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## **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**

**Note by the Secretariat**

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## **I. Introduction**

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 12 to 85 of document A/CN.9/WG.I/WP.60, which is before the Working Group at its fourteenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments, including the use of framework agreements, in public procurement.

2. This note has been prepared pursuant to the request of the Working Group at its thirteenth session to the Secretariat to revise the draft provisions on the use of framework agreements, and those addressing types, conditions and procedures for the use of framework agreements.<sup>1</sup>

## **II. Draft Guide to Enactment text to addressing the use of framework agreements in public procurement under the Model Law**

3. The text that follows is presented as a narrative description of framework agreements. The Working Group may wish to consider the level of detail of the information set out, which is greater than the guidance provided for many of the provisions of the current text of the Model Law, and also in the light of its preliminary decision that the revised Guide to Enactment should primarily be addressed at legislators and regulators, and that guidance for procuring entities and other users could be located elsewhere or as an appendix or supplement to the Guide itself. A greater level of detail in the Guide may be useful when introducing a relatively novel topic, and would avoid repetition and cross references between sources. On the other hand, the Guide to Enactment text could be more closely aligned with the text of the provisions in the Model Law if less background information were provided. The draft below also includes sub-headings, which do not normally appear in Guide to Enactment text.

### **A. General description of framework agreements procedures**

4. Framework agreements procedures can be described as transactions to effect repeated purchases of a product or service over a period of time, which involve:

(a) The solicitation of tenders or other offers against set terms and conditions;

(b) The examination and evaluation of tenders or other offers and the assessment of suppliers’ qualifications;<sup>2</sup>

(c) Selected suppliers and the procuring entity entering into a framework agreement on the basis of the tenders or other offers. The framework agreement sets

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<sup>1</sup> A/CN.9/648, para. 13.

<sup>2</sup> See A/CN.9/WG.I/WP.62, paras. 3-6 for a discussion of the terminology used here.

out the terms and conditions of future purchases, and is concluded for a given duration (this is the “first stage of the procurement”); and

(d) Subsequent placing of periodic orders with the supplier(s) under the terms of the framework agreement, as particular requirements arise (which may involve a further round of competition, and is the “second stage of the procurement”).

5. Framework agreements are generally used to procure products or services for which a procuring entity has a repeat need over a period of time, but does not know the exact quantities, nature or timing of its requirements. In many cases, the purchases could otherwise be made as a single lot, broken down and awarded over time. In essence, the transactions establish the main terms upon which purchases will be made (or establish the mechanism to be used to establish those terms), but do not set the remaining terms, which may include the quantities to be delivered at any particular time, and in some cases the overall quantity of the procurement and the price. Reference is made in the above description to “suppliers”, but a procuring entity that wishes to conclude a framework agreement with one supplier (for example, to enhance security of supply) can do so.

6. Since the first version of the Model Law was adopted in 1994 (which did not make provision for the use of framework agreements), the use of framework agreements has increased significantly, such that in those systems that use them, a significant proportion of procurement may now be conducted in this way. Some types of framework agreement could arguably be operated without specific provision in the Model Law, but it was considered that specific provision to ensure appropriate use would be necessary to ensure that the particular issues that framework agreements raise are adequately addressed.

## **B. Potential benefits and concerns observed in the use of framework agreement procedures**

7. The main potential benefit of using framework agreements is that framework agreements are administratively efficient because they effectively aggregate procurement proceedings. Under a framework agreement procedure, many steps in the procurement process are undertaken once for what would otherwise be a series of procurements (advertising, assessing suppliers’ qualifications and examining and evaluating tenders or other submissions). With the terms and conditions established before an order is placed, purchases can be made with lower transaction costs and shorter delivery times than would be the case were each purchase tendered separately. Other noted benefits include enhancing transparency and competition for smaller procurements, which are sometimes considered at risk of abuse or failure to achieve value for money because of the less transparent and open ways in which they are often conducted (in many cases because they fall below relevant thresholds). Further, the grouping of a series of smaller procurements can amortize advertising and other costs and can facilitate oversight. Framework agreements can also ensure security of supply, and enable further costs savings to be made through centralized purchasing (that is, a central unit of one entity makes purchases for a number of units, or one entity or consortium makes purchases on behalf of several entities).

