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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – a revised text of the Model Law

Note by the Secretariat

Addendum

This note sets out a proposal for a consolidated article on request for proposals and competitive negotiations, which the Working Group had before it but did not consider at its fifteenth session (A/CN.9/668, paras. 210-212), as an alternative to the provisions from the 1994 Model Law on the procedures for request for proposals and competitive negotiation. It also contains proposed provisions for chapters V (Conditions for use of and procedures for electronic reverse auctions) and VI (Framework agreements procedures).¹

The Working Group's attention is drawn to draft articles 48 and 50, the consideration of which was deferred by the Working Group to a later stage.

The Secretariat's comments are set out in the accompanying footnotes.

¹ At its fifteenth session, the Working Group agreed to consider drafting suggestions for the chapter on framework agreements procedures that would allow for negotiations in the context of framework agreements. It was agreed that the drafting of the relevant provisions should be undertaken together with the drafting of a revised chapter IV (A/CN.9/668, para. 224).



CHAPTER IV. CONDITIONS FOR USE OF AND PROCEDURES FOR TWO-STAGE TENDERING, REQUEST FOR PROPOSALS AND COMPETITIVE NEGOTIATION

(continued)

[Article [39]. Competitive negotiation²

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(2) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(3) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of [economy and efficiency] [economy or efficiency] [economic efficiency]³ the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(4) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) The relative managerial and technical competence of the supplier or contractor;

(b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

² The proposed article was before the Working Group at its fifteenth session. It consolidated the articles on request for proposals and competitive negotiation (articles 48 and 49 of the 1994 Model Law) on the ground that requests for proposals were typically the solicitations used to launch competitive negotiations (A/CN.9/668, para. 211). The Working Group decided to defer the consideration of the proposed article together with other provisions of chapter IV to a later stage (A/CN.9/668, para. 212). The Working Group may wish to consider that the merger of these two articles would eliminate the significant degree of flexibility currently provided for in the article on competitive negotiation (article 49 of the 1994 Model Law). The Working Group may also wish to consider that whether, and if so how, the provisions of article 44 of the 1994 Model Law on selection procedure with consecutive negotiations should be incorporated in the revised Model Law. The proposed merged article incorporates only the selection procedure with simultaneous negotiation.

³ The Working Group may wish to consider which of the three terms in square brackets should be retained in the provisions, in the light of the proposed article 7 (3) (that uses the term “economic efficiency”) and the existing provisions of the Model Law (that is not consistent in the use of the other two terms) (see articles 20 and 48 (2)).

(c) The price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.⁴

(5) A request for proposals issued by a procuring entity shall include at least the following information:

(a) The name and address of the procuring entity;

(b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;⁵

(c) The criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal;⁶ and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(6) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(7) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.⁷

(8) The procuring entity [may] [shall]⁸ engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential;⁹

(b) Subject to article [22], one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;¹⁰

⁴ The Working Group may wish to consider that the provisions of this paragraph repeat article 12 and therefore should be deleted.

⁵ The Working Group may wish to consider that the subparagraph should be amended in the light of the new definition of “description” in article 2, the proposed article 11 and the revisions made to the similar provisions appearing in the context of the tendering proceedings (article 27 (d)).

⁶ The Working Group may wish to consider whether the subparagraph should be amended to conform to the proposed article 12 and the revisions made to similar provisions appearing in the context of tendering proceedings (article 27 (e)).

⁷ The Working Group may wish to consider that the provisions of this paragraph repeat the proposed article 21 and therefore should be deleted.

⁸ The Working Group may wish to consider that in the light of paragraph (1) of the proposed article, the word “shall”, not “may” as proposed, should be used.

⁹ The Working Group may wish to consider that the provisions of this paragraph repeat the proposed article 21 and are therefore unnecessary.

¹⁰ Ibid.

(c) The opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(9) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(10) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article [22], one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.¹¹

(11) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.¹²

(12) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) Only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(13) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.”¹³]

¹¹ Ibid. In addition, the Working Group may wish to consider that the provisions are already addressed in paragraph (8).

¹² The Working Group may wish to consider whether the second sentence of this paragraph overlaps with the proposed paragraph 13 of this article and therefore may be deleted.

