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Report of Working Group I (Procurement) on the work of its fifteenth session (New York, 2-6 February 2009)

Contents

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the "Commission") entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations (A/59/17, para. 82).

2. The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At its seventh to thirteenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, New York, 21-25 May 2007, Vienna, 3-7 September 2007, and New York, 7-11 April 2008, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process. At its seventh, eighth and tenth to twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders. At its thirteenth and fourteenth (Vienna, 8-12 September 2008, A/CN.9/664) sessions, the Working Group held an in-depth consideration of the issue of framework agreements. At its thirteenth session, the Working Group also discussed the issue of suppliers' lists and decided that the topic would not be addressed in the Model Law. At its fourteenth session, the Working Group also held an in-depth consideration of the issue of remedies and enforcement and addressed the topic of conflicts of interest.

3. At its thirty-eighth to forty-first sessions, in 2005 to 2008, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17 (Part one), para. 170, and A/63/17, para. 307). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part one), para. 170). Pursuant to that recommendation, the Working Group adopted the timeline for its deliberations at its twelfth and thirteenth sessions (A/CN.9/640 and A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17, para. 307).

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its fifteenth session in New York, from 2-6 February 2009. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Belarus, Benin, Bulgaria, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, France, Germany, Greece, Guatemala, Honduras, Iran (Islamic Republic of), Italy, Kenya, Mexico, Mongolia, Morocco, Nigeria, Paraguay, Poland, Republic of Korea, Senegal, Singapore, Spain, Sri Lanka, Thailand, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

5. The session was attended by observers from the following States: Afghanistan, Angola, Bangladesh, Belgium, Brazil, Croatia, Democratic Republic of the Congo, Holy See, Indonesia, Peru, Philippines, Qatar, Romania, Tunisia and Turkey.

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

(a) *United Nations system*: United Nations Office of Legal Affairs and World Bank;

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO), Caribbean Community (CARICOM), European Commission, European Space Agency (ESA), International Development Law Organization (IDLO), Organization for Economic Co-operation and Development (OECD) and Organization for Security and Co-operation in Europe (OSCE);

(c) *International non-governmental organizations invited by the Working Group*: American Bar Association (ABA), Association of the Bar of the City of New York, Forum for International Conciliation and Arbitration C.I.C (FICACIC), International Bar Association (IBA), International Federation of Consulting Engineers (FIDIC) and International Law Institute (ILI).

7. The Working Group elected the following officers:

Chairman: Mr. Jeffrey Wah Teck CHAN (Singapore)

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

8. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.65);

(b) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – a revised text of the Model Law (A/CN.9/WG.I/WP.66 and Add.1-5).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.

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

5. Other business.

6. Adoption of the report of the Working Group.

III. Deliberations and decisions

10. At its fifteenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group used the notes by the Secretariat referred to in paragraph 8 above as a basis for its deliberations.

11. The Working Group noted that it completed the first reading of the revised text and although a number of issues were outstanding, including the entire chapter IV, the conceptual framework was agreed upon. It also noted that further research was required for some provisions in particular in order to ensure that they were compliant with the relevant international instruments.

12. The Working Group requested the Secretariat to revise the drafting materials contained in document A/CN.9/WG.I/WP.66/Add.1-4, reflecting its deliberations at the fifteenth session, for further consideration.

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

A. Review of outstanding issues and a proposed new drafting approach in document A/CN.9/WG.I/WP.66 and addenda

13. The Working Group heard an introduction of document A/CN.9/WG.I/WP.66 and its addenda.

14. General support was expressed for the suggested drafting approach, which would eliminate the distinction between the procurement of goods, construction and services and instead would draw a distinction between various procurement methods based on the complexity of the procurement concerned.

15. The Working Group agreed to consider the specific issues discussed in document A/CN.9/WG.I/WP.66 in conjunction with the related provisions of the draft revised Model Law in A/CN.9/WG.I/WP.66/Add.1-4. The Working Group noted that a table setting out correlation of new proposed provisions to the provisions of the 1994 Model Law was contained in document A/CN.9/WG.I/WP.66/Add.5.

B. Review of provisions of the draft revised Model Law (A/CN.9/WG.I/WP.66/Add.1-4)

1. CHAPTER I. GENERAL PROVISIONS (A/CN.9/WG.I/WP.66, paras. 54-64, and A/CN.9/WG.I/WP.66/Add.1 and 2)

Article 1. Scope of application (A/CN.9/WG.I/WP.66, paras. 54-55)

16. The Working Group noted that the proposed article was based on article 1 of the 1994 Model Law. It considered whether the defence and national security blanket exemptions should be eliminated in a revised Model Law, with the effect that the procurement regime of the Model Law would apply to all sectors of the economy in the enacting State. The Working Group noted justifications for taking such approach in document A/CN.9/WG.I/WP.66 (paras. 54-55) in particular that not all procurement in these sectors was so sensitive or confidential as to justify blanket exemptions from the provisions of the Model Law.

17. The Working Group agreed to remove the reference to the exception in the proposed article and approved the draft article as revised at the current session. (See also para. 63 below for the suggestions made relating to this article.)

Article 2. Definitions (A/CN.9/WG.I/WP.66, paras. 62-63)

18. The Working Group noted that the proposed article was based on article 2 of the 1994 Model Law and that a number of changes were suggested to be made in the draft article, in particular the addition of several new definitions.

19. Noting the interaction of the article with other provisions of the Model Law, the Working Group decided to defer the consideration of the proposed article 2 to a later stage. This decision was without prejudice to the understanding in the Working Group that some terms would have to be considered in conjunction with the related provisions of the Model Law at the time when the Working Group considered them. (For subsequent decisions relating to article 2, see paras. 66 (c) and (d), 229, 235 and 272-274 below.)

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

20. The Working Group noted that the proposed article reproduced article 3 of the 1994 Model Law. The Working Group approved the draft article without change.

Article 4. Procurement regulations

Paragraph (1)

21. The Working Group noted that the paragraph reproduced article 4 of the 1994 Model Law. The Working Group approved the paragraph without change.

Paragraph (2)

22. The Working Group noted that the paragraph was new and was introduced further to the Working Group's decision taken at its fourteenth session regarding the topic of conflicts of interest (A/CN.9/664, paras. 17 and 116). It further noted that, under the proposed new text, a code of conduct as part of procurement regulations

would be subject to mandatory publication in accordance with article 5 (1) of the proposed revised Model Law.

23. The Working Group considered whether the reference to avoidance of conflicts of interest in square brackets was necessary in the Model Law so as to link the text with the requirements of the United Nations Convention Against Corruption[1] (UNCAC), or whether reference in the Guide to Enactment would be sufficient.

24. A proposal was made that the revised Model Law itself not the Guide should incorporate provisions from UNCAC that sets examples of what constituted conflicts of interest in public procurement (articles 8 and 9). An alternative view was expressed that these provisions should be put in the Guide, not the Model Law. The latter, it was proposed, should mandate a code of conduct for officers or employees of procuring entities, and should set out only the essential principles that such a code should contain. Some delegates supported that view on the ground that repeating only some provisions from UNCAC in the Model Law might distort the context in which they were set out in UNCAC and in the process some other important and relevant provisions from UNCAC might be overlooked. It was stressed at the same time that placing the provisions from UNCAC in the Guide rather than in the Model Law should avoid giving the impression that the negative effects of the conflicts of interest on transparency and accountability were underestimated.

25. Another concern was expressed that UNCAC did not deal with all cases of conflicts of interest and therefore mentioning only the examples from UNCAC in the Model Law might be misleading. The preferred option, it was said, would be for the Model Law to address the conflicts of interest in terms of general principles, leaving more detail to enacting States to regulate.

26. The Working Group agreed to replace the term "officials engaged in procurement" with the term "officers or employees of procuring entities", so as to ensure conformity with the terms used elsewhere in the Model Law (such as article 2, definition of a "procuring entity", and article 27 (u), reference to officers and employees).

27. The Working Group further agreed that the square brackets in paragraph (2) would be deleted and the following provision drafted on the basis of article 9 (1) (e) of UNCAC would be added: "where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements".