8. Thus the use of framework agreements could enhance, in particular, two objectives of the Model Law – transparency and efficiency – particularly for procurements that might otherwise fall outside many of the controls of a procurement system.

9. However, concerns that commentators have raised on the topic include that administrative efficiency may be gained at the expense of other procurement objectives. For example, the use of framework agreements simply to achieve administrative efficiencies can compromise value for money because they are not in fact the appropriate tool for the procurement concerned. Procuring entities may procure through an existing framework agreement that does not quite meet their needs to avoid having to draft their own specifications and terms and conditions, to issue a procurement notice, to examine the qualifications of suppliers, to conduct a full examination and evaluation of tenders and so on.

10. Secondly, experience in their use has indicated significant risks to, or significantly reduced, transparency, competition and value for money in procurement conducted through framework agreements as compared with traditional procurement methods. As regards transparency, the placing of orders at the second stage can be less transparent and more open to abuse than some traditional procurement methods. As regards competition, excluding suppliers that are not parties to the framework agreement can curtail competition, particularly where a monopolistic or oligopolistic market results, and competition once the framework agreement is in place can be difficult to implement in practice. As regards value for money, observers have commented that prices may not remain current and competitive as they tend to remain fixed under a framework agreement, rather than varying with the market, procuring entities tend to overemphasize specifications or quality over price when placing orders under framework agreements and they may fail to assess price and quality sufficiently when placing a particular order. In addition, centralized purchasing entities may have an interest in keeping their fee earnings high by keeping prices high and promoting purchases that go beyond strict needs. These concerns and risks can be elevated where the framework agreements are of longer duration.

11. Thus the approach to the provisions enabling the use of framework agreement procedures under the Model Law is designed to facilitate the appropriate and beneficial use of the technique, but to discourage its use where framework agreement procedures are not in fact appropriate. For example, the procedures can be appropriate for commodity-type purchases, such as stationery, spare parts, information technology supplies and maintenance, which are normally regular purchases for which quantities may vary, and for the purchase of items from more than one source, such as electricity, and for items for which the need can sometimes arise on an emergency basis, such as medicines, and to ensure security of supply in procurement. On the other hand, complex procurement for which the terms and conditions (including specifications) vary for each purchase would not be suitable for this technique, such as large investment or capital contracts, highly technical or specialized items, and more complex services procurement.

## C. The framework agreement

12. A framework agreement, depending on its terms and conditions and the law that governs agreements by procuring entities in the enacting State concerned, may be a binding contract. Nonetheless, for the purposes of article 2 (g) of the Model Law, it is not treated as a procurement contract. The procurement contract for the purposes of article 2 (g) of the Model Law is concluded at the second stage of the procedure, when the procuring entity issues an acceptance notice (that is, the procuring entity accepts the supplier's offer to supply the amount requested by the procuring entity at that stage) in accordance with article [13/36] of the Model Law. Thus the provisions regulating the use of framework agreements cover both the first and second stages of the procurement concerned.