¹³ The Working Group may wish to consider whether the paragraph should be conformed to the proposed articles 12 and 19, and whether it accurately applies the definition of the successful submission in article 2.

CHAPTER V. [CONDITIONS FOR USE OF AND PROCEDURES FOR] ELECTRONIC REVERSE AUCTIONS

Article 41. Conditions for use of electronic reverse auctions¹⁴

(1) A procuring entity may engage in procurement by means of an electronic reverse auction, or may use an electronic reverse auction to determine the successful submission in other methods of procurement, as appropriate, in accordance with the provisions of this chapter and under the following conditions:

(a) Where it is feasible for the procuring entity to formulate detailed and precise descriptions for the subject matter of the procurement;

(b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction such that effective competition is ensured; and

(c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

(2) The electronic reverse auction shall be based on:

(a) Price, where the procurement contract is to be awarded to the lowest price; or

(b) Prices and other criteria to be used by the procuring entity in determining the successful submission, specified in accordance with article [12] and as set out in the notice of the electronic reverse auction, where the procurement contract is to be awarded to the lowest evaluated submission.

(3) Where the procurement contract is awarded on the basis of the lowest evaluated submission, the electronic reverse auction shall be preceded by a full assessment of responsiveness and evaluation of initial submissions in accordance with the criteria to be used by the procuring entity in determining the successful submission and the relative weight of such criteria, as specified in accordance with article [12] and as set out in the notice of the electronic reverse auction. The invitation to the electronic reverse auction shall be accompanied by the outcome of the full assessment of responsiveness and evaluation of initial submissions in accordance with the provisions of article [44 (4)].

Article 42. Procedures for soliciting participation in procurement involving the use of electronic reverse auctions¹⁵

(1) Where an electronic reverse auction is to be used as a [stand-alone] procurement method, the procuring entity shall cause a notice of the electronic

¹⁴ The Working Group, at its fifteenth session, approved the article as revised at that session (A/CN.9/668, para. 216).

¹⁵ The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 222).

reverse auction to be published in accordance with procedures of article [24] of this Law.

(2) Notwithstanding paragraph (1) of this article, where the procurement proceedings are limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law, the procuring entity shall not be required to employ the procedures set out in articles 14 (1) (c), 24 (2), [25 (h) and (i), and 27 (j), (k) and (s)] of this Law.¹⁶

(3) Where an electronic reverse auction is to be used in other methods of procurement, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings, as appropriate, that an electronic reverse auction will be held.¹⁷

Article 43. Contents of the notice of the electronic reverse auction¹⁸

(1) The notice of the electronic reverse auction shall include, at a minimum [and in addition to other information required for the procurement method concerned], the following:

(a) Where the auction is to be used as a [stand-alone] procurement method, information referred to in article [25 (a), (d) and (e), and article 27 (d), (f), (h) to (j) and (t) to (y);]

(b) The criteria to be used by the procuring entity in determining the successful submission, including any criteria other than price to be used, the relative weights of all criteria, the mathematical formula to be used in the evaluation procedure and indication of any criteria that cannot be varied during the auction;¹⁹

(c) How the electronic reverse auction can be accessed; and information about the electronic equipment being used and technical specifications for connection;

(d) The manner and, if already determined, deadline by which the suppliers and contractors shall register to participate in the auction;

¹⁶ The Working Group may wish to consider whether there should be an explicit statement of the provisions of the Model Law that would apply to auctions as a stand-alone procurement method, in addition to those of general application (in Chapters I and VII). Some other provisions, such as those referred to in article 43 (1) (a), are expressly applied in this article, but the Working Group may consider that there may be some uncertainty as to the extent to which, for example, the relevant provisions of Chapters II and III apply. See, for example, footnote 20 below.

¹⁷ The Working Group may wish to consider whether an express statement that this notification constitutes the notice of an electronic reverse auction for the purposes of the next article is required.

¹⁸ The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 222).

¹⁹ The Working Group may wish to consider whether an express cross-reference to proposed article 12 and making provision for a mathematical formula might be preferable to the current formulation, in order to avoid any perceived difference or inconsistency between this provision and proposed article 12.

(e) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;

(f) Whether there will be only a single stage of the auction, or multiple stages (in which case, the number of stages and the duration of each stage); and

(g) The rules for the conduct of the electronic reverse auction, including the information that will be made available to the bidders in the course of the auction and the conditions under which the bidders will be able to bid.