28. It was also agreed that the following provisions from article 8 (5) of UNCAC, which was of general rather than procurement-specific application, should be reflected in the Guide: "where appropriate, measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result". The understanding was that the Guide should highlight concerns expressed at the current session regarding problems with providing exhaustive provisions on conflicts of interest in the Model Law and that it would also emphasize enacting States' role in eliminating gaps in regulation and in

[1] General Assembly resolution 58/4, annex. Entered into force on 14 December 2005.

enacting measures for the effective implementation of the UNCAC relevant provisions on the conflicts of interest.

29. Referring to the practical difficulties in the proper implementation of the Model Law in some countries, some delegates stressed the importance of supplementing the provisions on conflicts of interest in the revised Model Law with the provisions in the Guide that would list measures (for example, training) that should be enacted to ensure effective implementation. It was also suggested that the Guide should point out that conflicts of interest were regulated differently in different jurisdictions.

30. The Working Group approved the paragraph as revised at the current session.

Article as a whole

31. The Working Group approved the draft article as revised at the current session.

Article 5. Publication of legal texts

32. The Working Group noted that the proposed article was as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-33), except for its paragraph (3), which had been set out in a separate article 6, immediately following article 5. The Working Group approved the draft article without change.

Article 6. Information on forthcoming procurement opportunities

33. The Working Group noted that the proposed article was based on draft article 5 (3) as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, para. 34).

34. The suggestion was made that, in order to avoid ambiguities as regards the intended scope of the article, the Guide should explain that the reference in the article was made to long-term general plans rather than immediately upcoming procurement opportunities. Another view was expressed that the proposed article itself should be redrafted to eliminate any ambiguities as regards its intended scope.

35. Another suggestion was to replace the word “may” with the word “shall”, in the proposed article. The opposing view was that, taking into account that the article was intended to cover indicative general information about future procurement plans only, it should remain facilitative rather than prescriptive. The Working Group recalled its previous deliberations on the same subject and noted the difficulties of regulating mandatory publication of this type of information, such as timing of original publication and amendments.

36. It was proposed that the article should be deleted entirely, since it imposed unnecessary burdens on procurement entities. The Working Group recalled its previous deliberations of a similar suggestion and its decision to retain the provisions on publication of forthcoming procurement opportunities as being important for strategic planning and transparency.

37. Noting that the ambit of the article was to address longer term procurement plans and not procurement opportunities that might arise in the short term, it was agreed that the provision should remain optional and not mandatory, and that the Guide would explain the benefits of such publication for strategic and operational

planning. It was also agreed that the Guide would emphasize that the provision should not facilitate collusion and lobbying through the effective pre-advertisement of forthcoming procurements. Accordingly, the following text was agreed to replace the first sentence of draft article 6: "Procuring entities may publish information regarding planned procurement activities for forthcoming months or years". It was agreed that the second sentence of the article would be retained without change.

38. The Working Group approved the draft article as revised at the current session.

Article 7. Rules concerning methods of procurement and type of solicitation (also A/CN.9/WG.I/WP.66, paras. 32-48 and 67-69)

39. The Working Group noted that the proposed article was new and was based on a number of provisions, in particular article 18 and other provisions of chapter II, of the 1994 Model Law. It was further noted that the article sought to provide a hierarchy of procurement methods and principles that would apply to the choice of a procurement method, technique or procedure, including the single-source procurement, and type of solicitation. The Working Group proceeded with a paragraph-by-paragraph consideration of the article.

Paragraph (1)

40. The Working Group noted that the paragraph was based on article 18 (1) of the 1994 Model Law. The Working Group approved the paragraph without change.

Paragraph (2)

41. The Working Group noted that the paragraph was based on article 18 of the 1994 Model Law.

42. The proposal was made to replace the words "the most competitive" with the words "the most efficient", taking into account in particular that public procurement might be used for achieving socio-economic goals, such as environmental goals. It was also noted that in some procurement, competition might be cumbersome and counterproductive. The alternative view was expressed that the words "the most competitive" should be retained as reflecting the thrust of the 1994 Model Law – to encourage competition in order to guarantee efficiency and value for money.

43. The view was expressed that the proposed wording "appropriate in the circumstances of the given procurement" addressed the concern that in some procurements the factors other than maximizing competition would need to be considered. It was suggested that in order to avoid any ambiguities in this respect, the Guide should explain this intended meaning.

44. The Working Group further considered whether reference to the various techniques available within procurement methods, such as electronic reverse auctions (ERAs) and framework agreements, should be made in the paragraph. Support was expressed for adding this reference as proposed in the draft paragraph.

45. The Working Group approved the paragraph as revised at the current session.

Paragraph (3)

46. The Working Group noted that the paragraph was based on article 18 of the 1994 Model Law, and that the terms “economy and efficiency” and “economy or efficiency”, not the term “economic efficiency” as proposed in the draft paragraph, were used in the 1994 Model Law (articles 20 and 48 (2)).

47. The Working Group considered whether the reference to “economic efficiency” should remain in the paragraph. The view was expressed that it should not as being superfluous in the light of the understanding reached in conjunction with paragraph (2) (see para. 43 above), which should also be applicable to paragraph (3). The view prevailed however that the reference to “economic efficiency” should be retained in the paragraph and that the square brackets should therefore be removed. The proposal to add the word “notably” before the words “for reasons of economic efficiency” was not accepted.

48. The Working Group approved the paragraph as revised at the current session.

Paragraph (4)

49. The Working Group noted that the paragraph was based on articles 18 and 19 (1) (a) of the 1994 Model Law. The Working Group approved the paragraph without change.

Paragraph (5)

50. The Working Group noted that the paragraph was based on draft article 22 bis as amended at the Working Group’s twelfth session (article 42 of the proposed revised Model Law). The Working Group approved the paragraph without change.

Paragraph (6)

51. The Working Group noted that the paragraph was based on article 22 of the 1994 Model Law.

52. The proposal was made to delete the opening phrase in the chapeau of the paragraph as inviting cumbersome and costly practices. The Working Group noted that the referred phrase was included in the 1994 text in order to prevent corruption and arbitrary decisions on the side of the procuring entities when decisions to have recourse to single-source procurement were made. It was also explained that the provisions reflected practices in some procurement systems, as explained in the Guide, where higher-level approval was required for a procuring entity to use such an exceptional measure as single-source procurement. It was also explained that the provisions were in parentheses suggesting that it was up to an enacting State to decide whether these provisions should be incorporated in the national law.

53. The Working Group agreed that the opening phrase should be deleted from the chapeau but that the Guide should highlight that some jurisdictions might require procuring entities to obtain a prior approval from a higher-level authority.

54. The suggestion was made to retain in paragraph (6) only subparagraphs (c) and (d). This suggestion was not accepted on the ground that the deletion of the remaining subparagraphs would unreasonably narrow the cases justifying the recourse to single-source procurement.

55. Concern was expressed that subparagraph (a) might encourage monopolies and corruption, and negatively affect transparency and accountability in procurement practices. The Working Group noted rare and exceptional cases dealt with in the subparagraph, which nevertheless occurred in practice and should therefore be reflected in the Model Law. It was noted that the Model Law would be consistent in this respect with the provisions of the Agreement on Government Procurement of the World Trade Organization (WTO) (GPA, article XV (1) (b)).[2] The Working Group agreed to retain the subparagraph without change and provide in the Guide sufficient explanations about the intended scope of the provisions and specific examples.

56. As regards subparagraph (b), the Working Group noted that the text would address the most urgent procurement, in which other methods such as competitive negotiation were impractical. The Working Group considered whether the references to catastrophic events, to unforeseeable events and lack of dilatory conduct on the part of the procuring entity should be cumulative. After debate, it was agreed that the provision in essence addressed unforeseeable events that were not caused by the conduct of the procuring entity, and that the reference to catastrophic events was superfluous and would be deleted.

57. As regards subparagraph (c), the Working Group considered whether the proviso starting from "the limited size of the proposed procurement in relation to the original procurement" should be retained. On the one hand, it was observed that the basis of this justification for single-source procurement – uniformity between successive procurements – was unrelated to the relative sizes of the original procurement (which would have been conducted through a competitive procedure) and the subsequent procurement conducted through a single-source procedure, and thus that the proviso should be deleted. On the other hand, it was stated that the law should stress the exceptional nature of such procurement and that there was potential for the abuse of the provision, and retaining the proviso would support these notions. Further, it was observed, technological advances might mean that the price of the original procurement might not remain current. Finally, it was observed that removing the proviso could, on one interpretation, in fact strengthen the obligation to conduct a new, competitive procurement procedure for a subsequent purchase. It was decided that the text should remain without change, but in order to address the concerns set out above, the Guide to Enactment should stress that the way to avoid this situation arising would be to conduct the original procurement using a framework agreement, and that where there was no framework agreement, the use of single-source procurement for any subsequent purchase should be exceptional, and should be limited both in size and in time.

