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### **Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement**

#### **Note by the Secretariat**

##### **Addendum**

This addendum sets out a proposal for the Guide text to accompany articles 58-62 of chapter VII (Framework agreements procedures) of the UNCITRAL Model Law on Public Procurement, and points regarding framework agreements procedures proposed to be discussed in a section of the Guide to Enactment addressing changes from the 1994 text of the Model Law.



## GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

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### **B. Provisions on framework agreements to be included in the article-by-article commentary (*continued*)**

#### **Article 58. Requirements of closed framework agreements**

1. The purpose of the article is to set out the terms and conditions of the closed framework agreement and the award of contracts under that agreement. As certain terms and conditions of the procurement are not set at the outset of a framework agreement procedure (by contrast with “traditional” procurement), it was considered appropriate to require that they will be contained in the framework agreement itself, to ensure that the terms and conditions of the procurement are known and consistent throughout the procedure. The framework agreement will in particular contain the terms and conditions that will apply to the second stage of the framework agreement procedure, including how the terms and conditions that were not established at the first stage will be settled: this information being important to encourage participation and transparency, it is also to be disclosed in the solicitation documents under article 57.
2. The law of the enacting State will address such issues as the enforceability of the agreement in terms of contract law, and such issues are therefore not provided for in the Model Law.
3. The chapeau provisions of paragraph (1) require the framework agreement to be in writing, in order to ensure that the terms and conditions are set out clearly for all parties. They are supplemented by paragraph (2) of the article that allows under certain conditions to conclude individual agreements between the procuring entity and each supplier or contractor that is a party (see further paragraph ... below).
4. Paragraph 1(a) limits the duration of all closed framework agreements; the potentially anti-competitive effect of these agreements is considered to increase as their duration increases. A maximum duration is also considered to assist in preventing attempted justifications of excessively long framework agreements. On the other hand, longer durations can enhance the administrative efficiencies of framework agreements. UNCITRAL considers that there is no one appropriate maximum duration, because of differing administrative and commercial circumstances in individual States, and so the enacting State is invited to set the appropriate limit in the procurement regulations. It is important to note that the limit is the maximum duration, and not the average or appropriate duration: the latter may vary as market conditions change, and in any event should reflect the nature of the procurement concerned, financial issues such as budgetary allocations, and regional or developmental differences within or among States. Bearing in mind the need to ensure that framework agreements are cost-effective as well as ensuring periodic full competition, and on the basis of practice examined by UNCITRAL, an appropriate range for the maximum duration may be of 3-5 years. Enacting States

may also consider that different periods of time might be appropriate for different types of procurement, and that for some highly changeable items the appropriate period may be measured in months. Shorter durations within the legal maximum contained in article 58 can be set out in regulations; if this step is taken, clear guidance must be provided to procuring entities to ensure that they consult the appropriate source.<sup>1</sup> Such guidance should also address any external limitations on the duration of framework agreements (such as State budgeting requirements).

5. The Model Law does not provide for extensions to concluded framework agreements or exemptions from the prescribed maximum duration: allowing such variations would defeat the purpose of the regime contemplated by the Model Law. If enacting States wish to provide for extensions in exceptional circumstances, clear regulations or guidance will be required to ensure that any extensions are of short duration and limited scope. For example, new procurements may not be justified in cases of a natural disaster or restricted sources of supply, when the public may be able to benefit from the terms and conditions of the existing framework agreement. Guidance should also address the issue of a lengthy or sizeable purchase order or procurement contract towards the end of the validity of the framework agreement, not only to avoid abuse, but to ensure that procuring entities are not purchasing outdated or excessively priced items. If suppliers or contractors consider that procuring entities are using framework agreements beyond their intended scope, future participation may also be compromised: the efficacy of the technique in the longer-term will depend on whether or not the terms are commercially viable for both parties.

6. Paragraph 1(b) requires the terms and conditions of the procurement to be recorded in the framework agreement (and under article 57 will have been provided in the solicitation documents). These terms and conditions will include the description of the subject matter of the procurement, which should fulfil the requirements of article 10, and the evaluation criteria. Where the subject matter of the procurement is highly technical, an overly narrow approach to drafting the description and the use of detailed technical specifications may limit the use of the framework agreement. The use of functional descriptions may enhance the efficacy of the procedure, by allowing for technological development and variations to suit the precise need at the time of the procurement contract. The procuring entity must ensure that the description is as accurate as possible both for transparency reasons and to encourage participation in the procedure, and enacting States may wish to provide guidance to assist in this process. For guidance on the evaluation criteria in framework agreements procedures, see paragraphs ... below.

7. Paragraph 1(c) requires setting out in the framework agreement estimates of the terms and conditions that cannot be established with precision at the outset of the procedure. They are usually to be refined or established through second-stage competition, such as the timing, frequency and quantities of anticipated purchases, and the contract price. To the extent the estimates are known, they must be set out (see paragraph ... above). Providing the best available estimates, where firm commitments are not possible, will also encourage participation. Naturally, the limitations on estimates should also be recorded, or a statement that accurate

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<sup>1</sup> The provision of guidance to the Secretariat is requested on more detail for the Guide to Enactment on this point, if necessary.

estimates are not possible (for example, where emergency procurement is concerned).