(2) Where the auction is to be used as a [stand-alone] procurement method, the procuring entity may decide to impose a minimum and/or maximum on the number of suppliers or contractors to be invited to the auction on the condition that the procuring entity has satisfied itself that in doing so it would ensure that effective competition and fairness are maintained. In such case, the notice of the electronic reverse auction shall state such a number and, where the maximum is imposed, the criteria and procedure that will be followed in selecting the maximum number of suppliers or contractors.²⁰

(3) The procuring entity may decide that the electronic reverse auction shall be preceded by prequalification [in accordance with article [15]]. In such case, the notice of the electronic reverse auction shall contain the invitation to pre-qualify [and include the information referred to in article [15 (3).]]²¹

(4) The procuring entity may decide that the electronic reverse auction shall be preceded by an assessment as to whether the submissions are responsive. In such case, the notice of the electronic reverse auction shall contain an invitation to present initial submissions and include information referred to in articles [25 (f) to (j) and 27 (a), (k) to (s) and (z)] and information on procedures to be used in such assessment.

(5) Where both a full evaluation of initial submissions and an assessment of responsiveness are required in accordance with the provisions of article [41 (3),] the notice of the electronic reverse auctions shall contain an invitation to present initial submissions and shall include the information referred to in articles [25 (f) to (j) and 27 (a), (k) to (s) and (z)] and information on procedures to be used in such evaluation.

Article 44. Invitation to participate in the electronic reverse auction²²

(1) Except as provided for in paragraphs (2) to (4) of this article, the notice of the electronic reverse auction shall serve as an invitation to participate in the auction and shall be complete in all respects, including as regards information specified in paragraph (5) of this article.

²⁰ The Working Group may wish to ensure consistency between this provision and the provisions on limiting numbers in proposed article 34.

²¹ The Working Group may wish to consider whether the provisions of the entire proposed article 15 (Prequalification) should be applied by cross-reference, or whether the more limited cross reference to the article 15 (3) would be sufficient.

²² The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222).

(2) Where a limitation on the number of suppliers or contractors to be invited to the auction has been imposed in accordance with article [43 (2),] the procuring entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor selected corresponding to the number, and in accordance with the criteria and procedure, specified in the notice of the electronic reverse auction.²³

(3) Where the auction has been preceded by prequalification of suppliers or contractors in accordance with articles [15 and 43 (3),] the procuring entity shall:

(a) Promptly notify each supplier or contractor concerned whether or not it has been pre-qualified, and where a supplier or contractor that has not been pre-qualified so requests, promptly communicate to that supplier or contractor the grounds for the decision not to pre-qualify;²⁴

(b) Send the invitation to participate in the auction individually and simultaneously to each supplier or contractor pre-qualified in accordance with article [15] of this Law.

(4) Where the auction has been preceded by an assessment of responsiveness or full evaluation of initial submissions [in accordance with articles [[11], [12], 26, 28 to 30, 31 (1), 32 (1) and (2) and 43 (4) and (5),] the procuring entity shall:

(a) Promptly notify each supplier or contractor concerned whether or not its submission is responsive. Where a supplier or contractor's submission is not responsive, and is accordingly rejected in accordance with article [32 (3)], the procuring entity shall, upon request, promptly communicate to the supplier or contractor concerned the grounds upon which its initial submission was considered to be non-responsive;²⁵

(b) Send an invitation to participate in the auction individually and simultaneously to each supplier or contractor whose initial submission was responsive. The procuring entity shall also notify each supplier or contractor concerned of the outcome of any full evaluation of its respective initial submission.²⁶

(5) Unless already provided in the notice of the electronic reverse auction, the invitation to participate in the auction shall set out:

²³ The Working Group may wish to consider whether the text or the Guide should explain that, if there are fewer participants than the maximum permitted number, that all must be invited to participate.

²⁴ Additional provision to ensure consistency with proposed article 15. As noted in footnote 21 above, the Working Group may wish to apply the provisions of the entire article 15 to this procedure, in which case this additional provision would no longer be necessary. The Working Group may wish to explain in the Guide that the notice that the supplier was pre-qualified can be included in the invitation to participate (and similarly as regards any responsiveness assessment and the outcome of any full evaluation).

