented as early as possible to minimize the potential disruption to the procurement process.

69. The maximum period of suspension in a review by an independent administrative body was considered. On the one hand, it was suggested that the maximum period could be flexible, and measured by the time needed to review the complaint under article 54 (4). For example, the time needed for the review could be the "appropriate period" as assessed by the procuring entity. In support of this suggestion, it was observed that the appropriate period might vary from case to case, and should be left to the reviewing body, and no explicit minimum or maximum period would be set out in the text. In response, it was stated that the reviewing body should be under pressure to conduct its review swiftly, so a maximum period should be set out, and that the current 30-day period would generally be appropriate in the light of practical experience. After debate, it was agreed that a maximum period of 30 days would be included in the text, which could be prolonged if the circumstances concerned would justify an extension.

70. The Guide, it was further agreed, should provide sufficient detail to assist enacting States in implementing these provisions.

71. As regards paragraph (2) and the position after the procurement contract had entered into force, it was agreed that the introduction of an "Alcatel standstill" period rendered the 7-day suspension in that paragraph superfluous and it would accordingly be deleted.

72. It was noted that the "Alcatel standstill" would be counterproductive in the situation contemplated by paragraph (4), and appropriate amendments to article 36 and the review provisions would be needed.

73. In the light of the above amendments to article 56, it was proposed that the entire article could be deleted, and its provisions included in articles 53 and 54, amended to reflect the nature of the review in each case.

8. Other issues arising in Chapter VI

74. The Working Group recalled that it had agreed to implement the right of appeal (additional to the right of review) required by UNCAC. Accordingly, it was agreed that a right of appeal should be included in article 52 of the Model Law, and that flexibility should be given to enacting States to craft the mechanism of the appeals process in the light of their legal systems. In the light of possible difficulties that using the term "appeal" might involve, it was agreed that article 52 should be amended to provide that the initial review by an independent review body under article 54 (or by a judicial body under article 57 if there were no administrative body in the State concerned) could subsequently be challenged before a second or superior body. It was also stressed that the optional review under article 53 would not constitute the initial review required by UNCAC.

B. Draft provisions to enable the use of framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.62, paras. 3-12 and A/CN.9/WG.I/WP.63, paras. 3-35)

1. Terminology

75. It was agreed that the terms in paragraph (6) would be used for the purposes of the review of the draft provisions for the Model Law, and that the Working Group would reconsider whether to retain those terms themselves at a future date.

2. Types of framework agreement procedures and conditions for their use

Article [22 ter]. Types of framework agreement procedures and conditions for their use

76. It was observed that the Guide should encourage procuring entities to consider the totality of purchases under a framework agreement as part of control and oversight procedures.

3. Procedures for the use of framework agreements

Article [51 octies]. Commencement of a framework agreement procedure

77. It was agreed that the cross references to draft article 22 ter would be updated.

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

78. As regards paragraph (f) of article 51 novies, the notion of "multiple framework agreements" was discussed. It was observed that the reference to "multiple framework agreements" would not indicate different contractual positions between the procuring entity and the suppliers that were parties to the framework agreement, but that the agreements with individual suppliers could include minor non-material variations by example so as to protect trade secrets and other

commercially sensitive information. It was agreed that the current text should be revised to reflect that only minor differences of form or terms and conditions that were of a non-material nature were permitted. It was also agreed that appropriate guidance to limit such variations should be provided in the Guide.

79. The Working Group agreed to add to paragraph (h) that a procuring entity should set out the envisaged frequency of second stage competition in the solicitation documents.

80. It was queried whether the requirement to state quantities or estimates of the purchases envisaged under the framework agreement in article 51 novies paragraph (i) would enable procuring entities to conclude framework agreements of the type described in article 22 ter (4) (b). Realistic estimates or quantities would not be known where future emergency procurement was concerned. It was therefore agreed to move the phrase "to the extent that they are known at this stage of the procurement" to the end of the paragraph.

81. The flexibility that the procuring entity would enjoy as regards actual purchases under the framework agreement (which, it was observed, might differ from the estimated quantity) would be explained in the Guide. It was also agreed that the optimum results from a commercial perspective would be obtained if suppliers were to know the likely level of orders that might be issued under the framework agreement and therefore the Guide should stress the importance of providing full information at this early stage wherever possible.

82. It was also agreed that the text would be revised to ensure that the second-stage competition could take place on the basis of lowest price tender (and not only on the basis of lowest evaluated tender), and that the Working Group would consider the terminology used at a later date.

Article [51 decies]. First stage of procurement involving framework agreements

83. It was agreed that the first stage of all framework agreement procedures would be conducted in accordance with the provisions of draft article 51 octies, that subject to any subsequent changes that the Working Group might propose to the procedures for open framework agreements, the words "under closed framework agreements" would be deleted from paragraph (1), and paragraph (2) would be deleted in its entirety.