8. Maximum or minimum aggregate values for the framework agreement may be known; if so, they should be disclosed in the agreement itself, failing which an estimate should be set out. An alternative approach is, where there are multiple procuring entities that will use the framework agreement, to allow each procuring entity to set different maxima depending on the nature and potential obsolescence of the items to be procured; in such cases, the relevant values for each procuring entity should be included. The maximum values or annual values may be limited by budgetary procedures in individual States; if so, guidance to these provisions should set out other sources of regulation in detail.

9. The contract price may or may not be established at the first stage. Where the subject matter is subject to price or currency fluctuations, or the combination of service-providers may vary, it may be counter-productive to try to set a contract price at the outset. A common criticism of framework agreements of this type is that there is a tendency towards contract prices at hourly rates that are generally relatively expensive, and task-based or project-based pricing should therefore be encouraged, where appropriate.

10. It will generally be the case that the agreement will provide that suppliers or contractors may not increase their prices or reduce the quality of their submissions at the second stage of the procedure, because of the obvious commercial disadvantages and resultant lack of security of supply that would ensue, but in certain markets, where price fluctuations are the norm, the framework agreement may appropriately provide a price adjustment mechanism to match the market.

11. Paragraph 1(d) requires the framework agreement to identify whether or not second-stage competition will be used to award the procurement contracts under the framework agreement, and if it will be used, to define terms and conditions of such second-stage competition. Paragraphs (1)(d)(i) and (ii) require the substantive rules and procedures for any second-stage competition to be set out in the framework agreement. The rules and procedures are designed to ensure effective competition at the second stage: for example, all suppliers or contractors parties to the framework agreement are, in principle, entitled to participate at the second stage, as is explained further in the commentary to article 61 below. The framework agreement must also set out the envisaged frequency of the competition, and anticipated time frame for presenting second-stage submissions — this information is not binding on the procuring entity, and is included both to enhance participation through providing to suppliers or contractors the best available information and to encourage effective procurement planning.

12. A key determinant of effective second-stage competition is the manner in which evaluation criteria will be designed and applied. A balance is needed between evaluation criteria that are so inflexible that there may be effectively only one supplier or contractor at the second stage, with consequential harm to value for money and administrative efficiency, and the use of such broad or vague criteria that their relative weights and the process can be manipulated to favour certain suppliers or contractors. The rules in paragraph (1)(d)(iii) therefore provide that the relative weight to be applied in the evaluation criteria during the second-stage competition should be disclosed at the first stage of the procedure. However, they also provide

for limited flexibility to vary or give greater precision to the evaluation criteria at the second stage, reflecting the fact that multiple purchasers might use a framework agreement, with different relative weights to suit their individual evaluation criteria, and that some framework agreements may be of long duration. This flexibility will also be useful for centralized purchasing agencies, and to avoid the negative impact on value for money if one common standard must be applied to all users of the framework agreement.

13. The mechanism in paragraph 1(d)(iii) therefore allows for relative weights of the evaluation criteria at the second stage to be varied within a pre-established range or matrix set out in the framework agreement and the solicitation documents. This flexibility has to be read together with the qualification provided in article 62 that the variation must be authorized by the framework agreement but in any event may not lead to a change to the description of the subject matter of the procurement. Thus even if within the permitted scope of variations under the framework agreement, a change would not be acceptable if it effectively leads to the change in the description of the subject matter of the procurement (for example, if the minimum quality requirements were waived or altered).<sup>2</sup>

14. Flexibility in applying evaluation criteria should be monitored to ensure that it does not become a substitute for adequate procurement planning, does not distort purchasing decisions in favour of administrative ease, does not encourage the use of broad terms of reference that are not based on a careful identification of needs, and does not encourage the abusive direction of procurement contracts to favoured suppliers or contractors. These latter points may be of increased significance where procurement is outsourced to a fee-earning centralized purchasing agency, which may use framework agreements to generate income (see, further, the discussion of outsourcing at ...). Oversight processes may assist in avoiding the use of relatively flexible evaluation criteria in framework agreements to hide the use of inappropriate criteria based on agreements or connections between procuring entities and suppliers or contractors, and to detect abuse in pre-determining the second-stage results that would negate first-stage competition, the risks of which are elevated with recurrent purchases. Transparency in the application of the flexibility, and the use of a pre-determined and pre-disclosed range both facilitates such oversight and ensures that the mechanism complies with the requirement of the United Nations Convention against Corruption that requires the evaluation criteria to be set and disclosed in advance (article 9(1)(b) of the Convention). Enacting States will wish to provide that their oversight regimes examine the use of a range of evaluation criteria, in order to ensure that the range set out in the framework agreement is not so wide as to make the safeguards meaningless in practice.

15. Paragraph 1(e) notes that the framework agreement must also set out whether the award of the procurement contract(s) under the framework agreement will be made to the lowest-priced or most advantageous submission<sup>3</sup> (for a discussion of

<sup>2</sup> The provision of guidance to the Secretariat on further relevant examples is requested, to underscore that this flexibility should be the exception rather than the rule.