²⁵ Additional provision to ensure consistency with proposed article 15. As noted in footnote 21 above, the Working Group may wish to apply the provisions of the entire article to this procedure, in which case this additional provision would no longer be necessary.

²⁶ The Working Group may wish to consider what guidance should be given in the Guide addressing the extent of the information on the outcome of the full evaluation should be provided. See, also, footnote 30, below.

- (a) The deadline by which the invited suppliers and contractors shall register to participate in the auction;
 - (b) The date and time of the opening of the auction;
 - (c) The requirements for registration and identification of bidders at the opening of the auction;
 - (d) Information concerning individual connection to the electronic equipment being used; and
 - (e) All other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction.
- (6) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction in accordance with this article is sufficient to guarantee effective competition.

Article 45. Registration to participate in the electronic reverse auction and timing of holding of the auction²⁷

- (1) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.
- (2) If the number of suppliers or contractors registered to participate in the auction is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity may cancel the electronic reverse auction. The fact of the cancellation of the auction shall be promptly communicated individually to each registered supplier or contractor.
- (3) The auction shall not take place before expiry of adequate time after the notice of the electronic reverse auction has been issued or, where invitations to participate in the auction are sent, from the date of sending the invitations to all suppliers or contractors concerned. This time shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.²⁸

Article 46. Requirements during the auction²⁹

- (1) During an electronic reverse auction:
 - (a) All bidders shall have an equal and continuous opportunity to present their submissions;

²⁷ The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222).

²⁸ The words “taking into account the reasonable needs of the procuring entity” were added to ensure consistency with other similar provisions of the Model Law (see, e.g., articles 15 (3) (i) and 29 (1) of this draft).

²⁹ The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222).

(b) There shall be automatic evaluation of all submissions in accordance with the criteria and other relevant information included in the notice of the electronic reverse auction;

(c) Each bidder must instantaneously and on a continuous basis during the auction receive sufficient information allowing it to determine the standing of its submission vis-à-vis other submissions;³⁰

(d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.

(2) The procuring entity shall not disclose the identity of any bidder during the auction.

(3) The auction shall be closed in accordance with the criteria specified in the notice of the electronic reverse auction.

(4) The procuring entity shall suspend or terminate the electronic reverse auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the electronic reverse auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.

Article 47. Requirements after the auction³¹

(1) The submission ascertained at the closure of the auction to be the lowest price or the [lowest] [best]³² evaluated submission, as applicable, shall be the successful submission.

(2) Whether or not it has engaged in prequalification proceedings pursuant to article [15], the procuring entity may require the bidder presenting the submission that has been found at the closure of the auction to be the successful submission to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article [10]. If the bidder fails to do so, the

³⁰ The Working Group, at its fifteenth session, approved the subparagraph without change but agreed that the Guide would highlight the risks of collusion that might arise where information about other bids is provided, and would provide examples of existing good practice to mitigate these risks.

³¹ The Working Group, at its fifteenth session, approved the article subject to the consideration at a later stage of the use of the term “the best evaluated submission” in place of the term “the lowest evaluated submission” (A/CN.9/668, para. 222). See the footnote immediately below.

³² At the Working Group’s fifteenth session, it was suggested that the term “the lowest evaluated submission” should be replaced with the term “the best evaluated submission”, since in practice it was the highest or the best, not the lowest, evaluated submission that was accepted. The provisions, it was pointed out, as drafted at present, might cause unnecessary confusion. The Working Group noted that the suggested change should be considered in conjunction with other provisions of the Model Law. It was also pointed out that the term was used in the 1994 text. The Working Group deferred the consideration of the issue to a later stage (A/CN.9/668, paras. 220 and 222). The same issue is discussed in the context of proposed articles 12 and 32 (4) (b) (ii) of this draft. The Working Group may wish therefore to conform its use of this and similar notions throughout the Model Law. See also the related discussion in A/CN.9/WG.I/WP.68, under section II.B.1.

procuring entity shall reject that submission. Unless the procuring entity decided, in accordance with article [16 (1)], to reject all remaining submissions, it shall select the submission that at the closure of the auction was the next lowest price or next [lowest] evaluated submission, provided that the bidder that presented that submission can demonstrate its qualifications if required to do so.