58. As regards subparagraph (d), it was observed that the provision contained several elements, not all of which were considered necessary. First, the proposed proviso that single-source procurement would be justified only where other procurement methods were not appropriate meant that the reference to the commercial viability of the research and development concerned was superfluous. Secondly, it was added that the remaining justification would arise only if there was a single possible provider of the services concerned, and thus that the situation

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[2] Entered into force on 1 January 1996; available as of the date of this report at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

contemplated by the subparagraph was already encompassed under subparagraph (a). Accordingly, it was agreed that subparagraph (d) should be deleted.

59. As regards subparagraph (f) of the 1994 text, proposed to be deleted, it was commented that a blanket exemption for defence procurement should not be inadvertently introduced by replacing this subparagraph with an excessively broad provision. Noting that the aim was to allow for recourse to single-source procurement only where it was justified by the nature of the procurement concerned, it was agreed that this subparagraph should be renumbered as subparagraph (e) and replaced with the following text: "In the case of procurement for the reasons of national defence or national security, where the procuring entity determines that the use of any other method of procurement is not appropriate". This formulation, it was said, would provide an appropriate balance between encouraging the use of the Model Law for defence procurement and protection of confidentiality and other concerns in such procurement. It was agreed that the Guide to Enactment would explain that the reference to "national defence or national security" was a commonly used term, but that it would not preclude the use of the provision on the basis of defence or security issues arising within a region of an enacting State.

60. As regards subparagraph (e), the Working Group took note of the issues raised in document A/CN.9/WG.I/WP.66 (paras. 45-48). The Working Group also noted the relevance of the subparagraph to the provisions of draft article 12 of the revised Model Law dealing with socio-economic policy issues.

61. The Working Group agreed to retain the wording of article 22 (2) of the 1994 Model Law in place of subparagraph (e), with updated cross-references. It was said that the principle contained in article 22 (2) of the 1994 Model Law was a fundamental one, and the Working Group might exceed its mandate by departing from it.

62. A further proposal to delete the approval requirement in that subparagraph was not accepted. The general view was that higher-level approval for the cases specified in the subparagraph would be required given their exceptional nature.

63. Having agreed not to make specific reference in the subparagraph to serious economic emergency, the Working Group noted that the Guide would point out that States in situations of economic and financial crisis might exceptionally exempt the application of the Model Law to some procurement, through legislative measures (which would themselves receive the scrutiny of the legislature in the enacting State). Such measures, it was agreed, would affect the application of the entire Model Law, and not only its provisions regulating single-source procurement.

64. The Working Group approved subparagraph (e) and paragraph (6) as a whole, as revised at the current session.

Paragraph (7)

65. The Working Group noted that the paragraph was based on a number of provisions of the 1994 Model Law, including repetitive provisions found in articles 17, 23, 24 and 37 of the 1994 Model Law.

66. The Working Group decided:

(a) To begin subparagraph (a) with the words “without prejudice to article 24 of this Law”;

(b) To limit the cross-references in subparagraph (a) to “paragraphs (3) to (5)”, and to consider the inclusion of a provision addressing the issue of a notice of single-source procurement (in place of the cross-reference to paragraph (6)) at a later stage;

(c) To introduce and define in article 2 the term “open solicitation” to refer to procurement commenced by an advertisement as described in articles 24 and 37 of the 1994 Model Law;

(d) To retain the term “direct solicitation” from article 37 (3) of the 1994 Model Law and define it in article 2 of the revised Model Law as the alternative to “open solicitation”;

(e) To retain in subparagraph (b) all cross-references and update them as appropriate;

(f) To delete in subparagraph (c) the reference to “international publication” and instead refer to “solicitation in accordance with article 24 (2)”;

(g) To add in subparagraph (c) (ii) the following wording: “The enacting State shall establish in the procurement regulations the value threshold for the purposes of invoking the exception referred to in this paragraph.”

67. The Working Group deferred the consideration of the paragraph as revised at the current session to a later date.

Paragraph (8)

68. The Working Group agreed to delete the paragraph.

Paragraph (9)

69. The Working Group noted that the paragraph was based on article 18 (4) of the 1994 Model Law, and approved the paragraph without change.

Article as a whole

70. The Working Group deferred the consideration of the draft article as revised at the current session to a later date.

Article 8. Communications in procurement

71. The Working Group noted that the proposed article was based on article 5 bis as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 17-25). The Working Group agreed to replace the cross-reference in paragraph (2) to article 7 (2) (b) with a reference to article 7 (7) (a). The Working Group approved the draft article as revised at the current session.

Article 9. Participation by suppliers or contractors

72. The Working Group noted that the proposed article reproduced article 8 of the 1994 Model Law, and approved the draft article without change.

Article 10. Qualifications of suppliers and contractors (A/CN.9/WG.I/WP.66, paras. 71-72)

73. The Working Group noted that the proposed article was based on article 6 of the 1994 Model Law and that limited amendments had been made to that text in the light of the revisions to the Model Law thus far recommended by the Working Group. The Working Group in particular noted that paragraph (2) had been amended to allow the assessment either of the qualifications of all suppliers or of the winning one alone. As regards draft new paragraph (7), the Working Group noted that it was based on article 10 of the 1994 Model Law. The Working Group recalled that, at its sixth session, it preliminarily agreed to amend article 10 in order for the legalization requirement to apply, if at all, only to a successful supplier, and to combine the amended provisions of article 10 of the 1994 text with a revised article regulating qualifications (A/CN.9/568, paras. 127-128).

74. The Working Group did not accept proposals:

(a) To delete the words "in this State" in paragraph (2) (iv); and

(b) To introduce in paragraph (2) (v) that, where a conviction had occurred, suppliers might nonetheless be treated as qualified, on the basis that they: "had proven to the satisfaction of the procuring entity that they had taken all necessary measures to prevent that the events which led to the conviction would occur again."

75. The Working Group agreed:

(a) To replace in the end of the second sentence of paragraph (4) the word "article" with the word "Law", so as to ensure, for example, that conflicts of interest could be appropriately addressed;

(b) To delete the cross-reference to article 12 (5) in paragraph (6), since the latter dealt with evaluation, not qualification, criteria;

(c) To amend the cross-reference in paragraph (7) to paragraph (6).

76. The Working Group approved the draft article as revised at the current session and requested the Secretariat to update all cross-references as appropriate.

Article 11. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement

77. The Working Group noted that the proposed article was based on article 16 of the 1994 Model Law and that it was linked to the proposed new definition (k).

78. The derivation of the second sentence of paragraph (3) was queried since it was apparently similar in drafting but different in meaning to the provisions of the WTO GPA, article VI (3). The latter provision sought to restrict references to trademarks or similar references. It was observed that the use of trademarks or similar terms could be of practical assistance, provided that they were followed by a generic description. A proposal was accordingly made to amend the second sentence of paragraph (3) by replacing the provision starting with the words "unless" with the

following phrase: “unless the requirement or reference is also accompanied with a sufficiently precise description of the salient characteristics of the subject matter of the procurement and provided that the words such as ‘or equivalent’ are included.” The prevailing view however was that the text of the second sentence should be closely aligned with the provisions in the WTO GPA restricting the use of trademarks or similar references.

79. The Working Group agreed that in paragraph (3), the first sentence, the opening words should read “to the extent practicable”, to allow for appropriate input-based specifications where necessary, and that the issue would be explained in the Guide; and that the second sentence should be aligned with the WTO GPA, article VI (3).

80. The Working Group approved the draft article as revised at the current session.

81. The Working Group noted that the Guide would draw the attention of enacting States to practices in some jurisdictions to require including in the solicitation documents the reference source for technical terms used (such as the European Common Procurement Vocabulary). It was reported that such practices proved to be useful in some jurisdictions.