<sup>3</sup> The provision of guidance to the Secretariat on the mechanism of award of procurement contracts under multi-supplier closed framework agreement without second-stage competition is requested. Possible rotation schemes, disclosed in the framework agreement, were mentioned as an example in the Working Group. They are to be considered in the light of other provisions of the Model Law and in the light of the risks of creating oligopolies.

those terms, see ...). The basis of the award will normally, but need not necessarily, be the same as that for the first stage; for example, the procuring entity may decide that among the highest-ranked suppliers or contractors at the first stage (chosen using the most advantageous submission), the lowest-priced responsive submission to the precise terms of the second-stage invitation to participate will be appropriate.

16. Paragraph (2) provides limited flexibility to the procuring entity to enter into separate agreements with individual suppliers or contractors that are parties to the framework agreement. General principles of transparency and fair and equitable treatment indicate that each supplier or contractor should be subject to the same terms and conditions; the provisions therefore limit exceptions to minor variations that concern only those provisions that justify the conclusion of separate agreements; those justifications are to be put on the record. An example may be the need to execute separate agreements to protect intangible or intellectual property rights and to accommodate different licensing terms or where suppliers or contractors have presented submissions for only part of the procurement.<sup>4</sup> Nonetheless, the result should not involve different contractual obligations for different suppliers or contractors parties to the framework agreement.

17. Paragraph (3) requires all information necessary to allow for the effective operation of the framework to be set out in the framework agreement, in addition to the above requirements, and to ensure transparency and predictability in the process. Such information may include technical issues such as requirements for connection, a website if the framework agreement is to operate electronically, particular software, technical features and, if relevant, capacity; this access information should be issued in technologically neutral terms where possible and appropriate. These requirements can be supplemented by detailed regulations to ensure that the technology used by the procuring entity does not operate as a barrier to access to the relevant part of the procurement market, applying the principles set out in article 7 (see commentary to that article, at ...).

18. In multisupplier framework agreements, each supplier or contractor party will wish to know the extent of its commitment both at the outset and periodically during operation of the framework agreement (such as after a purchase is made under the framework agreement). Enacting States may therefore wish to encourage procuring entities to inform the suppliers or contractors about the extent of their commitments [commentary about the extent/duration of commitment, and cross-references to second-stage notice provisions are to be added].

#### **Article 59. Establishment of an open framework agreement<sup>5</sup>**

1. The purpose of the article is to set out the procedure for the first stage of an open framework agreement procedure. By comparison with the provisions for closed framework agreements, which are concluded through the use of a procurement method under chapter III, IV or V of the Model Law, an open framework agreement procedure is a self-contained one,<sup>6</sup> and this article provides

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<sup>4</sup> The provision of guidance to the Secretariat is requested on whether all jurisdictions will be permitted to take advantage of this provision under their administrative law.

<sup>5</sup> The provision of guidance to the Secretariat is requested on whether these framework agreements should be compared with electronic catalogues and request for quotations.

<sup>6</sup> The provision of guidance to the Secretariat is requested on whether this technique should be

for the relevant procedures. An open framework agreement is described at paragraphs ... above, and the guidance to this and the following article of the Model Law makes cross-reference to that description where necessary.

2. Paragraph (1) records the requirement that the agreement be established and maintained online. This provision is a rare exception to the approach of the Model Law that its provisions are technologically neutral, and is included because seeking to operate an open framework agreement in traditional, paper-based format would defeat the administrative efficiency that lies at the heart of open framework agreement procedures, in that it relies on the use of Internet-based, electronic means of communication. The procedure is designed to involve a permanently open web-based procurement opportunity, which suppliers or contractors can consult at any time to decide whether they wish to participate in the procurements concerned, without necessarily imposing an administrative burden in the provision of individual information to those suppliers or contractors, with consequent delays in response times, as is further explained in paragraphs ... below. Responses to opportunities and requests to participate are intended to be provided in a time frame that only online procurement can accommodate.

3. Paragraph (2) provides the mechanism for solicitation of participation in the open framework agreement procedure. It applies the provisions of article 32 by reference;<sup>7</sup> it is self-evident that solicitation to become a party to an open framework agreement must itself be open. The solicitation must also be international, unless the exceptions referred to in article 32(4) and article 8 by cross-reference apply (guidance as to which is found at ... above). It is recommended that the invitation also be made permanently available on the website at which the framework agreement will be maintained (see, also, the guidance to article 60(2) below, regarding ongoing publicity and transparency mechanisms, including periodic re-publication of the initial invitation).

4. Paragraph (3) sets out the requirements of the invitation that solicits participation in the procedure, and tracks the requirements for an invitation to tender in open tendering proceedings, with certain deviations necessary to accommodate the conditions of an open framework agreement. The provisions are also consistent, so far as possible, with those applicable to closed framework agreements. Thus, the commentary to solicitation in closed framework agreements should be consulted on the provisions equivalent to those contained in paragraphs (3)(b), (3)(c) and (3)(f) (subparagraphs (b) and (c) are intended to make it clear that the procedure involves an open framework agreement)<sup>8</sup> and the commentary to solicitation in open tendering proceedings should be consulted on the provisions equivalent to those in paragraphs (3)(e)(i), (3)(g) and (3)(h). Guidance on issues particular to open framework agreement procedures appears in the following paragraphs.

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classified as a separate procurement method and listed in article 26 (1) accordingly. The same point is raised in the commentary to article 26.