(3) Where it has not assessed responsiveness of initial submissions prior to the auction, the procuring entity shall assess after the auction the responsiveness of the submission that at the closure of the auction has been found to be the successful submission. The procuring entity shall reject the submission if that submission is found to be unresponsive. Unless the procuring entity decided, in accordance with article [16 (1)], to reject all remaining submissions, it shall select the submission that at the closure of the auction was the next lowest price or next [lowest] evaluated submission, provided that this submission is found to be responsive.

(4) The procuring entity may engage in procedures described in article [17] if the submission that at the closure of the auction has been found to be the successful submission gives rise to concerns as to the ability of the bidder that presented that submission to perform the procurement contract. If the procuring entity rejects the submission on the grounds specified in article [17], it shall select the submission that at the closure of the auction was the next lowest price or next [lowest] evaluated submission, subject to the right of the procuring entity, in accordance with article [16 (1)], to reject all remaining submissions.

CHAPTER VI. FRAMEWORK AGREEMENTS PROCEDURES³³

Article 48. Conditions for use of a framework agreement procedure³⁴

(1) A procuring entity may engage in a framework agreement procedure in accordance with this chapter where it determines that:

(a) The need for the subject matter of the procurement [is expected to/will] arise on a [repeated or indefinite]³⁵ basis during a given period of time; or

³³ At the Working Group's fifteenth session, the view was expressed that it might be necessary to allow for negotiated procedures subsequent to the conclusion of the framework agreements. It was suggested that drafting of the provisions allowing for negotiations in the context of framework agreements should be undertaken together with chapter IV. The Working Group agreed with these suggestions (A/CN.9/668, para. 224).

³⁴ The Working Group, at its fifteenth session, agreed to remove to article 2 the definitions proposed to be included in this article in the note by the Secretariat (A/CN.9/WG.I/WP.66/Add.4) (A/CN.9/668, paras. 229 and 273 (f)). The Working Group deferred the consideration of other revisions proposed to be made to the draft article to a later stage (A/CN.9/668, para. 229).

³⁵ One of the issues deferred by the Working Group was a proposal presented at the fifteenth session to reconsider the inclusion and extent of conditions for use (A/CN.9/668, paras. 227-229). The alternatives in square brackets were provided by participants at the session to the Secretariat, for further consideration by the Working Group, with the comment that the term "indefinite" indicates unknown timing and/or unknown quantities.

(b) By virtue of the nature of the subject matter of the procurement, the need for it may arise on an urgent basis during a given period of time; or

[(c) Other grounds and circumstances that justify recourse to a framework agreement procedure.]³⁶

(2) The procuring entity shall include in the record required under article [22] of this Law a statement of the grounds and circumstances upon which it relied to justify the recourse to a framework agreement procedure and the type of framework agreement selected.³⁷

Article 49. Information to be specified when first soliciting participation in a framework agreement procedure³⁸

When first soliciting the participation of suppliers or contractors in a framework agreement procedure, the procuring entity shall specify:

(a) The name and address of the procuring entity;

(b) That the procurement will be conducted as a framework agreement procedure;

(c) The type of the framework agreement to be concluded – a closed or open framework agreement; if closed, whether it is with or without second-stage competition; and, if closed without second-stage competition, whether it is to be concluded with one or more than one supplier or contractor;³⁹

(d) All minimum information required to be included in the framework agreement in accordance with article [52] or [54], as applicable;

(e) In framework agreements with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties to the framework agreement;

³⁶ At the Working Group's fifteenth session, it was alternatively suggested that an additional open-ended subparagraph (c) could be included, which would allow the procuring entity to have recourse to framework agreement procedures subject to the justification of its decision in the record of the procurement proceedings (A/CN.9/668, para. 228).

³⁷ At the Working Group's fifteenth session, it was suggested that all provisions in this chapter referring to the record of procurement proceedings should be consolidated for further consideration at a later date (A/CN.9/668, para. 229). The Secretariat consolidated as many of the provisions in this paragraph that the context would allow. The understanding is that their content will eventually be also reflected in an article on the record of procurement proceedings (article 22 of the proposed revised Model Law). According to the understanding reached by the Working Group, the consideration of the provisions on the record of procurement proceedings is to be deferred until after all other outstanding substantive issues with respect to a revised Model Law have been resolved which will also include provisions related to the record found elsewhere in this Chapter.