84. As regards paragraph (3), it was agreed that parties to the framework agreement should be notified of their selection alone, and that the words "and, where relevant, their ranking" should therefore be deleted. The Guide, it was added, would address how a competitive evaluation at the first stage would operate in practice (for those framework agreements in which such a step was necessary). The Working Group agreed to consider in the context of draft article 51 undecies whether such a step would be necessary or indeed beneficial in open framework agreements.

85. As regards paragraph (4), the Working Group agreed that the current formulation should apply to closed framework agreements, and that the appropriate formulation for open framework agreements would be considered under draft article 51 undecies.

86. It was confirmed that the first stage of the procedure for closed framework agreements would be conducted as a normal tendering procedure (or other procurement method where appropriate), including competitive evaluation of the suppliers' tenders or other offers. It was recalled, in this regard, that the appropriate procurement methods for the first stage of closed framework agreements procedures would be open, unless the conditions for use of an alternative procurement method applied. It was also agreed that the use of negotiated procedures would not be appropriate.

87. It was further agreed that the resulting article 51 decies would now apply to the first stage of procurement involving closed framework agreements, and accordingly paragraph (2) of the proposed text would be deleted. It was added that a reference to the competitive evaluation of tenders would be included in article 51 decies (3) to replace the deleted notion of "ranking", and that the Guide would explain how the competitive evaluation would operate in practice.

88. As regards the publication requirements of draft paragraph (4), it was agreed that the text would remain as proposed so far as closed framework agreements were concerned. It was queried whether the requirement to disclose the names of supplier(s) or contractor(s) selected to become the party or parties to the framework agreement should also be reflected in article 14 of the Model Law. The Working Group agreed to defer its consideration of this issue to a later session.

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

89. The Working Group considered whether a competitive evaluation would be necessary or appropriate in the context of an open framework agreement. It was observed that a better result might be obtained if suppliers' tenders or other offers were assessed to see whether they met the minimum terms and conditions (including specifications) of the procurement. If they did meet those terms, and the suppliers were qualified, then they would be selected to be parties to the agreement (subject to capacity constraints, see para. 103 below). Competition between those suppliers would then take place at the second stage. Such a formulation, it was said, would avoid the practical difficulties that would arise in operating open framework agreements with ongoing competitive evaluation at the first stage. After discussion, it was agreed that first-stage competitive evaluation should not be provided for, and the provisions would be revised accordingly.

90. It was also agreed that the provisions in the Model Law addressing open framework agreements should be separated from those addressing closed framework agreements.

91. It was also agreed that the provisions in the Model Law addressing open framework agreement procedures would be based on the electronic operation of the procedures. However, the Guide would note that enacting States might wish to operate them in paper-based fashion (or by using a mixture of electronic and paper-based procedures). The Guide would also explain which provisions would need to be amended to accommodate paper-based or mixed systems, and provide appropriate formulations.

92. It was observed that the first stage of open framework agreements would involve the use of an open procurement method, the assessment of suppliers'

qualifications, and the examination of their tenders or other offers against the terms and conditions, including specifications, of the procurement. Provided that the tenders or other offers were compliant with those terms and conditions, the suppliers would become parties to the framework agreement.

93. It was queried whether open framework agreements should be subject to a statutory maximum duration, as was required for dynamic purchasing systems by the European Union Directives. The benefits of flexibility regarding duration for open framework agreements of broad scope, and the costs of conducting new proceedings, were stressed.

94. After considering the desirability of allowing the periodic renewal of full and open competition, the need periodically to reassess the qualifications of suppliers and the responsiveness of their offers, and to assess whether framework agreements continued to reflect current market conditions, it was agreed that open framework agreements should be concluded for a defined period. In addition, it was said, suppliers might be wary of participating in an agreement that was unlimited in time.

95. It was observed, however, that the open nature of the agreements indicated that there was not the same need to limit their duration as there was for closed framework agreements. The equivalent to article 22 ter (3) for open framework agreement procedures would therefore provide that "an open framework agreement shall be concluded for a given term" without further qualification. It was added that the considerations governing the appropriate duration of open framework agreements should be discussed in the Guide, to include the risks of excessively large orders, and the heightened risks of abuse in awarding procurement contracts consistently to the same vendors, and of lack of transparency in longer agreements. The guidance would also address, it was noted, the ability of the procuring entity to terminate the agreement in accordance with its terms (should market conditions change significantly, for example).