Article 12. Rules concerning evaluation criteria (A/CN.9/WG.I/WP.66, paras. 22 (e), 26-31 and 49-50)

82. The Working Group noted that the proposed article was based on a number of provisions of the 1994 Model Law.

83. General support was expressed for the proposition in paragraph (2) (a) that evaluation criteria should relate to the subject matter of the procurement. This principle, it was said, was a cornerstone to ensure best value for money and would assist in curbing abuse. However, it was noted that other evaluation criteria referred to in the proposed article (such as paragraph (4) (d)) would not relate to the subject matter of the procurement.

84. Support was expressed for retaining paragraph 4 (d) on the condition that enacting States in the procurement regulations would regulate precisely how the criteria listed in paragraph (4) (d) should be applied in individual procurements, and the opening phrase of paragraph 5 would accordingly be repeated in paragraph 4 (d).

85. The Working Group agreed to restructure the article to provide for a general principle as per paragraph 2 (a), with exceptions for the criteria elsewhere in the article that did not relate to the subject matter. The Working Group agreed to consider whether the exceptions should be justified when reviewing the revised article.

86. Some disagreement was expressed with the suggestion made in footnote 55 of document A/CN.9/WG.I/WP.66/Add.1. The Working Group decided to defer the consideration of the issue proposed in that footnote to be reflected in the Guide to a later stage, at which the revised Guide provisions would be considered.

87. The Working Group deferred the consideration of the draft article as revised at the current session to a later date.

Article 13. Rules concerning the language of solicitation documents

88. The Working Group noted that the proposed article was based on article 17 of the 1994 Model Law. The Working Group approved the draft article, subject to the updating of cross-references. (See further para. 169 below for a subsequent decision affecting this article.)

Article 14. Securities

89. The Working Group noted that the proposed article was based on article 32 of the 1994 Model Law (which had been moved from chapter III to chapter I in order to make the rules on tender securities applicable to all procurement methods). The Working Group agreed to that approach.

90. An inquiry was made as to whether the provisions of the article should regulate the subject of securities in the context of framework agreements as well. The general view was that securities might be required in the context of framework agreements but that this subject should be regulated in the chapter dealing with framework agreements rather than in the proposed article 14. The Working Group noted the views expressed at the session that requesting the provision of securities in the context of framework agreements, because of the nature of the latter, should be regarded as an exceptional measure.

91. The Working Group approved the draft article without change.

92. The Working Group noted a suggestion that the Guide should highlight the potentially onerous nature of securities, and the negative effects of requiring suppliers or contractors to present them, the issues of mutual recognition and the right of the procuring entity to reject securities in certain cases. The Working Group agreed to defer the consideration of these issues to a later stage, at which the revised Guide provisions would be considered.

Article 15. Prequalification proceedings (A/CN.9/WG.I/WP.66, paras. 22 (a) and (b) and 57 (d)-59)

93. The Working Group noted that the proposed article consolidated a number of provisions found in several articles of the 1994 Model Law. It in addition noted that some other revisions were proposed to be made to the article, in particular to conform it to the provisions on pre-selection found in the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and the UNCITRAL Legislative Guide on the same subject (the "PFIPs instruments").[3] The Working Group proceeded with a paragraph-by-paragraph consideration of the article.

Paragraph (1)

94. The Working Group noted that under the PFIPs instruments the prequalification was mandatory (A/CN.9/WG.I/WP.66, para. 22 (a)) and noted the reasons given for requiring prequalification in the PFIPs instruments. The Working

[3] Available as of the date of this report at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

Group considered whether provisions of the revised Model Law should provide for mandatory prequalification and, if so, in which types of procurement.

95. The Working Group expressed a preference for retaining optional prequalification. A suggestion was made that the Guide should highlight that prequalification might be used for limiting access to a specific procurement.

96. The Working Group considered the phrase "prior to the solicitation" proposed to replace the previous wording "prior to the submission of tenders, proposals or offers" for the reasons explained in paragraph 58 of document A/CN.9/WG.I/WP.66. The Working Group agreed with the suggested revision.

Paragraphs (2)-(8)

97. The Working Group approved the paragraphs without change, except for paragraph 5 (f) that, as was noted, would be considered with paragraph (9) (see the paragraphs immediately below).

Paragraph (9)

98. The Working Group considered: (i) whether the procuring entity should have the right to limit the number of prequalified suppliers allowed to participate further in the procurement proceedings (referred to as pre-selection); (ii) if so, how to ensure that the pre-selection was made in an impartial and objective manner; and (iii) whether any such right should be granted only for complex procurements proposed to be covered by chapter IV of the revised Model Law, or for any procurement.

99. The Working Group noted that proposed paragraphs (5) (f) and (9) (and consequential changes in paragraphs (10) to (12) and elsewhere in the proposed revised Model Law) were included to provide for such a right. It was noted that in this respect, the revised Model Law would then be conformed to the relevant provisions of the PFIPs instruments (A/CN.9/WG.I/WP.66, paras. 22 (b) and 59).

100. Flexibility was urged on the question, supporting the inclusion of provisions permitting pre-selection. It was noted that pre-selection was commonly used in large projects or where the prequalification was utilized for testing the market. It was also suggested that without pre-selection, there would be no real difference between open tendering with prequalification and open tendering without prequalification, and prequalification might therefore impose an extra burden on procuring entities.

101. Concern was expressed that allowing pre-selection would introduce subjectivity, and the opportunity for abuse and discrimination. It was noted that many suppliers were already reluctant to participate in procurement involving prequalification, given the expense of so doing, and that permitting pre-selection might operate as a further deterrent.

102. Strong support was expressed that if there were to be provision for pre-selection, it should require objectivity and transparency in the process. It was therefore suggested that the Model Law should require disclosure in the prequalification documents of the fact that the pre-selection would take place and of all relevant information about pre-selection procedures and criteria. Doubts were expressed, however, as regards the extent to which pre-selection could be regulated so that it was carried out in an impartial and objective manner.

103. The prevailing view was that all prequalified suppliers or contractors should be allowed to present submissions. The Working Group agreed that provisions on pre-selection should not be included and that therefore paragraphs (5) (f) and (9) and consequential changes proposed to be made to other paragraphs of the draft article and elsewhere in the text should be deleted.

104. It was suggested that the Guide might highlight that the drafting of stringent prequalification requirements might in any event limit the numbers of prequalified suppliers.

Paragraph (10)

105. The Working Group agreed that, in the light of its decision not to incorporate provisions on pre-selection in the article on prequalification, the text in the square brackets would be deleted. The Working Group approved the paragraph with this change.

Paragraph (11)

106. The Working Group agreed that the word "promptly" should be added before the word "communicate", and that the text in the square brackets should be deleted. Having noted that the word "promptly" might be interpreted subjectively, the Working Group agreed that the Guide should explain that the notice ought to be given prior to the solicitation.

107. The meaning of the last phrase in the paragraph was questioned (that is, the meaning of the statement that the procuring entity did not need to provide evidence for or give reasons for the grounds for disqualification of suppliers). It was suggested that the current formulation in the light of the review provisions should be reworded, to allow for meaningful debriefing and where necessary review. The Working Group agreed with that suggestion and that the Guide should explain the reasons for the revisions made to the 1994 text, in particular that mechanisms of review were considerably strengthened in the revised Model Law.

108. With these changes, the Working Group approved the paragraph.

Paragraph (12)

109. The view was expressed that the paragraph envisaged a second qualification exercise, which was inconsistent with provisions on prequalification. A preference was expressed that the provisions should consequently appear in article 10, together with the provisions of paragraph (8) of that article, and it was agreed that any overlap in the merged provisions should be eliminated. It was also agreed that the Guide should explain the value of the provisions where qualifications had changed during the procurement process. Reference was made to the existing guidance on the issue (paragraph (3) of the commentary to article 7 of the Guide), which would be incorporated in the revised commentary to the relevant provisions of the revised Model Law.

Article as a whole

110. The Working Group approved the draft article as revised at the current session.

Article 16. Rejection of all submissions

111. The Working Group noted that the proposed article reproduced article 12 of the 1994 Model Law.

112. Support was expressed for the suggestion that the opening phrase in paragraph (1) referring to higher-level approval should be deleted, because the benefits of the approval process might be illusory, and to avoid creating an unnecessary bureaucratic burden. It was viewed that the remedies mechanisms envisaged in the revised Model Law would provide sufficient safeguards against abuse. The Working Group agreed with that suggestion.