<sup>7</sup> The provision of guidance to the Secretariat is requested on the need to amend the wording in article 59(2) to read “following the requirements of article 32” instead of the current wording “in accordance with article 32”, to reflect more accurately that article 32 in fact applies.

<sup>8</sup> The Commission may wish to consider that paragraph 3 (c) of article 59 of the draft Model Law is redundant and may be deleted, in the light of the provisions of paragraph (3)(b) of the same article.

5. Paragraph (3)(a) requires the names and addresses of the procuring entities that will be parties to the open framework agreement or that otherwise can place orders (procurement contracts) under it to be recorded.<sup>9</sup> The provision is therefore flexible in terms of allowing procuring entities to group together to maximize their purchasing power, and in allowing the use of centralized purchasing agencies, but the framework agreement is not open to new purchasers. The reason for both the flexibility and the limitation is to provide adequate transparency and to support value for money: suppliers or contractors need to know the details of the procuring entities that may issue procurement contracts if they are to be encouraged to participate and to present submissions that meet the needs of the procuring entity, and the efficacy of the procedure is to be ensured. In addition, the requirements of contract formation in individual States will vary; some may not permit procuring entities to join the framework agreement without significant administrative procedures, such as novation. The provision should be read together with the definition of “procuring entity”, in article 2(l), which allows more than one purchaser in a given procurement to be the “procuring entity” for that procurement. In the context of framework agreements, the entity that awards a procurement contract is by definition the procuring entity for that procurement; the framework agreement itself allows for several potential purchasers at the second stage. However, one agency will be responsible for establishing and maintaining the framework agreement, and it will be identified as the “procuring entity” for that purpose, as provided for in paragraph (3)(a).

6. Paragraph (3)(d) requires the languages of the framework agreement to be set out in the invitation, and includes other measures to promote transparency and consequently to enhance access to the framework agreement once it has been concluded. The website at which the open framework agreement is located should be easy to locate, as an example of the general considerations regarding effective transparency in electronic procurement (see guidance at ... above). The invitation is also required to set out any specific requirements for access to the framework agreement; guidance on ensuring effective market access to procurement is provided in the commentary to article 7 above.

7. Paragraph (3)(e) contains a mixture of provisions of general applicability, and provisions concerning framework agreement procedures alone, which together provide the terms and conditions under which suppliers or contractors can become parties to the framework agreement. Paragraph (3)(e)(i) requires the standard declaration as to whether participation is to be restricted on the basis of nationality in the limited circumstances envisaged by article 8. Paragraph (3)(e)(ii) is an optional provision (accordingly presented in brackets) permitting a maximum number of suppliers or contractors parties to the framework agreement to be set. As the accompanying footnote explains, the provision need not be enacted by States where local technical constraints do not so require, and in any event should be read in conjunction with the limited scope of this permission in paragraph (7) of this article (as explained in the commentary to that paragraph of the article below), so as to provide essential safeguards against abuse and undesirable consequences. The paragraph requires the procedure and criteria that are to be followed in selecting any

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<sup>9</sup> The provision of guidance to the Secretariat on operation of this flexibility in practice is requested.



maximum to be disclosed, consistent with equivalent provisions elsewhere in the Model Law (guidance as to the general issues arising is found in the commentary to [restricted tendering], at .... above). [A cross-reference to similar considerations in the context of ERAs is to be added.]

8. Paragraph (3)(e)(iii) addresses the manner in which applications to become parties to the framework agreement are to be presented and assessed, and it tracks the information required for tendering proceedings under article 38. The provision refers to “indicative submissions”, a term used to reflect that there will always be second-stage competition under an open framework agreement, so that the initial submissions are merely, as their name suggests, indicative. Moreover, while the qualifications of suppliers or contractors are assessed, and their submissions are examined against the relevant description to assess responsiveness (see paragraphs (5) and (6) of the article), by comparison with initial submissions in closed framework agreements, there is no evaluation of indicative submissions (i.e. no competitive comparison of submissions, such as is provided for in article 42). Also by contrast with the position in closed framework agreements, and as is explained in the guidance to paragraph (6) of the article below, all suppliers or contractors presenting responsive submissions are eligible to join the framework agreement, provided that they are qualified.

9. Paragraph (3)(e)(iv) requires the invitation to include a statement that the framework agreement remains open to new suppliers or contractors to join it throughout its duration (see paragraph (4) of the article for the related substantive requirement), unless the stated maximum of suppliers or contractors parties to the agreement is exceeded and unless the potential suppliers or contractors are excluded under limitations to participation imposed in accordance with article 8 of the Model Law. The invitation should also set out any limitations to new joiners (which might arise out of capacity constraints, as described above, or as a result of imposition of limitations under article 8 of the Model Law), plus any further requirements, for example as regards qualifications of parties to the agreement and responsiveness of their indicative submissions.

10. Paragraph 3(f) requires all the terms and conditions of the framework agreement (themselves governed by article 60) to be set out in the invitation, to include, among other things, the description of the subject matter of the procurement and evaluation criteria. The requirements for those terms and conditions are discussed in the commentary to article 60 below.

11. Paragraph (4) sets out the substantive requirement that the framework agreement be open to new suppliers or contractors throughout the period of its operation. [As is noted in the general commentary to this chapter,] this provision is a key feature of open framework agreements.

