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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 chapter VII (Framework agreements procedures) of the revised Model Law, comprising articles 52 to 57.

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



CHAPTER VII. FRAMEWORK AGREEMENTS PROCEDURES

Article 52. Award of a closed framework agreement¹

(1) The procuring entity shall award a closed framework agreement:²

(a) By means of open tendering proceedings, in accordance with provisions of chapter III of this Law except to the extent that those provisions are derogated from in this chapter; or

(b) By means of other procurement methods, in accordance with the relevant provisions of chapters II, IV and V of this Law except to the extent that those provisions are derogated from in this chapter;³

(c) In the case of a framework agreement concluded with only one supplier or contractor, in addition⁴ by means of single-source procurement under the conditions set out in article [27 (5)] of this Law.

(2) The provisions of this Law regulating the contents of the solicitation in the context of the procurement methods referred to in paragraph (1) (a) and (b) of this article shall apply *mutatis mutandis*⁵ to the information to be provided to suppliers or contractors when first soliciting their participation in a closed framework agreement procedure. The procuring entity shall in addition specify at that stage:

(a) That the procurement will be conducted as a framework agreement procedure, leading to a closed framework agreement;

(b) Whether the framework agreement is to be concluded with one or more than one supplier or contractor;

(c) If the framework agreement will be concluded with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties thereto;

¹ The accompanying Guide text will alert enacting States to both the benefits of framework agreements and the risks to competition, including the risk of creating monopolies or highly concentrated oligopolies through the use of framework agreements in relatively concentrated markets, and of driving potential suppliers out of the market altogether.

² The accompanying Guide will cross-refer to the definition of the closed framework agreement in article 2 that specifies that in this type of agreement no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party.

³ The accompanying Guide will explain that there are no derogations from the substantive provisions on choice of procurement methods in chapter II of this Law, and that the derogations are limited to procedural issues in chapters IV and V.

⁴ The accompanying Guide text will explain that the phrase “in addition” in this provision intends to convey that a single-supplier closed framework agreement can be awarded also by means of the proceedings referred to in paragraphs 1 (a) and (b) of this article. It would also point out that, under the general principle contained in article 25 (2) of the current draft, the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to single-source procurement is appropriate, the procuring entity must select such an alternative procurement method that would ensure most competition in the circumstances of the given procurement.

⁵ The accompanying Guide text will explain what will need to be changed in the context of framework agreement procedures.

(d) The form, terms and conditions of the framework agreement in accordance with article [53] of this Law.

(3) The provisions of article [20] of this Law shall apply *mutatis mutandis*⁶ to the award of a closed framework agreement.

Article 53. Requirements of closed framework agreements

⁷(1) 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 duration)] [the maximum duration established by the procurement regulations];⁸

(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 agreement and, if so:

(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 anticipated frequency⁹ of any second stage competition and envisaged deadlines for presenting second stage submissions;

(iii) Whether the award of a procurement contract under the framework agreement will be to the lowest priced or to the most advantageous submission;¹⁰

⁶ Ibid.

⁷ Paragraph (1) of this article in previous drafts was deleted as being superfluous. It read: “(1) A closed framework agreement may be concluded between one or more procuring entities and one or more suppliers or contractors as selected in accordance with the criteria and procedures specified when first soliciting their participation in the framework agreement procedure.”

⁸ The text in the first set of square brackets reflects the understanding in the Working Group (A/CN.9/690, para. 55 (b)). Since the maximum duration will be different for different types of subject matter of the procurement, the Working Group may wish to consider that the procurement regulations, not the Law, shall specify appropriate maximum duration per each group of subject matters (hence the proposed text in the second set of square brackets). For example, as was pointed out in the Working Group, the maximum duration for framework agreements dealing with such items as IT products, whose price might fluctuate rapidly, should be established in months rather than years.

⁹ Amended pursuant to A/CN.9/690, para. 55 (c). The accompanying Guide will explain that the frequency of second stage competition may not easily be anticipated, and that this information is not binding on the procuring entity.

¹⁰ Amended pursuant to A/CN.9/690, para. 55 (d). The accompanying Guide will explain why UNCITRAL changed the term the “lowest evaluated” used in the 1994 Model Law to the term

(iv) The procedures and criteria to be applied during the second stage competition, including the relative weight of such criteria and the manner in which they will be applied, in accordance with articles [10 and 11] of this Law. If the relative weights of the evaluation criteria may be varied during second stage competition, the framework agreement shall specify the permissible range.¹¹

(2) 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 [23] of this Law a statement of the reasons and circumstances on which it relied to justify the conclusion of separate agreements;¹² and

(c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor and concerns only those provisions that justify the conclusion of separate agreements.