113. In response to an enquiry as to whether the procuring entity should be obliged to reserve the right to reject all submissions in the solicitation documents, general support was expressed for the view that there should be no such obligation. The general understanding was that the right to reject all submissions would be sufficient if provided for in the law, and a simple omission to record it in the solicitation document should not affect the right. It was proposed therefore that the phrase "if so specified in the solicitation documents" in the first sentence of paragraph (1) should be deleted. The Working Group agreed with that proposal.

114. In response to an enquiry as to whether the procuring entity should provide justifications for a decision to reject all submissions, the general view was expressed that the procuring entity should not be required to provide any justification, but should inform the suppliers or contractors concerned of the decision and grounds for it. The Working Group noted that justifications would be important where decisions involving issues of equal treatment or non-discrimination among suppliers were taken; in other cases, including in the case covered by the article, where all justify taking the decision the requirement to provide justifications would impose an unreasonable burden without clear benefit. It was agreed that this distinction should be clarified in the Guide, which should also highlight that decisions to reject all submissions would not normally be amenable to review unless abusive practices were involved.

115. The suggestion was made that the following words could be deleted in the second sentence of paragraph (1): "but is not required to justify those grounds." Another suggestion was that the words "upon request" should be deleted. The alternative view was that the sentence should be retained as it was.

116. The Working Group deferred the approval of the draft article as proposed to be revised at the current session to a later stage.

117. The Working Group agreed that references in the article and elsewhere in the revised Model Law to "solicitation or equivalent documents" should read "solicitation documents".

Article 17. Rejection of abnormally low submissions

118. The Working Group noted that the proposed article was as preliminarily agreed by the Working Group at its twelfth session (draft article 12 bis, A/CN.9/640, paras. 44-55).

119. A proposal was made that paragraph (1) should specifically reflect the occurrence of abnormally low submissions in situations of money-laundering. It was

noted that the point had already been discussed at the Working Group's previous sessions and that it would be addressed in the revised Guide, as had been previously agreed.

120. The Working Group approved the draft article without change.

Article 18. Rejection of a submission on the ground of inducements from suppliers or contractors or on the ground of conflicts of interest

121. The Working Group noted that the proposed article was based on article 15 of the 1994 Model Law.

122. The Working Group agreed with the proposal that the opening phrase in paragraph (1) should be deleted. The suggestion that all similar provisions in other provisions of the Model Law should also be deleted was not accepted. The Working Group agreed to decide on the need for provisions requiring a higher-level approval on a case-by-case basis.

123. In the light of the Working Group's discussions of conflicts of interest at its fourteenth session (A/CN.9/664, para. 116), the Working Group considered whether a provision should be included in the article requiring the rejection of a submission that had been presented in circumstances indicating conflicts of interest, either on the side of the supplier or contractor or in addition where conflicts of interest was on the side of the procuring entity. The Working Group considered the following wording for paragraph (1):

> "1. A procuring entity shall reject a submission if:
>
> (a) The supplier or contractor that presented it: offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings; or
>
> (b) The supplier or contractor has gained an unfair competitive advantage as the result of a conflict of interest in violation of the standards promulgated pursuant to this Law."

124. As regards subparagraph (b) of the proposal, the point was made that conflicts of interest standards could be found not only in regulations enacted pursuant to a procurement law, but also in other areas of law. It was therefore suggested that the reference in the subparagraph should be made to conflicts of interest standards established by the enacting State, in order to encompass all applicable regulations. With this change, the proposal was accepted.

125. The Working Group approved the draft article as revised at the current session.

Article 19. Acceptance of submissions and entry into force of the procurement contract (A/CN.9/WG.I/WP.66, para. 57 (a))

126. The Working Group noted that the proposed article was based on article 36 of the 1994 Model Law, which had been amended in the light of the introduction of a standstill period (A/CN.9/664, paras. 45-55 and 72). The Working Group further noted the proposal to place the article in chapter I of the revised Model Law in lieu

of article 13 of the 1994 Model Law, in order to make provisions on acceptance of the successful submission and entry into force of the procurement contract applicable to all procurement methods, and not only to tendering. The attention of the Working Group was drawn to the fact that provisions of the 1994 Model Law regulating these issues were not consistent from one procurement method to another. The Working Group agreed to the proposed approach and proceeded with a paragraph-by-paragraph consideration of the article.

Paragraph (1)

127. The Working Group noted that the paragraph was based on the first sentence of article 36 (1) of the 1994 Model Law. The Working Group approved the paragraph without change.

Paragraph (2)

128. The Working Group noted that the paragraph was included further to the Working Group's decision to introduce provisions on a standstill period in the revised Model Law (see A/CN.9/664, paras. 45-55 and 72). The Working Group further noted that the paragraph was based on the relevant provisions of the EU Directive 2007/66/EC of 11 December 2007 (article 2a. Standstill period).[4]

129. It was agreed that in paragraph (2), the chapeau provisions, the phrase "decision to accept the successful submission" should be reworded, to refer to the intended decision of the procuring entity and the provisional identification of the successful submission. It was noted that this formulation would be consistent with the logic of introducing the standstill period: after the successful submission is ascertained/identified by the procuring entity, no decision to accept the successful submission should be made before the expiry of the standstill period, as reflected in paragraph (4) of the article. Consequential changes would be made elsewhere in the article and differences between language versions conformed. It was also agreed that the term "participating in the procurement proceedings" in the chapeau of the same paragraph should be reworded to refer to remaining participants, with suitable explanation in the Guide.

130. As regards paragraph 2 (b), the Working Group noted that the provisions were closely linked to proposed article 22 (3) and (4), and should be conformed as regards both – the type of information about evaluation of submissions that could be disclosed to suppliers or contractors participating in the procurement, and the stage of the procurement proceedings at which such disclosure could be made. It was stressed that it was essential for suppliers or contractors participating in the procurement to receive sufficient information about the evaluation process to make the meaningful use of the standstill period.

131. The point was made that the exceptions to the disclosure provisions in that paragraph were drafted too broadly, might inhibit transparency, and should be redrafted to refer only to confidential information. In response, it was noted that the language proposed was similar to the language found in the WTO GPA

[4] Available as of the date of this report at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm#remedies.

(article XVIII (4)) and the EU procurement directives.[5] The Working Group agreed to consider whether to revise the wording at a future session. It was also agreed that the Guide would explain that the phrase "to impede fair competition" should be interpreted as encompassing the risks of hampering competition not only in the procurement proceedings in question but also in subsequent procurements.

132. The Working Group requested the Secretariat to supplement the provisions of paragraph 2 (c) that referred to the dispatch of the notice on a standstill period, to reflect that the dispatch should be made promptly and by reliable means. It was agreed that the same amendments should be made elsewhere in the article where reference was made to the dispatch of notices.

133. Also with respect to paragraph 2 (c), the inclusion of suggested time limits in square brackets was questioned. An alternative approach, accepted by the Working Group, would be to leave the specification of the time limits to an enacting State. The Guide, it was agreed, should point out that there were different regulations on the subject, and that even within the same jurisdiction, an enacting State might establish different time frames at various points of time depending, for example, on the level of penetration of electronic means of communication in public procurement. The Working Group agreed that the time frame should be specified in the terms of general principle, notably that the time frame should be sufficiently long to ensure that the meaningful review was possible.

134. The Working Group deferred its consideration of the paragraph as proposed to be revised at the current session to a later stage.

Paragraph (3)

135. The Working Group recalled and confirmed its decision taken at its fourteenth session that the requirement for a standstill period might be counterproductive where urgent public interest considerations required the procurement to proceed without delay (A/CN.9/664, para. 72). It requested that the different language versions be conformed in this respect.

136. The Working Group considered other cases that would justify exemptions from the application of a standstill period. In this context, it noted the relevant provisions in the EU Directive 2007/66/EC, which allowed a derogation from the standstill period for low-value procurement and in cases where prior publication of a contract notice was not required (such as negotiated procedures without the prior publication of a contract notice) (article 2b).

137. The Working Group agreed to retain the proposed exemption for low-value procurement. Noting the interaction of the provisions with proposed article 20 (3) (which exempted low-value procurement from mandatory publication of contract award notices), the Working Group, in conformity with the approach taken in that article, decided to defer the determination of an appropriate threshold for low-value procurement to an enacting State.

138. The Working Group approved the paragraph as revised at the current session.

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[5] Directive 2004/17/EC, article 49 (2); and Directive 2004/18/EC, articles 35 (4), 41 (3) and 69 (2). Available as of the date of this report at http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm#remedies.