³⁸ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 233).

³⁹ This subparagraph was revised as a result of the amendments made to draft article 48, such as the removal of the description of various types of framework agreements to the article on definitions (article 2 of this draft). In order to avoid extensive cross-referencing, the Working Group may wish to consider including some of the more detailed definitions (marked in the comments to article 2) in this Chapter, with the more general definitions remaining in article 2.

(f) The procedures and criteria to be used by the procuring entity in the selection of the parties to the framework agreement; in the case of closed framework agreements, in addition any evaluation criteria, their relative weight and the manner in which they will be applied in the selection and whether the selection will be based on the lowest price or [lowest]⁴⁰ evaluated submission;

(g) In closed framework agreements procedures, the information referred to in article 25 (e)-(j) and article 27 (a)-(c) and (g)-(z), unless such information will be established in a second-stage competition.

Article 50. No material variation during the operation of the framework agreement⁴¹

During the operation of the framework agreement, no amendment to the terms and conditions of the procurement, including variation of the relative weight of the evaluation criteria, shall be permitted if it leads to a material change in the description of the subject matter of the procurement or all other terms and conditions of the procurement established when first soliciting the participation of suppliers or contractors in a framework agreement procedure in accordance with article [49].

Article 51. [Selection of the party or parties to a closed framework agreement] [First stage of a closed framework agreement procedure]⁴²

(1) The procuring entity shall select the party or parties to a closed framework agreement⁴³ with a procuring entity:

(a) By means of tendering proceedings in accordance with provisions of chapter II of this Law except to the extent that those provisions are derogated from in this article and article [52]; or

(b) By means of a method of procurement of chapter III under the conditions of article [7 (3)] of this Law and in accordance with the relevant provisions of chapter III except to the extent that those provisions are derogated from in this article and article [52];

⁴⁰ See footnote 27 above.

⁴¹ The Working Group, at its fifteenth session, agreed to remove to article 2 the definition of “material change” proposed to be included in this article in the note by the Secretariat (A/CN.9/WG.I/WP.66/Add.4) (A/CN.9/668, paras. 235-237 and 273 (f)). The Working Group deferred the consideration of the revised draft article (A/CN.9/668, paras. 235-237).

⁴² The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 238). The proposed change in title (the first option in square brackets) is to avoid any confusion with the initial solicitation under proposed article 49 (which would be the first step in the proceedings).

⁴³ Paragraph (1) of the previous draft was deleted to ensure consistency with the revisions made to proposed article 48 (removal of the descriptions of the type of framework agreement procedures to article 2), and also because the decision on the selection of the type of framework agreement should already be taken by this stage and reflected in the solicitation docs (see proposed article 49 (c)) above.

(c) In the case of a framework agreement concluded with one supplier or contractor, in addition to the methods of procurement specified in subparagraphs (a) and (b) of this paragraph, by means of single-source procurement under the conditions set out in article [7 (7) (a) (i) and (iii) to (v)].

(2) The procuring entity shall include in the record required under article 22 of this Law a statement of the grounds and circumstances upon which it relied to justify the use of any method of procurement other than tendering for the selection of the party or parties to a closed framework agreement with the procuring entity.

(3) The procuring entity shall select the supplier(s) or contractor(s) with which to enter into the framework agreement on the basis of the specified selection criteria, including the relative weights of such criteria and the manner of their application. The procuring entity shall promptly notify the selected supplier(s) or contractor(s) of their selection.⁴⁴

Article 52. Minimum requirements of closed framework agreements⁴⁵

(1) A closed framework agreement may be concluded between the procuring entity and one supplier or contractor or more than one supplier or contractor.⁴⁶

(2) A closed framework agreement shall be concluded in writing and shall set out:

(a) The duration of the framework agreement, which shall not exceed [the enacting State specifies a maximum] years;⁴⁷

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;

(c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;

(d) Whether in a closed framework agreement concluded with more than one supplier or contractor there will be a second-stage competition to award a procurement contract under the framework agreement⁴⁸ and, if so:

⁴⁴ The Working Group may wish to consider whether, in the light of the strengthened review provisions, the paragraph should also provide for debriefing of suppliers or contractors that were not selected. See in this context the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

⁴⁵ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 245).