12. Paragraph (5) requires indicative submissions received after the establishment of the framework agreement to be assessed promptly, in order that the framework agreement remains open to new joiners in reality; this is a critical feature in the context of an online open framework agreement, which may be designed for small-scale and regular purchases. All responsive submissions from qualified suppliers or contractors must be accepted and the suppliers or contractors concerned admitted to the framework agreement, as provided for in paragraph (6), subject to any capacity constraints justifying rejection imposed under paragraphs (3)(e)(ii) and (7) as set out

in the invitation to become a party to the agreement, or other restrictions (where the procurement is domestic, for example; see the relevant discussion above).

13. Paragraph (7) is linked to paragraph (3)(e)(ii), both of which are put in brackets as an optional text to be considered for inclusion in the law by an enacting State. They concern imposition of the maximum number of suppliers or contractors parties to the agreement because of technical constraints. In addition to the considerations raised in connection with the similar provisions appearing in the context of ERAs (see commentary to article 52(1)(k) and (2) in ... above), there are additional considerations that an enacting State should keep in mind in considering enacting these provisions. Because the salient difference between closed and open framework agreements is that the latter remain open to new suppliers or contractors throughout their operation, any imposition of a maximum number of suppliers or contractors parties may effectively turn the framework into a closed agreement. This situation may be exacerbated in that the benefits of a fluctuating pool of suppliers or contractors may be lost if suppliers or contractors that cease to participate in second-stage competition remain, from a technical point of view, parties to the framework agreement and block new joiners. Paragraph (7) therefore permits such a maximum number of supplier or contractors parties only where technical capacity constrains access to the systems concerned (e.g. the software for the framework agreement may accommodate only a certain maximum number). However, enacting States should be aware that such capacity constraints are declining at a rapid rate, and the provision is likely to become obsolete within a short period.

14. Even though a maximum number, where needed, is likely to be of a reasonable size, the procuring entity is required to be objective in the manner of selecting the suppliers or contractors parties up to that maximum. An example, it can follow the approach of restricted tendering used on the ground of article 28(1)(b) (see commentary to that article in ... above), limiting the number on the basis of random selection, or “first come first served”, etc (see paragraphs ... above). As the selection decision will be subject to challenge under the provisions of chapter VIII,<sup>10</sup> enacting States should ensure that the procurement regulations, or other applicable rules, provide sufficient guidance to procuring entities.

15. Enacting States will observe that there is no evaluation of the indicative submissions provided for in this article. The nature of an open framework agreement is that the indicative submissions are indicative only and, as is explained in paragraph ... above, all responsive submissions from qualified suppliers or contractors are accepted. As is further explained in the guidance to article 61 below, price competition is largely absent at the first stage, and so ensuring genuine competition at the second stage is critical.

16. The provisions of paragraph (8) are designed to provide transparency in decision-making and to allow a supplier or contractor to challenge the decision of the procuring entity not to accept the supplier or contractor in the framework agreement procedure if desired. The inclusion of such provision in the context of the open framework agreement is justified because safeguards of the standstill period

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<sup>10</sup> The provision of guidance to the Secretariat is requested on how non-discrimination is to be ensured given the silence of the Model Law on this point. Addressing the matter only in regulations in the absence of the requirement to be objective in the Model Law itself, may not be sufficient.

notification would not be applicable to indicative submissions but only to submissions presented in response to the specific purchase orders placed under the agreement (the second-stage submissions). It is therefore essential for the supplier or contractor to know whether it is the party to the agreement without which it would not be able to learn about purchase orders placed under the agreement and present second-stage submissions. However, in the case of the challenge of the procuring entity's decision, the policy considerations regarding delaying the execution of a procurement contract to allow an effective challenge and allowing the procurement contract to proceed are different in the open framework agreement context from the norm (the general policy considerations are set out in the guidance to article 21 above). In the case of open framework agreements, any aggrieved supplier or contractor whose submission was rejected as non-responsive or that was not admitted because of disqualification will be able to be admitted to the framework agreement for future purchases if a challenge is resolved in its favour, the harm occasioned by the delay in participation was considered as unlikely to override the interest in allowing an effectively limited portion of procurement contracts in open framework agreements to proceed.

#### **Article 60. Requirements of open framework agreements**

1. This article mirrors article 58 regarding closed framework agreements, governing the terms and conditions of the open framework agreement and the award of contracts under it. As was also the case for closed framework agreements, the law of the enacting State will address such issues as the enforceability of the agreement in terms of contract law, and such issues are therefore not provided for in the Model Law. Suppliers or contractors that join the framework agreement after its initial conclusion will need to be bound by its terms; they may be so bound automatically upon joining the agreement, but enacting States should ensure that the law makes appropriate provision in this regard.
2. Paragraph (1) records the requirement that the award of procurement contracts under the open framework agreement must be carried out through a competition at the second stage of the framework agreement procedure. Subparagraphs (c) to (f) set out the terms and procedures of the second-stage competition. They are similar to the provisions in paragraph (1)(d) of article 58, guidance for which is found at paragraphs ... above. The differences reflect the nature of the subject matters envisaged to be procured through open framework agreements (simple standardized items, as explained in ... above).
3. Paragraph (1)(a) requires the duration of the framework agreement to be recorded in that agreement. By comparison with closed framework agreements, there is no reference to any maximum duration imposed under the procurement regulations: the fact that the agreement is open to new suppliers or contractors throughout its period of operation lessens the risks of choking off competition as described in the context of closed framework agreements in paragraph (...) above. However, in order to allow for new technologies and solutions, and to avoid obsolescence, the duration of an open framework agreement should not be excessive, and should be assessed by reference to the type of subject matters being procured. (See, also, the general guidance at paragraph ... above on the importance of a periodic reassessment of whether the framework agreement continues to reflect

what is currently available in the relevant market.) In addition, suppliers or contractors may be reluctant to participate in an agreement of unlimited duration.