96. The appropriate level of flexibility that should be provided regarding the specifications for procurement under open framework agreements was discussed. It was noted that the provisions, as currently drafted, did not permit the terms and conditions of the framework agreement to be amended, but that article 22 ter 2 (a) and (d) provided limited, non-material amendments for procurement contracts issued under the framework agreement.

97. It was observed that the longer the duration of the framework agreement, the higher the degree of flexibility that would be needed, especially if applicable regulations addressing such matters as ecological or sustainable development requirements were subject to amendment during the term of the agreement. Further, it was stressed, some notion of flexibility would be necessary to ensure the effective operation of open agreements, particularly as compared with a stricter regime that would be appropriate for closed framework agreements.

98. In response, it was noted that flexibility and resultant discretion to amend specifications at either stage of the procedure might elevate the risk of abuse, and that controls would be needed to mitigate that risk. Some enacting States with higher risks of corruption, it was said, would be looking to adopt the Model Law with its transparency requirements as part of the fight against corruption, and a cautious approach was therefore urged.

99. The prevailing view was that no changes to the proposed text for the Model Law would be made, but the benefits and risks of flexibility could be discussed in detail in the Guide (with reference to article 22 ter 2 (a) and (d)).

100. It was recalled that the Working Group had previously agreed that there should be no provision for suppliers' lists in the Model Law, because of observed abuse in their operation. It was noted that one of the main differences between framework agreements and suppliers' lists was that a framework agreement would contain specifications that were sufficiently detailed that no further specifications would be needed to conduct a procurement. By comparison, suppliers' lists would not include specifications at that level. It was cautioned, therefore, that the provisions regarding specifications in open framework agreements should be sufficiently precise to ensure that the result was indeed a framework agreement and not a suppliers' list. It was agreed that the differences between the two tools and the consequences should be addressed in the Guide.

101. The Guide, it was agreed, would also address the limits to permissible amendments to the specifications for procurement contracts issued under framework agreements, for example that:

(a) Any amendment to the specifications, which under the article 22 ter 2 (a) and (d) must be limited to minor, non-material items, should be announced in advance, preferably in the solicitation documents and with reference to a possible range;

(b) The reasons for the amendment should be recorded;

(c) The meaning of the term "material" should be discussed. Any amendment that would make the tenders or other offers from any suppliers that were parties to the framework agreement non-responsive, or that would render previously non-responsive tenders responsive would be considered as a material amendment, as would any amendment that would change the status of suppliers with regards to their qualification;

(d) Any amendment that would raise concerns about competition, transparency or integrity would also be considered a material amendment.

102. As regards paragraph (2) (a), it was agreed that republication should be as frequent as practicable, reflecting the circumstances of the procurement concerned, but at the minimum of once per year, and that the procurement regulations should reflect this minimum. It was also agreed that the republication should be effected in the same place as the initial solicitation under article 51 novies. In addition, as the provisions addressed electronic procedures, the republication should specify the website address where the details set out in article 51 novies (g) could be found, and that any new joiners to the agreement would be publicized at that website. The Guide would address the issues set out in footnote 29 to A/CN.9/WG.I/WP.62. It was stressed that the procuring entity was responsible for such publication.

103. As regards paragraph (5), it was agreed that the text in square brackets would be deleted. The Guide would explain that only technological or capacity constraints could limit the number of parties to the framework agreement, and that such constraints would have to be justified in the record of the procurement (but that the extent of such constraints would not have to be set in advance).

104. It was agreed that paragraph (7) was no longer necessary in the light of the Working Group's decisions relating to the extent of first stage competition for open framework agreements, and would be deleted.

Article [51 duodecies]. Second stage of procurement involving closed framework agreements without second-stage competition

105. It was decided that paragraph (4) and the first sentence of paragraph (5) article 51 duodecies were unnecessarily detailed and should be deleted, and also to delete the word "other" from the remaining part of paragraph (5).

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

106. In the light of the above deletions, it was agreed that articles 51 duodecies and 51 terdecies should be consolidated. As regards paragraph (4) of article 51 terdecies, it was agreed that the square brackets should be deleted; as regards paragraph (5), that the word "the" should be inserted before "suppliers or contractors"; as regards subparagraphs (6) (b) and (c), that the text in square brackets should be deleted and the subparagraphs consolidated; that a reference to the relative weight of the selection criteria should be included in paragraph 6 (d); and that paragraph (8) should be deleted.

107. It was also agreed that paragraph (9) should be reviewed to ensure that it would accommodate electronic reverse auctions under framework agreement procedures.

Article [51 quaterdecies]. Second stage of procurement involving open framework agreements

108. It was agreed that the text should be conformed with article 51 terdecies regarding the second stage of competition, and therefore that the articles would be identical save for the inclusion of paragraph (2) in article 51 terdecies. The need to ensure consistency among the terms used in various language versions was noted.