13. The framework agreement procedure can take one of three forms:

(a) A "closed" framework agreement procedure, involving a framework agreement concluded with one or more suppliers, and in which the specification for, and all terms and conditions of, the procurement are set out in the framework agreement. As a result, there is no further competition between the suppliers at the second stage of the procurement, and the only difference of this type of framework agreement procedure as compared with traditional procurement procedures is that the items are purchased in batches over a period of time ("Type 1" framework agreements);

(b) A "closed" framework agreement procedure, involving a framework agreement concluded with more than one supplier, and which sets out the specification, and the main terms and conditions of, the procurement. A further competition among the supplier-parties to the framework agreement is required to award the procurement contract at the second stage of the procurement ("Type 2" framework agreements);

(c) An "open" framework agreement procedure, involving a framework agreement concluded with more than one supplier and involving second-stage competition between the supplier-parties ("Type 3" framework agreements). This type of framework agreement is intended to provide for commonly used, off-the-shelf goods or straightforward, recurring services that are normally purchased on the basis of the lowest price. [Add commentary on whether these agreements must operate electronically, or encourage electronic operation, so as to maximise the advantages that the system can bring, depending on the Working Group's resolution as to whether they can operate non-electronically].

14. Type 1 and 2 framework agreements are "closed" in that no suppliers or contractors can become parties to the framework agreement after the first stage of the procurement. Type 3 framework agreements are "open" to new suppliers throughout the duration of the framework agreement.

15. A Type 1 framework agreement can be concluded with one supplier, but Type 2 framework agreements that theoretically could be concluded with one supplier are considered to be at significant risk of abuse, in that they would involve inviting that one supplier to improve its offer for a particular purchase under the framework agreement. Thus Types 2 and 3 framework agreements under the Model Law must be concluded with more than one supplier.

16. The main differences between the types of framework agreement procedure at the first stage are [add commentary addressing the extent of first stage competition, depending on the Working Group's resolution of the question of whether the first stage is competitive for some or all types of framework agreement]. The procuring entity is also required to justify the choice of the type of framework agreement procedure in the record of the procurement [elaborate to address the impact of selecting the first stage level of competition]. The main differences at the second stage is that Types 2 and 3 framework agreements involve a second stage competition between all supplier-parties to the framework, or all those capable of fulfilling the need of the procuring entity at issue (the procedures for which are set out in [cross reference]).

17. There are additional provisions governing the use of Type 3 framework agreement procedures [cross-refer to relevant guidance], designed to ensure that the framework agreements themselves remain fully open to new joiners throughout their duration, and that their existence is adequately publicised so that potential suppliers or contractors are aware of them. Thus there must be a permanent notice on a procuring entity's website of the existence of a Type 3 framework agreement that operates using electronic means [and regular re-publication of the initial notice of the framework agreement procedure for Type 3 framework agreement procedure that is not operated electronically, in each case] including all the information required when first publishing a notice to participate in the relevant procurement. Procuring entities are required to assess new joiners' qualifications and examine [and evaluate] their submissions within a reasonable time. The Model Law does not prescribe the relevant time, which enacting States should include in their legislation to accord with then prevailing circumstances in the jurisdiction concerned. [discuss improvement of offers, whether procuring entity needs to approve them, to reflect the Working Group's deliberations of the provision in article 51 undecies (7)]

18. [add provisions relating to maximum number of parties to a Type 3 framework agreement procedure, to reflect the deliberations of the Working Group].

#### **D. Controls over the use of framework agreements procedures**

19. Controls over the use of framework agreements procedures are included in the text of the Model Law to address the concerns set out above. There are conditions for the use of framework agreement procedures, and mandatory procedures for conducting them. A procuring entity that wishes to use a framework agreement procedure will be required to follow one of the procurement methods of the Model Law to select the suppliers to be parties to the framework agreement (the first stage). In addition, the procedures themselves have been drafted to ensure sufficient competition where a second round of competition is envisaged by extending the provisions of the Model Law to the second stage of the procurement. However, the Working Group has sought to avoid limiting the usefulness of framework agreements and their administrative efficiency by formulating too many conditions for their use or too many inflexible procedures.