4. Paragraph 1(b) requires the terms and conditions of the procurement that are known at the stage when the open framework agreement is established to be recorded in the framework agreement (and under article 59 will have been provided in the invitation to become a party to the open framework agreement). This provision is similar to article 58(1)(b) regarding closed framework agreements, but as noted above, some deviations are justified in the light of the nature of subject matters intended to be procured through the open framework agreements. Their nature would not require establishing any terms and conditions of the procurement at the second stage but only the refinement of the established ones, for example as regards the quantity, place and time frame of the delivery of the subject matter. Although the nature of an open framework agreement tends to indicate that the description of the procurement will be framed in functional and broad terms so as to allow refinement to the statement of the procuring entity's needs at the second stage, it is important that it is not so broad that the open framework agreement becomes little more than a suppliers' list. If that were the case, the procuring entity or entities using the framework agreement would be required to conduct or re-conduct stages of the procurement at the second stage (fuller reconsideration of qualifications and responsiveness as well as the evaluation of second-stage submissions), thus defeating the efficacy of the procedure. In addition, the extent of the change in the initial terms of solicitation at the second stage is subject to limitations of article 62. On the other hand, sufficient flexibility is required to allow for changes in the regulatory framework, such as regarding environmental requirements or those pertaining to sustainability.

5. Paragraph (2) requires the periodic re-advertising of the invitation to become a party to the open framework agreement. The invitation must be published, at a minimum, once a year, in the same place as the initial invitation. Nonetheless, enacting States may consider that more frequent publication will encourage greater participation and competition. The electronic operation of the open framework agreement implies purely online publication, including at the first stage under article 32,<sup>11</sup> thus keeping the costs of publication to a reasonable level. The invitation must contain all information necessary for the operation of the framework agreement (including the relevant website, and supporting technical information). The paragraph also requires the procuring entity to ensure unrestricted, direct and full access to the terms and conditions of the framework agreement; the agreement operates online, which means that such information must be available at a website indicated in the invitation. It should also include the names of all suppliers or contractors parties<sup>12</sup> and, as noted above, all procuring entities that may use the framework agreement. Second-stage competitions should also be publicized on that website, as further explained in paragraphs ... below.

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<sup>11</sup> The provision of guidance to the Secretariat is requested on whether this understanding is correct, or when the open framework agreement is established, the notice may be required to be published in paper-based media as well.

<sup>12</sup> The need to disclose the identity of all suppliers or contractors parties to the framework agreement under article 22 may need to be reconsidered in the light of the elevated risks of collusion.

### **Article 61. Second stage of a framework agreement procedure**

1. This article governs second-stage competition under both closed and open framework agreements. Some of its provisions, such as in paragraph (3) intend to accommodate differences in the award of procurement contracts under closed framework agreements without second-stage competition and closed framework agreements with second-stage competition.
2. As paragraph (1) notes, the framework agreement sets out the substantive criteria and certain procedures governing the award of procurement contracts under the framework agreement, and the provisions of this article record the other elements of the award procedures. Thus there is a requirement for full transparency as regards both the award criteria and the procedures themselves.
3. The procedures are aimed at allowing effective competition at this second stage of the procedure, while avoiding excessive and time-consuming requirements that would defeat the efficiency of the framework agreement procedures. These considerations are particularly important in open framework agreements, in which there have been indicative, rather than initial, submissions at the first stage and there has been no evaluation of those submissions.
4. Paragraph (2) records that a procurement contract can be awarded only to a supplier or contractor that is a party to the framework agreement. This may be self-evident as regards closed framework agreements, but in the context of open framework agreements, the provision underscores the importance of swift examination of applications to join the framework agreement itself, and the utility of relatively frequent and reasonable-sized second-stage competitions to take advantage of a competitive and dynamic market. In practice, a second-stage competition will probably be announced on the website for the framework agreement itself, with a relatively short period for presenting final submissions in the second-stage competition. New joiners may wish to present their indicative submissions in time to be considered for the second-stage competition but may be able to participate only in subsequent competitions. The interaction between final submission deadlines, the time needed to assess indicative submissions and the frequency and size of second-stage competitions should be carefully assessed when operating the framework agreement.
5. Paragraph (3) records that article 21 on the award of the procurement contract applies to closed framework agreements without second-stage competition, save as regards the application of a standstill period required under paragraph (2) of that article. The reason for not applying standstill period provisions in the context of closed framework agreements without second-stage competition are [to be completed; see the relevant query in the commentary to article 21(3)(a)].
6. Paragraph (4) sets out the procedures for the second-stage competition. Subparagraph (a) requires the issue of an invitation to the competition to all parties of the framework agreement or only those then capable of meeting the needs of the procuring entity in the subject matter of the procurement. This notice is provided in accordance with the terms and conditions of the framework agreement which may, for instance, allow for automated invitations for efficiency reasons. Best practice is also to provide a copy of the invitation on the website at which the framework agreement itself is located; this may also encourage new suppliers or contractors to participate in the procedure where possible (i.e. in open framework agreements).