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

109. It was noted that the article might need to be revised to conform with the Working Group's consideration of the provisions governing the entry into force of the procurement contract under articles 13 and 36 in due course.

4. Further issues arising in the use of framework agreement procedures

110. It was agreed that the term "second-stage tenders" would be used to refer to tenders submitted in the second stage of framework agreement procedures.

C. Draft provisions for the Guide text to address provisions governing framework agreements in public procurement under the Model Law (A/CN.9/WG.I/WP.63)

111. Recalling the Working Group's earlier decision that the Guide should be for legislators and regulators in one composite document, the Working Group considered whether further guidance to operators should be given (as such guidance would be of a practical and not a policy-based nature).

112. The Working Group approved the scope and general level of detail in the draft Guide text, and made the following suggestions to the text:

(a) That reference to terms other than "framework agreements" to describe analogous procedures should be made in paragraph 5;

(b) That paragraph 7 should refer to lower administrative rather than transaction costs and should note that overall savings would be enhanced through second-stage competition;

(c) To replace the word "because" with the word "where" in the second sentence of paragraph 9;

(d) To introduce paragraph 10 with the qualification that should adequate precautions to guarantee competition and transparency not be taken, the results described in that paragraph might occur;

(e) To add a reference to the commercial advantage of framework agreements that bind both parties in paragraph 20;

(f) To add that a further reason for limiting the duration of open framework agreements was to allow for the fact that suppliers' qualification status might change during the term of the agreement;

(g) To separate the descriptions in paragraph 23 of the extent to which the terms and conditions of a procurement would be set at the first stage of a framework agreement procedure;

(h) To ensure that the reference in paragraph 29 to recording the choice of a framework agreement procedure in the record of a procurement did not provide that the procuring entity should justify that choice, and to ensure that the same consideration applied to draft article 51 octies (2) in the text of the Model Law;

(i) That the reference to "low-cost items" in paragraph 30 should be replaced with a reference to "standardized and regularly used items", and that the examples given should refer to goods rather than services.

D. Discussion relating to the finalization and adoption of the revised Model Law and the Guide

113. Recalling the encouragement of the Commission at its forty-first session that the Working Group should proceed expeditiously with the completion of its reform project, with a view to permitting the finalization and adoption of the revised Model Law and Guide within a reasonable time (A/63/17, para. 307), the Working Group

agreed that its first priority would be to finalize its work on the text of the Model Law. Thus, it was agreed, a complete version of the revised text of the Model Law would be presented to the Working Group for consideration at its 15th session, to be held from 9-13 February 2009, in New York. The Working Group also agreed that its aim was to submit the text, further revised to reflect the deliberations of the Working Group at the 15th session, to the Commission for consideration at its forty-second session.

114. In order to ensure the most efficient and expeditious review of the proposed revisions at the 15th session, the Working Group further agreed that an informal version of the text in its original language would be posted on the UNCITRAL website as soon as it was available, which delegates and observers could use as a basis for consultations prior to the 15th session. Finally, and in the light of the fact that the revisions would address issues both that the Working Group had considered in its substantive deliberations to date and other issues yet to be addressed in detail, the Secretariat was requested to highlight the latter revisions for the benefit of those engaged in the consultations.

115. The Working Group heard an explanation of the process of revision and consultation prior to the submission of the final revised text of the Model Law to the Commission. In this regard, it was noted that revisions to the Guide for the benefit of legislators would be drafted as the Working Group's second priority, and that the Secretariat would to the extent possible provide a working draft of such revisions to assist those attending the Commission session in considering the revised text of the Model Law. The Commission would also be able to review the working draft of the Guide for legislators, time permitting.

E. Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – Conflicts of interest (A/CN.9/WG.I/WP.64, paras. 10-33)

116. As regards conflicts of interest, the Working Group considered the information provided in section III of A/CN.9/WG.I/WP.64 on the manner in which the topic was addressed in various systems. Experience from several jurisdictions was shared. In the light of the requirement of the United Nations Convention against Corruption that procurement systems should address the topic, and of differing legal norms and traditions among States, the Working Group agreed that the Model Law itself should include provisions setting out the relevant principles. It was also agreed that explanations of the policy considerations concerned would be set out in the Guide, drawing on the experience and examples discussed at this session. The principles would be included in three sections of the Model Law: first, drawing on the UNCAC provisions, as a requirement in article 4 of the text for procurement regulations to address conflicts of interest, secondly, providing in article 15 for the consequences of procurement conducted or contracts awarded under the influence of a conflict of interest, and thirdly, to address the question of review under article 54. It was agreed that these proposals will be reviewed during the 15th session of the Working Group.