20. Practical experience in the operation of framework agreements indicates that the value for money to be obtained through their use is maximized where procuring entities make full use of them to make their purchases, rather than conducting new

procurements for the products or services concerned. Where such full use is observed, suppliers and contractors should have greater confidence that they will receive orders to supply the procuring entity, and should give their best prices and quality offers accordingly. On the other hand, the provisions do not require the procuring entity to use the framework agreement, for all subsequent purchases that could be made under it, allowing commercial considerations to dictate the extent of use. Nonetheless, the terms of the framework agreement itself may limit commercial flexibility if guaranteed minimum quantities are set out as one of its terms, though this flexibility should be set against the better pricing from suppliers.

#### **E. Limitation on the duration of the framework agreement**

21. The Model Law includes a provision to limit the duration of the framework agreements. Since no supplier or contractor may be awarded a procurement contract under the framework agreement without being a party to the framework agreement, framework agreements have a potentially anti-competitive effect. Ensuing full competition for the purchases envisaged on a periodic basis, by limiting the duration of a framework agreement and requiring subsequent purchases to be reopened for competition is generally considered to assist in limiting the anti-competitive potential. [The enacting State sets its own limit (i.e. no stated limit is set out in the Model Law itself). Practical experience in those jurisdictions that operate framework agreements indicates that the potential benefits of the technique are generally likely to arise where they are sufficiently long-lasting to enable a series of procurements to be made, such as a period of 3-5 years]. Thereafter, the anti-competitive potential may arise, and the terms and conditions of the framework agreement may no longer reflect current market conditions. As different types of product or service may change more rapidly, especially where technological developments are likely, and the appropriate period for each procurement may therefore be significantly shorter than the maximum. Enacting States are therefore encouraged to provide guidance on appropriate durations for particular procurement types, and may also wish to encourage procuring entities themselves to assess on a periodic basis during the currency of the framework agreement whether its terms and conditions remain current.

#### **F. Transparency requirements**

22. The solicitation documents for a framework agreement procedure must follow the normal rules: that is, they must set out the terms and conditions upon which suppliers are to provide the goods, construction or services to be procured, the criteria that will be used to select the successful suppliers or contractors, and the procedures for the award of procurement contracts under the framework agreement. The information required will also include the total quantity or minimum and maximum quantities for the purchases envisaged under the framework agreement, to the extent that they are known at the first stage of the procurement, failing which estimates should be provided. This information is required to enable suppliers or contractors to understand the extent of the commitment required of them, which itself will enable the submission of the best price and quality offers. Thus, the normal safeguard that all the terms and conditions of the procurement (including the

specifications and whether the selection of suppliers will be based on lowest-price or lowest evaluated tender or other offer) must be pre-disclosed also applies. This information must be repeated in the framework agreement itself, or, if it is feasible and would achieve administrative efficiency, and the legal system in the jurisdiction concerned treats annexes as an integral part of a document, the solicitation documents can be annexed to the framework agreement.

23. The solicitation documents and framework agreements either set out all the terms and conditions of the procurement, with only delivery times and quantities to be set when individual purchases are made and, where necessary, also set out those other terms and conditions that will be established when individual purchases at the second stage of the procurement [cross reference to guidance on second-stage procedures].

24. The “nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate” (description taken from article 27 (d) of the Model Law) are part of those terms and conditions, as are the procedures that will apply for making purchases at the second stage. Thus the solicitation documents and the framework agreement will make it clear either that there will be second-stage competition, and in respect of which terms and conditions, or make the basis upon which non-competitive second-stage purchases will be made. [Cross-refer to commentary about choosing how to allocate purchases at the second stage under Type 1 framework agreements].

25. One feature of selection that is more complex in the context of framework agreements than traditional procurement is the relative weight to be applied in the selection criteria for both stages of the procurement, if any. Particularly where longer term and centralized purchasing are concerned, there may be benefits in terms of value for money and administrative efficiency in permitting the procuring entity to set the relative weights and their precise needs only when making individual purchases (that is, at the second stage of the procedure). On the other hand, transparency considerations, objectivity in the process, and the need to prevent changes to selection criteria during a procurement are central features of the Model Law designed to prevent the abusive manipulation of selection criteria, and the use of vague and broad criteria that could be used to favour certain suppliers. Permitting changes to relative weights during the operation of a framework agreement might facilitate non-transparent or abusive changes to the selection criteria.