7. The provisions of subparagraph (a) require all suppliers or contractors parties to the framework agreement to be invited to participate or, where relevant, only those “capable” of fulfilling the procuring entity’s requirements. The latter should be understood in a very narrow sense, in the light of the terms and conditions of the framework agreement and terms and conditions of initial or indicative submissions, to avoid allowing much discretion on the procuring entity as regards the pool of suppliers or contractors to be invited, which may lead to abuse, such as favouritism. For example, the framework agreement may permit suppliers or contractors to supply up to certain quantities (at each second-stage competition or generally); initial or indicative submissions may state that certain suppliers or contractors cannot fulfil particular combinations or certain quality requirements. The assessment of suppliers or contractors that are “capable” in this sense is therefore objective; all suppliers or contractors parties to the agreement must be presumed to be capable unless the framework agreement or their initial or indicative submissions provide to the contrary.<sup>13</sup> The objectives of this provision are two-fold: first, to avoid abuse or misuse in the award of contracts to favoured suppliers or contractors and, secondly, to limit submissions to those that are capable of fulfilling them to enhance efficiency. The procuring entity should include an explanation in the record of the procurement as to why any suppliers or contractors parties to the agreement are not invited to participate in the second-stage competition; the publication of the invitation on the relevant website will allow for any such exclusion to be challenged.<sup>14</sup> These safeguards are considered critical to ensure that second-stage competition is effective, recalling that experience in the use of framework agreements indicates that this stage of the process is a vulnerable one from the perspective of participation and competition. Vulnerability increases even further since the provisions on the standstill period (article 21(2)) will apply in the case of framework agreements with second-stage competition only to suppliers or contractors that presented second-stage submissions (but not to all parties of the framework agreement).

8. Paragraph (4)(b) regulates the content of the second-stage invitation. Subparagraphs (iii) to (xi) repeat provisions from article 38 on the contents of solicitation documents, guidance on which is found in ... above. In the context of framework agreements, it is important to provide a suitable deadline for presenting submissions: in the context of open framework agreements, for example, it may be expressed in hours or a day or so. Otherwise, the administrative efficiency of the procedure will be compromised, and procuring entities will not avail themselves of

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<sup>13</sup> The guidance reflects the current wording of article 61 (4)(a). However, the suggestion was made in the Working Group that suppliers or contractors should be able to improve their initial submissions, for example by increasing quantities in their second-stage submissions. They would not however have such a chance if they are considered as not capable on the basis of the terms and conditions of their initial/indicative submissions and would be excluded on that ground from participation in the second-stage competition. The provision of guidance to the Secretariat is therefore requested on how the procuring entity will be able to determine objectively which suppliers or contractors are capable and which are not to fulfil purchase orders without knowing the content of second-stage submissions of all suppliers or contractors parties to the framework agreement.

<sup>14</sup> There is not however a substantive requirement in the Model Law to make an invitation to the second-stage competition public. See the immediately following footnote for further explanation.

the technique. The period of time between the issue of the invitation to present second-stage submissions and the deadline for presenting them should be determined by reference to what sufficient time to prepare second-stage submissions will be in the circumstances (the simpler the subject matter being procured, the shorter the possible duration). Other considerations include how to provide a minimum period that will allow a challenge to the terms of solicitation. The time requirement will be in any event qualified by the reasonable needs of the procuring entity, as explicitly stipulated in article 14(2) of the Model Law, which may in limited circumstances prevail over the other considerations, for example, in cases of extreme urgency following catastrophic events. (See also the relevant considerations in paragraph ... above.)

9. Enacting States will observe, however, that there is no requirement to issue a general notice of the second-stage competition, reflecting the presumption that the first stage of framework agreement will have included an open invitation since the default rule under articles 27 and 57(1) is to resort to open tendering. This presumption is however invalid when resort to alternative methods of procurement involving direct solicitation is made for the award of the framework agreement.<sup>15</sup>

10. Subparagraph (i) requires the information that sets the scope of the second-stage competition to be included in the invitation, a vital transparency requirement. Where the invitation is issued electronically (which must be, for example, in open framework agreements), procuring entities may wish to incorporate the required restatement of the existing terms and conditions of the framework agreement by hyperlink (i.e. by cross-reference), provided that the link is adequately maintained. The invitation must also include both the terms and conditions of the procurement that are the subject of the competition and further details thereof where necessary. This provision should be read together with articles 58(1)(d)(i) and (60)(1)(c), which requires the framework agreement to set out the terms and conditions that may be established or refined through second-stage competition. The flexibility to engage in such refinement is limited by application of article 62 which provides that there may be no change to the description of the subject matter of the procurement that is governed by article 10, and that other changes may be made only to the extent permitted in the framework agreement. Where modifications to the products, or technical substitutions, may be necessary, they should be foreshadowed in the framework agreement itself, which should also express needs on a sufficiently flexible and functional basis (within the parameters of article 10) to allow for such modifications. Other terms and conditions that may be refined include combinations of components (within the overall description),