(3) The framework agreement shall in addition to information specified elsewhere in this article contain all information necessary to allow the effective operation of the framework agreement, including information on how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information for connection where applicable.¹³

Article 54. Establishment of an open framework agreement

(1) The procuring entity shall establish and maintain an open framework agreement online.¹⁴

(2) The procuring entity shall solicit participation in the open framework agreement by issuing an invitation to become a party to the open framework agreement in accordance with article [29 bis] of this Law.

(3) The invitation to become a party to the open framework agreement shall include the following information:

(a) The name and address of the procuring entity that establishes and maintains the open framework agreement and the name and address of any other

the “most advantageous”.

¹¹ The accompanying Guide will cross-refer to the provisions of article 57, prohibiting any material change to the procurement during the operation of the framework agreement.

¹² The provisions have been retained pursuant to A/CN.9/690, para. 55 (e).

¹³ Amended pursuant to A/CN.9/690, para. 55 (f) and aligned with the similar wording in chapter VI of the current draft (articles 47 (1) (m) and 48 (1) (b)). The Guide will address the issues arising from the use of electronic means of communication in procurement proceedings.

¹⁴ The term “online” replaced the phrase “in electronic form” used in previous drafts.

procuring entities that will have the right to award procurement contracts under the framework agreement;¹⁵

(b) That the procurement will be conducted as a framework agreement procedure leading to an open framework agreement;

(c) That it is an open framework agreement that is to be concluded;

(d) The language or languages of the open framework agreement¹⁶ and all information about the operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts thereunder can be accessed and appropriate information for connection;¹⁷

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

(i) A declaration pursuant to article [8] of this Law;

(ii) If any limitation on the number of suppliers or contractors that are parties to the open framework agreement is imposed in accordance with paragraph (7) of this article, the relevant maximum number and the criteria and procedure, in conformity with this Law, that will be followed in selecting it;

(iii) Instructions for preparing and presenting indicative submissions necessary to become a party to the open framework agreement, including the currency(ies) and the language(s) to be used,¹⁸ as well as the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article [9] of this Law;

(iv) 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 by presenting indicative submissions, subject to any maximum number of suppliers, if any, and any declaration made pursuant to article [8] of this Law;

¹⁵ These provisions have been retained without square brackets pursuant to A/CN.9/690, para 58. The accompanying Guide text will explain the interaction between these provisions and the definition of the procuring entity, the importance of identifying the procuring entity at the outset of the procurement proceedings as an element of transparency under the Model Law, that the provisions enable multiple users of a framework agreement, that suppliers are to be adequately informed about the administrative arrangements for the operation of the framework agreement, and that both the parties to and users of the framework agreement are to be appropriately described.

¹⁶ The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances. The Guide would also note that an indication of the language or languages may still be important in some multilingual countries.

¹⁷ Aligned with the similar wording in article 53 (3).

¹⁸ A/CN.9/690, para. 22 (b). The accompanying Guide text will note that the procuring entity may decide not to include this information in domestic procurement, if it would be unnecessary in the circumstances.

(f) Other terms and conditions of the open framework agreement, including all information required to be set out in the open framework agreement in accordance with article [55] of this Law;

(g) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(h) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary.

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

(5) The procuring entity shall examine all indicative submissions received during the period of operation of the framework agreement within a maximum of ... working days (the enacting State specifies the maximum period of time)¹⁹ in accordance with the procedures set out in the invitation to become a party to the framework agreement.

(6) The framework agreement shall be concluded with all qualified suppliers or contractors that presented submissions unless their submissions have been rejected on the grounds specified in the invitation to become a party to the framework agreement.

(7) The procuring entity may impose a maximum number of parties to the open framework agreement only to the extent that capacity limitations in its communication system so require.²⁰ The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article [23] of this Law.²¹

(8) The procuring entity shall promptly notify the suppliers or contractors whether they have become parties to the framework agreement and of the reasons for the rejection of their indicative submissions if they have not.

Article 55. Requirements of open framework agreements

(1) An open framework agreement shall provide for second stage competition for the award of a procurement contract under the agreement and shall include:

¹⁹ The accompanying Guide text will in this context again draw attention of the enacting State that the period of time of a short duration should be established in working days; in other cases, it may be established in calendar days (A/CN.9/690, para. 87).

²⁰ As in the corresponding provisions applicable to auctions, the phrase “only to the extent that capacity limitations in its communication system so require” replaced the previously used phrase “for technical reasons or capacity limitations.”

²¹ The last sentence has been retained without square brackets pursuant to A/CN.9/690, para. 59.