Paragraphs (4)-(10)

139. The Working Group noted that the paragraphs were based on provisions of article 36 of the 1994 Model Law, with the consequential changes in the light of the introduction of a standstill period and the provisions on review in chapter VII of the revised Model Law.

140. The Working Group approved the paragraphs with the understanding that consequential changes would be made to these paragraphs where applicable to reflect the Working Group's decision on the dispatch of notices (see para. 132 above).

Paragraph (11)

141. The Working Group agreed that the words "as appropriate" in paragraph (11) should be amended to reflect more accurately the intended meaning that not all the provisions of the article were applicable to framework agreements.

142. In the context of footnote 21 of document A/CN.9/WG.I/WP.66/Add.2, the Working Group noted that, under the EU Directive 2007/66/EC, the requirement for a standstill period at the stage of awarding the contracts resulting from the second stage competition had been removed, because it had been considered cumbersome and undermining one of the main benefits of framework agreements – their efficiency.

143. Another view was expressed that no standstill period should apply in open framework agreements, since the electronic system through which these agreements operated should ensure sufficient transparency in the process of awarding contracts. It was noted that otherwise the swift operation of open framework agreements would be jeopardized.

144. The Working Group deferred its consideration of the paragraph to a later stage.

Article as a whole

145. The Working Group deferred the approval of the draft article as proposed to be revised at the current session to a later stage pending in particular the consideration of the revised paragraphs (2) and (11) (see paras. 134 and 144 above).

Article 20. Public notice of awards of procurement contract and framework agreement (A/CN.9/WG.I/WP.66, para. 60)

146. The Working Group noted that the proposed article was based on the provisions of article 14 of the 1994 Model Law.

147. The Working Group agreed to add in the revised article the provisions: (i) related to framework agreements; (ii) on disclosure of the name(s) of the supplier(s) or contractor(s); and (iii) on a mandatory publication of quarterly notices of all procurement contracts issued under open (but not closed) framework agreements (the view was expressed that in closed framework agreements this requirement would be cumbersome).

148. The Working Group approved the draft article as revised at the current session.

Article 21. Confidentiality

149. The Working Group noted that the proposed article was based on the provisions of article 45 of the Model Law and model provision 24 of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (one of the PFIPs instruments).

150. It was queried whether the provisions in paragraph (1) would prevent the disclosure of information that was required to be announced at the public opening of tenders.

151. The Working Group accepted the proposal that the article should be redrafted to reflect that the confidentiality requirement applied also to some other information that originated from suppliers or contractors, such as information submitted by suppliers in their applications to prequalify, to be supported by commentary in the Guide.

152. The Working Group deferred its consideration of the remainder of the draft article to a later stage.

Article 22. Record of procurement proceedings (A/CN.9/WG.I/WP.66, para. 61)

153. The Working Group noted that the proposed article was based on article 11 of the 1994 Model Law.

154. It was queried whether the words "where these are known to the procuring entity" when referring to price in paragraph (1) (e) were appropriate, because it was unlikely that the information would not be known to the procuring entity. It was also highlighted that the information in the paragraph would have to appear in the final record of procurement proceedings to allow for effective review. It was noted that the chapeau of paragraph (1) referred to maintaining the record, requiring the record to be updated as information was provided. It was clarified that the provisions should be understood as requiring the procuring entity to include in the record all information listed in paragraph (1) to the extent that it was known to the procuring entity. In addition, it was pointed out that the relevant provisions from the accompanying commentary in the Guide indicated the value of having the phrase in question in the text in the light of the specific nature of some procurement. The Working Group agreed that paragraph (1) (e) should be revised to ensure the meaning was clear.

155. The Working Group agreed that paragraph (1) (k) should refer to information to be provided if the bids were rejected on the basis of violation by a bidder of the auction rules, and that further information might be added later in the Working Group's deliberations.

156. The point was made that paragraphs (1) (m) and (4) (a) should be aligned with other provisions in the Model Law.

157. The Working Group deferred the approval of the draft article to a later stage until all outstanding issues had been resolved.

2. CHAPTER II. TENDERING PROCEEDINGS (A/CN.9/WG.I/WP.66/Add.2)

Article 23. Domestic tendering

158. The Working Group noted that the proposed article was based on article 23 of the 1994 Model Law. The Working Group approved the draft article without change.

Article 24. Procedures for soliciting tenders

159. The Working Group noted that the proposed article reproduced article 24 of the 1994 Model Law, except for the provisions related to invitation to prequalify, which had been moved to the proposed article 15 that had already been considered by the Working Group at the current session (see paras. 93-110 above). The Working Group approved the draft article without change.

Article 25. Contents of invitation to tender

160. The Working Group noted that the proposed article reproduced article 25 of the 1994 Model Law, except for the provisions related to the invitation to prequalify procedure, which were reflected in the proposed article 15 that had already been considered by the Working Group at the current session (see paras. 93-110 above).

161. The Working Group agreed to amend subparagraph (j) to refer to the modalities of submission of tenders, to allow for electronic submission, and to make equivalent changes in articles appearing later in the chapter.

162. The Working Group approved the draft article as revised at the current session.

Article 26. Provision of solicitation documents

163. The Working Group noted that the proposed article was based on article 26 of the 1994 Model Law. In the light of its decision as regards article 15 (see para. 103 above), the Working Group decided to delete the text in the square brackets.

164. The Working Group approved the draft article as revised at the current session.

Article 27. Contents of solicitation documents

165. The Working Group noted that the proposed article was based on article 27 of the 1994 Model Law and that a number of consequential changes had been made to that article, in particular to subparagraphs (d) and (e) in the light of the proposed articles 11 and 12, respectively. It was agreed that reference to the relative weight of evaluation criteria should be added to paragraph (e).

166. The Working Group approved the draft article as revised at the current session.

Article 28. Clarifications and modifications of solicitation documents

167. The Working Group noted that the proposed article was based on article 28 of the 1994 Model Law. The Working Group approved the draft article without change.

168. It was agreed that the Guide commentary accompanying the article should refer to the provisions of article 30 (2) that dealt with the extension of the deadline for presenting submissions. It was also pointed out that in the context of electronic procurement it should be made clear that any obligation of the procuring entity to

debrief individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors were known to the procuring entity.

Article 29. Language of tenders

169. The Working Group noted that the proposed article was based on article 29 of the 1994 Model Law and that it was suggested that it should be merged with the proposed article 13. The Working Group agreed with that suggestion.

Article 30. Submission of tenders

170. The Working Group noted that the proposed article was based on article 30 of the 1994 Model Law, and that paragraph (5) reproduced the text as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, para. 28).

171. It was agreed that paragraph (1) and similar provisions in the proposed revised Model Law with references to "a place" should be redrafted in a technologically neutral manner. It was further agreed to insert in paragraph (1) cross-references to articles 25 (j), 27 (n) and 30 (2) and (3).

172. The Working Group approved the draft article as revised at the current session.

173. The suggestion was made and accepted by the Working Group that the Guide should discuss the nature of the receipt to be provided in accordance with paragraph (5) (b) of the proposed article, and should state that the certification of receipt provided by the procuring entity would be conclusive.

Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders

174. The Working Group noted that the proposed article was based on article 31 of the 1994 Model Law.

175. In response to a proposal to delete the second sentence of paragraph (2) (a) on the basis that it was superfluous, the Working Group noted a comment by the observer of the World Bank that the provision in question was often invoked in the projects financed by the World Bank and referred to situations when the procuring entity was not able to evaluate all submissions on time and for that reason had to extend the deadline. In such situations, it was noted, suppliers might, but should not be obligated to, extend the effectiveness of their tenders and the refusal to do so should not forfeit their submission security. It was noted that the derivation and reasons for the inclusion of the provision in the Model Law should be examined.

176. The Working Group deferred its consideration of the draft article to a later stage.

Article 32. Opening of tenders

177. The Working Group noted that the proposed article was based on article 33 of the 1994 Model Law, and that paragraph (2) reproduced the text as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, para. 38). The Working Group approved the draft article without change.

178. It was agreed that the Guide should highlight that the modalities for the opening of tenders established by the procuring entity (time, place where applicable, and other factors) should allow for the presence of suppliers or contractors.