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<sup>15</sup> The need for requiring in the Model Law to give an advance notice of purchase orders placed under framework agreements to all parties of the framework agreement is nevertheless to be considered. This should be considered as an essential safeguard against abuses. This would make the safeguards in the context of framework agreements consistent with those applicable in restricted tendering where ex ante notice of procurement is required to be made public under article 33 (5) of the draft Model Law. Such notice enables suppliers or contractors to challenge their exclusion from the procurement proceedings when resort to restricted tendering is made in particular on the ground listed in article 28(1)(a) (i.e. an assumption by the procuring entity that there is only a limited number of suppliers or contractors capable of delivering the subject matter of the procurement, which may be similar to the assessment by the procuring entity under article 61 (4)(a) of capability of suppliers or contractors parties to the framework agreement to deliver the subject matter).

warranties, delivery times, and so forth. [In practice, the extent of refinement under closed framework agreements is likely to be lesser than that under open framework agreements.]<sup>16</sup> The balance of allowing sufficient flexibility to permit the maximization of value for money and the need for sufficient transparency and limitations to avoid abuse should form the basis of guidance to procuring entities in the use of framework agreements.

11. Subparagraph (ii) requires a restatement of the procedures and criteria for evaluation of submissions, as originally set out in the framework agreement. Again, this provision is aimed at enhancing transparency, and should be read together with articles 58(1)(d)(iii) and 60(1)(f), which allows the relative weights of the evaluation criteria (including sub-criteria) to be varied within a range set out in the framework agreement itself. Appropriate evaluation criteria and procedures at this second stage are critical if there is to be effective competition, objectivity and transparency, and their importance and application are explained in the guidance to article 58 above (see paragraphs ...).

12. Paragraph (4)(c) is derived from the general requirements in article 11(6), requiring objectivity and transparency in the evaluation of submissions by not permitting any previously undisclosed criteria or procedures to be applied during the evaluation.

13. Paragraph (4)(d) recalls the requirements of article 21 regarding notices and associated formalities when the successful submission is accepted (for guidance on those provisions, see ... above). The notice provisions would require that the price of each purchase be disclosed to the suppliers or contractors that presented second-stage submissions, so as to facilitate any challenge by unsuccessful supplier or contractors. It is considered to be good practice to give notice to unsuccessful parties to the framework agreement, such as by individual notification in electronic systems or, in paper-based closed framework agreements without large numbers of participants, as well as by a general publication. In the context of framework agreements, this manner of notification is not only efficient, but can be effective where repeated procurements can benefit from improved submissions, particularly when the notices are accompanied by explanations of why the submissions were unsuccessful or by debriefing procedures. The requirements of article 22, requiring publication of the award, also apply (allowing smaller purchases to be grouped together for publicity purposes, as set out in that article and discussed in the accompanying guidance).

#### **Article 62. No material change during the operation of the framework agreement<sup>17</sup>**

1. This article is intended to ensure objectivity and transparency in the operation of the framework agreement. It first provides that there can be no change in the description of the subject matter of the procurement, because allowing such a change would mean that the original call for participation would no longer be accurate, and a new procurement would therefore be required. The need for flexibility in the operation of framework agreements, such as permitting refinements

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<sup>16</sup> The provision of guidance to the Secretariat on accuracy of the statement is requested.

<sup>17</sup> The need for changing the title of the article to reflect more accurately the content of the article is to be considered.



of certain terms and conditions of the procurement during second-stage competition, means that changes to those terms and conditions (including to the evaluation criteria) need to be possible. The article therefore provides that such changes are permitted, but only to the extent that they do not change the description of the subject matter of the procurement, and with the transparency safeguard that changes are possible only to the extent permitted in the framework agreement. (This policy objective — ensuring objectivity and transparency in the procurement process — also underlies the provisions of article 15(3), which require a re-advertisement of the procurement and an extension of the submission deadline where the solicitation documents are modified to the extent that there is a material inaccuracy in the original advertisement.) As a result, the description of the subject matter of the procurement will commonly be framed in a functional or output-based way, with minimum technical requirements, so as to allow for product modifications or technical substitutions as described in the guidance to the previous articles of this chapter.

### **C. Points regarding framework agreements procedures proposed to be discussed in a section of the Guide to Enactment addressing changes from the 1994 text of the Model Law**

The 1994 Model Law did not make provision for the use of framework agreements. Their use has increased significantly since the date of the adoption of the 1994 Model Law, and in those systems that use them, a significant proportion of procurement may now be conducted in this way. Some types of framework agreement can arguably be operated without specific provision in the Model Law. UNCITRAL considers that the use of framework agreements could enhance efficiency in procurement and in addition enhance transparency and competition in procurements of subject matters of small value that in many jurisdictions fall outside many of the controls of a procurement system. Indeed, the grouping of a series of smaller procurements can facilitate oversight. UNCITRAL therefore has made specific provision for them, to ensure their appropriate use and to ensure that the particular issues that framework agreements raise are adequately addressed.

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