26. The Model Law seeks to address these competing objectives by providing that relative weights at the second stage can be varied within a pre-established range or matrix set out in the solicitation documents, and provided that the variation does not lead to a material change to the terms and conditions, including the specifications and overall selection criteria.

27. The conditions for use also require the framework agreement to be in writing, in order to ensure that the terms and conditions are set out clearly for all parties. Enacting States may wish to permit the use of individual agreements between the procuring entity and each supplier that is a party, so as to allow for minor changes in terms and conditions that may be required for intellectual property reasons, where suppliers have submitted offers for only part of the procurement, or other reasons,



provided that the minor changes taken together do not constitute a material departure from the terms and conditions applicable to all suppliers or contractors. In addition, where framework agreements to which there are several supplier-parties concerned, each supplier-party will wish to know the extent of its commitment both at the outset and periodically during its operation (such as after a purchase is made under the framework agreement). Enacting States may also wish to encourage procuring entities to inform the suppliers or contractors about the extent of their commitments [add commentary about the extent/duration of commitment, and cross-refer to second-stage notice provisions]. Finally, where framework agreements are to operate electronically, the solicitation documents must contain all the information necessary to allow their effective operation (such as any technical requirements and connection arrangements, and the website or similar address of the procuring entity where information regarding the procurement is publicized. [cross-refer to discussion of websites in e-procurement])

## **G. Publicity requirements**

28. Concerns have been voiced that the normal publicity mechanisms under procurement systems may not apply to framework agreements (because they are not procurement contracts) and to some procurement contracts under them (if they are under the publication threshold). The Model Law addresses these concerns by providing that the conclusion of a framework agreement must be published as if it were a contract award under the Model Law.<sup>3</sup> [add discussion of the information to be published, depending on the Working Group's decision in this regard]. In addition, where the price of a procurement contract or purchase order concluded under a framework agreement exceeds an amount to be set in each enacting State, the procuring entity must promptly publish a notice of the award. In addition, the procuring entity must publish periodic notices of all procurement contracts awarded under a framework agreement. These requirements are additional to the notifications that are to be provided to all supplier-parties to the framework agreement when a purchase is made [cross-refer to relevant provisions].

## **H. General conditions for use of framework agreement procedures**

### **1. Decision to conduct a procurement using a framework agreement procedure**

29. The procuring entity is required to consider whether a framework agreement procedure is appropriate for the procurement envisaged and must record the reason for using a framework agreement procedure in the mandatory record of the procurement. The Model Law provides that a procuring entity may procure through a framework agreement procedure in prescribed conditions, including where the requirement to be procured is anticipated to be recurring, or where the nature of procurement is such that the need for the items concerned is likely to arise on an

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<sup>3</sup> The Working Group has agreed that Article 14 of the Model Law, which envisages a threshold below which advertisement is not required, will be amended to accommodate framework agreements by providing that it is the aggregate amount under the framework agreement that is the relevant amount, not the amount of individual purchase orders or amount awarded to an individual supplier.

urgent basis during the term of the framework agreement (for example, emergency medical procurement following a catastrophe), and to ensure security of supply. Thus, a framework agreement procedure can enhance proper procurement planning and avoid unnecessary use of “emergency” procedures in non-emergency situations. The nature of the procurement concerned will dictate whether a framework agreement procedure is appropriate for the particular procedure concerned [cross-refer to earlier commentary on the types of procurement that are and are not suitable] in addition to whether it is permitted under the Model Law, and enacting States may wish to provide guidance on the decision concerned to procuring entities.