- (a) The duration of the framework agreement;
 - (b) 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;
 - (c) Any terms and conditions that may be refined through second stage competition;
 - (d) The procedures and the anticipated frequency²² of second stage competition;
 - (e) Whether the award of a procurement contract under the framework agreement will be to the lowest priced or the most advantageous submission;
 - (f) The 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 articles [10 and 11] of this Law. If the relative weights of the evaluation criteria may be varied during second stage competition, the framework agreement shall specify the permissible range.²³
- (2) The procuring entity shall, during the entire period of operation of the open framework agreement, republish at least annually the invitation to become a party to the open framework agreement and shall in addition ensure unrestricted, direct and full access to the terms and conditions of the framework agreement and to any other necessary information relevant to its operation.²⁴

Article 56. Second stage of a framework agreement procedure

- (1) Any procurement contract under a framework agreement shall be awarded in accordance with the terms and conditions of the framework agreement and the provisions of this article.
- (2) A procurement contract under a framework agreement may only be awarded to a supplier or contractor that is a party to the framework agreement.
- (3) The provisions of article [20] of this Law, except for its paragraph (2),²⁵ shall apply to the acceptance of the successful submission under framework agreements without second stage competition.

²² Amended pursuant to A/CN.9/690, para. 55 (c). The accompanying Guide will explain that the frequency of second stage competition may not easily be anticipated, and that this information is not binding on the procuring entity.

²³ The accompanying Guide will cross-refer to the provision of article 57 of this Law, prohibiting any material change to the procurement during the operation of the framework agreement.

²⁴ The accompanying Guide will explain, with a cross-reference to article 54 (3) (d) of this Law, that republication and maintenance of the relevant information shall be at the place where the original invitation was published or at the place (website or other electronic address) set out in the original invitation.

²⁵ The accompanying Guide text will explain reasons why provisions on the standstill period of article 20 do not apply to framework agreements without second stage competition.

(4) In a closed framework agreement with second stage competition and in an open framework agreement, the following procedures shall apply to the award of a procurement contract:

(a) The procuring entity²⁶ shall issue a written invitation to present submissions simultaneously to each supplier or contractor party to the framework agreement, or only to each of those parties of the framework agreement then capable of meeting the needs of that procuring entity in the subject matter of the procurement;

(b) The invitation to present submissions shall include the following information:

(i) A restatement of 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) A restatement of the procedures and criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application);

(iii) Instructions for preparing submissions;

(iv) The manner, place and deadline for presenting submissions;

(v) If suppliers or contractors are permitted to present submissions for only a portion of the subject matter of the procurement, a description of the portion or portions for which submissions may be presented;

(vi) The manner in which the submission price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(vii) Reference to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(viii) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the second stage competition, without the intervention of an intermediary;

(ix) ²⁷Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with

²⁶ Amended pursuant to A/CN.9/690, para. 62. The definition of the procuring entity provides for multi-user frameworks, and the accompanying Guide will stress the importance of ensuring that suppliers are aware of the administrative arrangements for the operation of framework agreement, as noted in the relevant footnote above.

²⁷ Reference to any commitments to be made by the supplier or contractor outside the procurement contract has been deleted pursuant to A/CN.9/690, para. 62.

information about duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(x) Any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article [20] of this Law, [and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval];²⁸

(xi) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of submissions and to other aspects of the second stage competition;

(c) The procuring entity²⁹ shall evaluate all submissions received and determine the successful submission in accordance with the evaluation criteria and the procedures set out in the invitation to present submissions;

(d) The procuring entity shall accept the successful submission in accordance with article [20] of this Law.

Article 57. No material change during the operation of a framework agreement

During the operation of a framework agreement, no change shall be allowed to the description of the subject-matter of the procurement. Changes to other terms and conditions of the procurement, including to the criteria (and their relative weight and the manner of their application) and procedures for the award of the anticipated procurement contract, may occur only to the extent expressly permitted in the framework agreement.³⁰

[Articles 58-60 are not used]

²⁸ The Working Group may wish to consider appropriateness of the provision put in square brackets in the context of the award of procurement contracts under the framework agreement procedures. It may consider that this provision may be relevant only in the context of the award of the framework agreement itself rather than procurement contracts thereunder (especially under open framework agreements). If it is to be deleted, the accompanying Guide text will elaborate on justifications for this deviation, as will be the case with respect to the corresponding provisions applicable to auctions (article 47 (1) (x) of the current draft).

²⁹ Amended pursuant to A/CN.9/690, para. 62. See the relevant footnote above.

³⁰ The accompanying Guide text will explain that the phrase “to the extent expressly permitted” is intended to ensure that any such changes must respect any estimates, variables or permissible range of variation set out in the framework agreement. It will also note that any change to the qualification or responsiveness criteria that would change the parties to the framework agreement would effectively contravene articles 52 and 54 that require establishing these criteria at the outset of the procurement proceedings.