⁴⁶ The paragraph was revised further to a suggestion at the Working Group's fifteenth session that the reference to a defined number should be deleted, and a decision on any required number left to an enacting State (A/CN.9/668, para. 243).

⁴⁷ At the Working Group's fifteenth session, it was agreed that paragraph (5) should be accompanied with the provisions in the Guide highlighting the danger of closed framework agreements of long duration, in the light of their potentially anticompetitive nature (A/CN.9/668, para. 244).

⁴⁸ The chapeau has been redrafted to avoid giving the impression that all multi-supplier agreements must involve second-stage competition.

- (i) A statement of the terms and conditions that are to be established or refined through second-stage competition;
 - (ii) The procedures for and the possible frequency⁴⁹ of any second-stage competition and envisaged deadlines for submission of second-stage tenders;⁵⁰
 - (iii) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or [lowest] evaluated tender [...];
 - (iv) Evaluation procedures and criteria, including the relative weight of such criteria and the manner in which they will be applied, in accordance with article [12] of this Law, during any second-stage competition. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second-stage competition, provided that any such variation does not lead to a material variation in the procurement as described in article [50].
- (3) A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless:
- (a) The procuring entity determines that it is in the interests of either party that separate agreements with each supplier or contractor party to the framework agreement be concluded; and
 - (b) The procuring entity includes in the record required under article [22] a statement of the grounds and circumstances on which it relied to justify the conclusion of separate agreements; and
 - (c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor, of a non-material nature and concerns only those provisions that justify the conclusion of separate agreements.
- (4) If the procuring entity is to maintain a closed framework agreement electronically, the framework agreement shall in addition to information specified elsewhere in this article contain all information necessary to allow the effective operation of the electronic framework agreement, including information on how the electronic framework agreement and notifications of forthcoming procurement

⁴⁹ At the Working Group's fifteenth session, it was agreed that the reference to the "envisaged frequency" should be replaced with a reference to the "possible frequency" (A/CN.9/668, para. 240).

⁵⁰ At the Working Group's fifteenth session, the view was expressed that information about tentative deadlines within which second-stage submissions would have to be presented was to be disclosed to suppliers or contractors in advance. That information was considered to be important for suppliers or contractors to decide whether to become parties to the framework agreement. The suggestion was made that the issue should be addressed in the context of proposed article 49 (g) to the extent it was not already covered, with explanation in the Guide that information provided was intended to be indicative rather than binding on the procuring entity (A/CN.9/668, para. 248). The Working Group may wish to consider that this type of information would most likely in practice be included in the framework agreement itself rather than in the solicitation notice. Since in accordance with the proposed article 49 (d), the minimum content of the framework agreement is to be disclosed at the outset of the procurement proceedings, the Working Group may wish to include the relevant information in the present subparagraph rather than in proposed article 49 (g).

contracts under the framework agreement can be accessed, the electronic equipment being used, and technical specifications for connection.

Article 53. Selection of parties to an open framework agreement procedure⁵¹

(1) The procuring entity shall establish and maintain an open framework agreement in electronic form.

(2) To establish an open framework agreement, the procuring entity shall publish a notice of the open framework agreement procedure, in accordance with article 24. The notice shall contain the information specified in article [49].

(3) The procuring entity shall, during the period of operation of the open framework agreement, either:

(a) Republish as frequently as practicable, but at least once annually, the initial notice of the open framework agreement procedure, a notice of the award of a framework agreement and an invitation to present further submissions to become a party to the framework agreement, in the publication or publications in which the initial publication was made; or

(b) Maintain a copy of the published information at the website or other electronic address set out in the initial notice.

(4) Suppliers and contractors may apply to become a party or parties to the open framework agreement at any time during its operation by presenting their submissions to the procuring entity in compliance with the requirements of the notice of the open framework agreement procedure.

(5) The procuring entity shall examine all such submissions to become a party to the framework agreement received during the period of its operation within a maximum of [...] days in accordance with the procedures set out in the notice of the open framework agreement procedure.

(6) The framework agreement shall be concluded with all suppliers or contractors unless their submissions were rejected in accordance with article [32 (3)] of this Law.