## **2. Requirement to follow one of the procurement methods of the Model Law at the first stage of a framework agreement procedure**

30. A procuring entity that wishes to conclude a framework agreement is required to follow one of the mandated procurement procedures under the Model Law to select the supplier(s) to be parties to the envisaged framework agreement with the procuring entity: that is, to follow open procurement proceedings, so as to ensure rigorous competition at that first stage of the procurement proceedings. Thus, procuring entities should normally use the Model Law’s tendering proceedings or the services equivalent as for any other procurement. In order to facilitate the use of framework agreements to protect sources of supply in limited markets, the swift and cost-effective procurement of low-cost, repeated and urgent items, such as maintenance or cleaning services, for which open tendering procurements may not be cost-effective, other methods can be used where they are justified in accordance with Chapter II of the Model Law. Since one of the other procurement methods will be used for this stage of the procurement, the provisions addressing framework agreement procedures [If the Working Group decides to require open procedures for open framework agreements, add further comment here. Add discussion of the importance of competition at the first stage, so as to ensure that the result is a framework agreement rather than a suppliers’ list, including commentary on minimum and maximum numbers of parties, the basis of selection and ranking, depending on the results of the Working Group’s deliberations on these issues].

31. At the end of the first stage, the provisions require the procuring entity both to notify all suppliers that have been selected to be parties to the framework agreement of their selection, and to publish a notice of the conclusion of the framework agreement (identifying those parties [add any other requirements] as if it were a procurement contract under the Model Law. In addition, where Type 3 framework agreements are concerned, the procuring entity must provide a permanent or periodic notice of the existence of the framework agreement [cross-refer to relevant commentary].

## **3. Second stage of the framework agreement procedure**

32. The procuring entity under a Type 1 framework agreement procedure awards a procurement contract by selecting the submission of the successful supplier. Where there is more than one supplier-party to the framework agreement [add details of how that selection takes place, permitted and non-permitted methods], and the procuring entity applies the terms and conditions of the framework agreement. Safeguards are included in the provisions to ensure that the framework agreement is not materially altered at this second stage, that the supplier selected for the purchase

must be a party to the framework agreement, and that purchases made under it are in accordance with its terms and conditions. There are publicity and notice provisions similar to those for framework agreements themselves, requiring in addition that the price of each purchase be disclosed to the supplier-parties to the framework agreement, but allowing smaller purchases to be grouped together for publicity purposes.

33. Under a Type 2 or Type 3 framework agreement, the provisions regulate the conduct of the second-stage competition to select the supplier for the purchase, requiring a written invitation to [tender], providing all pertinent information including the relative weight of the selection criteria in accordance with the range set out in the solicitation documents and any more precise terms and conditions where necessary, and affording suppliers adequate time to prepare their [tenders]. The invitation to [tender] cannot vary the pre-disclosed terms and conditions of the procurement beyond fixing the relative weights, where necessary. The [tenders] must be evaluated in accordance with the criteria pre-disclosed at the first stage (subject to the fixing of any relative weight within the permitted range) and the successful supplier advised by notice of its selection. Unless the procuring entity exercises its right to reject all [tenders], reject an abnormally low [tender] or otherwise cancel the procurement, the acceptance of the successful [tender] and issue of that notice concludes the procurement contract. The same safeguards and publicity requirements apply as for Type 1 framework agreement procedures.

34. The above procedures are designed to underscore a key element required to ensure that the use of framework agreement procedures does not compromise the objectives of a procurement system: that is, to ensure effective competition at the second stage of the procurement. The need to ensure effective competition is reflected in the requirement that all supplier-parties to the framework agreement must be invited to submit tenders at the second stage, unless they have not submitted tenders for the relevant part of the procurement at the first stage, or otherwise cannot fulfil the proposed procurement contract for capacity or similar reasons, and that all supplier-parties to the framework agreement not invited to submit tenders are nonetheless notified of upcoming purchase orders under the framework agreement. This notice will allow suppliers excluded from the second-stage competition to challenge the exclusion at an early stage, before the procurement contract is concluded.

35. [address review mechanisms under article 52]

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