Article 33. Examination, evaluation and comparison of tenders

179. The Working Group noted that the proposed article was based on article 34 of the 1994 Model Law and that amendments were proposed to be made to paragraphs (1) (a), (2) (a), (3), (4) and (8).

180. The Working Group agreed to defer the consideration of the following suggestions made at the current session to a later stage:

(a) To narrow the broad reference to solicitation documents in paragraph (2) (a) to relevant requirements;

(b) To include in paragraph 3 (c) a reference to article 11, as proposed in footnote 79 of document A/CN.9/WG.I/WP.66/Add.2;

(c) To reconsider the use of the term "lowest evaluated tender" in paragraph 4 (b) (ii);

(d) To add the words "Where price is the only award criterion" at the beginning of paragraph 4 (b) (i), and the words "Where there are price and other award criteria" at the beginning of paragraph 4 (b) (ii).

181. The Secretariat was requested: to present these suggestions in square brackets; to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments; and to report its findings when the provisions were considered.

Article 34. Prohibition of negotiations with suppliers or contractors

182. The Working Group noted that the proposed article was based on article 35 of the 1994 Model Law. The Working Group approved the draft article without change.

3. CHAPTER III. CONDITIONS FOR USE AND PROCEDURES OF RESTRICTED TENDERING, TWO-ENVELOPE TENDERING, AND REQUEST FOR QUOTATIONS (A/CN.9/WG.I/WP.66/Add.3)

Article 35. Restricted tendering (A/CN.9/WG.I/WP.66, paras. 38-40)

183. The Working Group noted that the proposed article was based on the merged articles 20 and 47 of the 1994 Model Law.

184. The Working Group considered two options presented for this article and the difference between them. The Working Group noted the reasons for proposing the second option set out in paragraphs 38-40 of document A/CN.9/WG.I/WP.66. The Working Group was invited to consider whether the Model Law, where highly complex or specialized nature procurement was involved, should require open tendering with prequalification instead of restricted tendering, to ensure transparency and objectivity.

185. Some delegates expressed a preference for option 1. The Working Group noted the possible benefits in retaining option 1 for specialized procurement, in particular that it might be the only viable option, especially for health products and pharmaceuticals, if open tendering failed.

186. Some delegates expressed a preference for option 2 as drafted, or including a reference to highly specialized products.

187. Another suggestion was to delete both options and eliminate restricted tendering as a separate procurement method from the Model Law. It was explained that experience in some jurisdictions indicated that restricted tendering opened the door to abuse and subjectivity. It was noted that open tendering with prequalification or pre-selection might achieve the same purposes as restricted tendering in a more transparent manner.

188. Another suggestion was to use the provisions on selective tendering procedures in article X of the WTO GPA as a basis for a revision of this article of the Model Law. The Secretariat was requested to draft option 3 based on this proposal, for consideration at a later stage.

189. The Working Group agreed that, regardless of which option was retained, the opening phrase in paragraph (1), referring to higher-level approval, should be deleted.

190. The Working Group heard suggestions that the provisions referring to pre-selection of suppliers or contractors in a non-discriminatory manner should be supplemented with the examples in the Guide how such non-discrimination could be ensured in practice. In response, it was pointed out that, in procurement of highly specialized products for which the number of suppliers was limited, objective criteria were already present.

191. The suggestion was made that the provisions of paragraph (3) on the publication of a notice of restricted tendering should be expanded to specify the timing, the content and the purpose of the publication. On the other hand, it was noted that the provisions would be repetitive with those in the chapter on tendering, and a preference was expressed to address the concern through the use of an express cross-reference. The Working Group agreed with this approach.

192. The Working Group deferred its consideration of all options for the article to a later stage.

Article 36. Two-envelope tendering

193. The Working Group noted that the title of the proposed article was new, reflecting the two-stage evaluation process, whereas its text closely followed the wording of article 42 of the 1994 Model Law (request for proposals procedure without negotiation, for services procurement). It was also noted that the proposed article was in addition based on articles 19 (1) (a) (i) and 37 and the general thrust of chapter IV of the 1994 Model Law.

194. The Working Group considered the need for the article and in this respect the extent to which the method of procurement set out in the article was different from tendering (if it commenced with a public advertisement) or restricted tendering (if it commenced without such an advertisement).

195. The view was expressed that the procurement method set out in the proposed article should be retained as it indeed provided features distinct from those of tendering. In particular, it was noted that in this method two envelopes with different content were submitted simultaneously but opened sequentially: the envelope with qualitative and technical criteria being opened first and the other envelope with price being opened after the evaluation of qualitative and technical criteria had been completed.

196. Another view was that the provisions should be deleted as they had not proved useful in practice and introduced subjectivity in the form of qualitative factors in the evaluation process. It was also noted that practical difficulties would arise in ensuring the confidentiality of price information up until the evaluation of technical and qualitative criteria was completed. In some cases, it was said, it was not possible to complete evaluation of technical and qualitative criteria without information about the price.

197. Another proposal was to delete the article but to explain in the Guide that the procedures were rare but used in practice. Another suggestion was to treat the method as variant of tendering or competitive negotiation.

198. The alternative view was that in some jurisdictions the method was used widely and had proved useful. Some delegates expressed the view that the concerns expressed about the method might not inevitably apply. A further view was that the method might not be appropriate in some procurement, for example in highly complex procurement where a complete evaluation was not possible without evaluating price and non-price criteria together. This, however, it was said, should not lead to the conclusion that the method was of no use in any procurement.

199. In response to a concern that there was flexibility in awarding the procurement contract envisaged in paragraph (6), and that the contract might be awarded in a non-transparent manner, it was noted that the manner of award would have to be specified in the solicitation documents (governed by chapter II).

200. The Working Group noted drafting suggestions to the text, in particular that some provisions, such as paragraph (6) (b) were not aligned with other provisions of the revised Model Law. It was also noted that the terms “open” and “direct” solicitations had not been defined in the revised Model Law and retaining them in the proposed article would depend on the Working Group’s decision in this respect.

201. The Working Group agreed to retain the draft article but deferred its consideration to a later stage. It was agreed that the Guide should explain the intended scope of the article.

Article 37. Request for quotations

202. The Working Group noted that the proposed article was based on articles 21 and 50 of the 1994 Model Law and that the terms in square brackets in paragraph (1) had been amended as compared with the 1994 text so as to allow the use of request for quotations for all types of standardized or common procurement that was not tailored by means of specifications or technical requirements.

203. The Working Group agreed to delete in paragraph (1) the opening phrase referring to higher-level approval.

204. With respect to the reference, in paragraph (3) of the article, to a minimum number of suppliers or contractors from whom quotations were to be requested, the Working Group’s attention was brought to academic comment that a minimum of five participants might be necessary to ensure effective competition. The Working Group was invited to consider therefore whether the reference to three participants, taken from the 1994 Model Law, was sufficient. In response, it was said that it was preferable that the threshold should be kept as low as possible and the reference to at least three suppliers or contractors was therefore satisfactory.

205. Concern was expressed, however, that the reference to a minimum requirement to seek quotations from at least three suppliers was qualified with the words "if possible". It was observed that the article dealt with off-the-shelf items for which there was an established market, so that it would always be possible to seek quotations from at least three suppliers, especially in the context of electronic procurement. The suggestion was made to delete the words "if possible" since they therefore opened the possibility of abuse and subjectivity. The alternative view was that flexibility should be retained.

206. The prevailing view was to delete the words. In response to concerns expressed about the deletion, it was explained that where conditions in the market did not allow the procuring entity to utilize the procurement method in question, the procuring entity would be able to have recourse to single-source procurement. It was also noted that the Guide would explain that if, for example, only one or two quotations were received as a result of the request for quotations addressed to three or more suppliers, the procurement could nonetheless continue.

207. The Working Group agreed to delete the words "if possible". It noted that the same notion appeared in other provisions of the Model Law but that the Working Group would consider retaining them on a case-by-case basis.

208. The Working Group approved the draft article as revised at the current session and agreed to consider in due course the suggestion that the Guide should reflect the non-binding nature of quotations unlike tenders, offers or proposals.

4. CHAPTER IV. CONDITIONS FOR USE AND PROCEDURES OF TWO-STAGE TENDERING, REQUEST FOR PROPOSALS AND COMPETITIVE NEGOTIATION (A/CN.9/WG.I/WP.66, paras. 21, 22 and 70, and A/CN.9/WG.I/WP.66/Add.3)

209. The Working Group noted that two main issues to consider in the context of this chapter were: (i) whether and, if so how, to ensure consistency between the provisions of this chapter of the revised Model Law and the PFIPs instruments; and (ii) in the light of article 12 on evaluation criteria, how to ensure transparency in evaluation in procurement methods involving negotiations.