(7) The procuring entity may set out a maximum number of parties to the open framework agreement because of technical or other capacity limitations. The procuring entity shall provide information about the imposition of such a maximum and the maximum number when first soliciting participation in a framework agreement procedure in accordance with article 49 of this Law. The procuring entity shall include a statement of the grounds and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article [22] of this Law.

(8) The procuring entity shall promptly notify the suppliers or contractors whether they have been selected to be parties to the framework agreement.⁵²

⁵¹ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 250-253). The title reflects the proposed changes to the title of proposed article 51.

Article 54. Minimum requirements as regards open framework agreements⁵³

(1) An open framework agreement shall provide for second-stage competition for the award of a procurement contract under the agreement and shall in addition contain at a minimum:

(a) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;

(b) Any terms and conditions that may be refined through second-stage competition;

(c) The language or languages of the open framework agreement and all information about the electronic operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts under the agreement can be assessed, electronic equipment used and the technical arrangements and specifications;

(d) If any limitation on a number of suppliers or contractors that are parties to the agreement is imposed, a maximum number of suppliers or contractors that may enter into the framework agreement;

(e) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:

(i) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation, subject to any maximum number of suppliers, if any;

(ii) The information specified in article 25 (e), and article 27 (b), (c), (t), (u), (w) and (z); and

(iii) Instructions for preparing and submitting indicative tenders, including the information referred to in article 27 (i) to (k);

(f) The procedures and the possible frequency of second-stage competition;

(g) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or [lowest] evaluated tender;

(h) The evaluation procedures and criteria to be applied during the second-stage competition, including the relative weight of the evaluation criteria and the manner in which they will be applied, in accordance with article [12] of this Law. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second-stage competition, provided that

⁵² The Working Group may wish to consider whether, in the light of the strengthened review provisions, the paragraph should also provide for debriefing of suppliers or contractors that were not selected. See in this context the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

⁵³ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 254).

any such variation does not lead to a material variation in the procurement as described in article [50];

(i) The duration of the framework agreement.⁵⁴

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

Article 55. Second stage of a framework agreement procedure⁵⁵

(1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions and the provisions of this article.

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

(3) (a) Each anticipated procurement contract under a closed framework agreement with the second-stage competition and an open framework agreement shall be the subject of a written invitation to tender;

(b) The procuring entity shall invite all suppliers or contractors that are parties to the framework agreement, or where relevant all such suppliers and contractors then capable of meeting the needs of the procuring entity, to present their tenders for the supply of the items to be procured;

(c) The invitation to tender shall:

(i) Restate the existing terms and conditions of the framework agreement to be included in the anticipated procurement contract, set out the terms and conditions that are to be subject to the second-stage competition and provide further detail of the terms and conditions where necessary;

(ii) Restate the procedures and selection criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application), and include the information referred to in article 27 (q) to (s) and (x) to (z) of this Law;

(iii) Set out instructions for preparing second-stage tenders, including information specified in article 27 (g) to (p) of this Law;

(iv) Fix the manner, modalities and deadline for the submission of tenders. The deadline for the submission of tenders shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and

⁵⁴ The Working Group, at its fifteenth session, agreed to add the reference to the duration of the framework agreement in this article (A/CN.9/668, para. 254).

⁵⁵ The Working Group, at its fifteenth session, agreed to merge draft articles addressing second-stage procedures in closed and open framework agreements. With this change, it approved the substance of the draft article (A/CN.9/668, paras. 247 and 255).

submit their tenders, taking into account the reasonable needs of the procuring entity;⁵⁶

(d) The procuring entity shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria and the procedures set out in the invitation to tender;

(e) [The procuring entity shall accept the successful tender in accordance with article 19].⁵⁷

(4) The procuring entity shall promptly notify in writing all suppliers or contractors that are parties to the framework agreement of the award of the contract, the name and address of the supplier or contractor to whom the notice has been issued and the contract price.⁵⁸

⁵⁶ The provisions of the paragraph were revised to make them technologically neutral and consistent with similar provisions in other articles of this proposed revised Model Law.

⁵⁷ To be reviewed in the light of the pending decision of the Working Group with respect to draft article 19 (11), in particular as regards the advisability of providing for a standstill period at the stage of the award of procurement contracts under framework agreements (A/CN.9/668, paras. 141-144).

⁵⁸ Ibid.