210. The Working Group had before it the following proposal for an article to merge article 40 (Request for proposals) and article 41 (Competitive negotiation):

"Article [40]. Competitive negotiation

(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 or efficiency 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

(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.

(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;

(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; 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.

(8) The procuring entity may 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;

(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;

(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) 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) 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."

211. It was explained that the proposed revised Model Law presented these two methods as distinct methods, whereas in practice requests for proposals were typically the solicitations used to launch competitive negotiations. It was explained that the proposal in the preceding paragraph merged the two articles with just one paragraph being deleted because of overlap.

212. The Working Group deferred its consideration of the entire chapter together with the draft article proposed at the current session to a later stage.

5. CHAPTER V. CONDITIONS FOR USE AND PROCEDURES OF ELECTRONIC REVERSE AUCTIONS (A/CN.9/WG.I/WP.66/Add.3)

Article 42. Conditions for use of electronic reverse auctions

213. The Working Group noted that the proposed article was based on the text amended at the Working Group's twelfth session (A/CN.9/640, paras. 56-57, and

A/CN.9/WG.I/WP.59, para. 3), and that minor consequential changes had been made in the light of the proposed revisions to the Model Law.

214. The Working Group agreed to replace the reference to "goods, construction or services" with the term "the subject matter of the procurement", with the Guide explaining in which type of procurement ERAs could be used.

215. A suggestion was made to amend paragraph (2) (a) by adding reference to "standardized goods". This suggestion was subsequently withdrawn on the understanding that the issue would be discussed when the Guide provisions accompanying paragraph (2) (a) were considered. It was also suggested that the Guide might provide drafting suggestions to enacting States for regulating a simple price-only ERA.

216. The Working Group approved the draft article as revised at the current session.

Articles 43-48

217. The Working Group noted that draft articles 43 to 48 had been revised further to the Working Group's consideration of the provisions on ERAs at its twelfth session (A/CN.9/640, paras. 62-92).

218. With respect to draft article 47 (1) (c), the Working Group considered the extent of the information that this provision would require to be disclosed during the auction, in addition to the formula and the results of the initial evaluation, such as information regarding all bids including their quality scores. The Working Group further considered whether the disclosure of this information might facilitate collusion. The Working Group was invited to consider an alternative formulation that would enable the bidder to see information regarding its bid and either the leading bid or by how much the bid needs to improve to become the leader.

219. It was agreed that the wording of draft article 47 (1) (c) would be retained but the Guide would highlight risks of collusion and provide examples of existing good practice to mitigate these risks.

220. It was suggested that, in draft article 48, 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, such as draft article 12 on evaluation criteria. It was also pointed out that the term in draft article 48 was based on the terms used in the 1994 text.

221. The Working Group noted remarks by certain commentators that procedures in which the auction was followed by traditional tendering involving the last remaining two bidders could provide good value for money. The view was expressed to the opposite. It was explained that no real competition could take place in the auction itself if subsequent tendering would take place. The Working Group decided not to consider the issue further.

222. Subject to paragraph 220 above, the Working Group approved articles 43-48.

6. CHAPTER VI. FRAMEWORK AGREEMENTS PROCEDURES (A/CN.9/WG.I/WP.66/Add.4)

223. The Working Group noted that the entire chapter on framework agreements procedures had been revised to reflect the decisions taken by the Working Group at its fourteenth session (A/CN.9/664, paras. 75-110). The revised chapter was therefore before the Working Group for the first time. The Working Group was invited to consider the order of the resultant provisions, which had been drafted to present provisions addressing open and closed framework agreements separately (A/CN.9/664, para. 90). The Working Group was also invited to consider whether the procedures should be available for all types of procurement, including negotiated procurement or procurement where specifications were set later than at the outset of the procurement, which were effectively excluded in the current draft.

224. 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.

225. The Working Group proceeded with an article-by-article consideration of the chapter. (For the decision affecting this chapter taken by the Working Group earlier at the current session, see para. 90 above.)

Article 49. Conditions for use of a framework agreement procedure

226. The Working Group noted that the proposed article was based on paragraphs 1, 4, 5, 6 and 7 of article 22 ter, which was before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), and which had been reordered to conform with the equivalent provisions regarding ERAs. It was also noted that the text included additional definitions.

227. Support was expressed for a proposal to delete the conditions for use in paragraph (1), on the basis that they were too restrictive and might lead to unsubstantiated complaints. The preferred option, it was said, would be to reflect the content of the provisions in the Guide.

228. The alternative view was expressed that conditions for use were important to retain since the framework agreement procedures were inherently of anticompetitive potential and open to abuse or improper use. A suggestion was made that the provisions setting out the conditions could be redrafted to include other instances where the use of framework agreements would be justifiable. It was proposed that an additional subparagraph (c) could be included that would be open-ended, subject to the justification by the procuring entity of the recourse to framework agreement procedures. Another suggestion was to retain the provisions as drafted with the explanation in the Guide that framework agreement procedures could also be used in other instances.

229. The Working Group agreed: to retain the provisions in paragraphs (1) and (3) in square brackets for further consideration at a later stage; and to reflect the content of paragraph (2) in article 2 (Definitions). Concern was expressed that there were many provisions in the chapter that required the inclusion of various decisions related to framework agreement procedures in the record of procurement

proceedings. It was suggested that these provisions would be consolidated for further consideration at a later date.

Article 50. Information to be specified when first soliciting participation in a framework agreement procedure

230. The Working Group noted that the proposed article was based on draft article 51 novies, which was before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), and which had been simplified by cross-referring to the mandatory provisions in proposed articles 53 (closed framework agreements) and 56 (open framework agreements). The presentation also sought to avoid unnecessary repetition, and incorporated the Working Group's decisions on the earlier draft (A/CN.9/664, paras. 78-82).

231. It was suggested that in proposed paragraph (f), the reference to evaluation criteria should apply both to open and to closed framework agreements, and thus the words "including in the case of closed framework agreements" should be deleted. It was explained, however, that no competitive evaluation took place in open framework agreements at this stage, and only responsiveness and qualifications were then ascertained. The Working Group agreed with the substance of the paragraph as drafted but it was suggested that the drafting should be revised to make the issue clearer, with suitable explanation in the Guide. It was agreed that the words "the evaluation criteria" should also be replaced with the words "any evaluation criteria".

232. With respect to subparagraph (g), the Working Group considered which information listed in articles 25 and 27 of the Model Law applicable to tendering proceedings was to be included in the solicitation documents in the context of framework agreements, and whether any information specified therein would be subject to refinement at the second stage of framework agreements without second-stage competition. The suggestion was made that the provisions as drafted were sufficient, but that the Working Group would consider any suggested changes at a later stage.

233. Subject to above changes, and to the possible inclusion of a further requirement (see para. 248 below), the Working Group approved the draft article.

Article 51. No material variation during the operation of the framework agreement

234. The Working Group noted that the proposed article was based on the description of "material variation" provided by the Working Group at its fourteenth session (A/CN.9/664, para. 101 (c) and (d)).

235. With respect to paragraph (2), the Working Group was invited to consider whether the definition of "material change" should be placed in the Model Law rather than the Guide as had been suggested at the Working Group's fourteenth session. The view was expressed that the provisions being essential should be retained in the Model Law itself and could be placed in article 2 (Definitions). The alternative view was that the provisions should be placed in the Guide.

236. Concern was expressed about the text in square brackets in the end of paragraph (2) as being excessively broad. It was suggested that the text should be

removed from the Model Law but its substance reflected in the Guide as an explanation of the policy considerations underlying the definition.

237. Subject to the removal of the text in square brackets to the Guide, the Working Group agreed to retain the definition in the Model Law but in square brackets, for further consideration at a later stage, and together with any proposals that were submitted by delegates on the subject. (See para. 273 (f) below for the Working Group's subsequent decision affecting the definition of "material change".)

Article 52. First stage of a closed framework agreement procedure

238. The Working Group noted that the proposed article was based on draft articles 51 octies and decies, which were before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), and which had been revised implementing the Working Group's decisions regarding separating open and closed framework agreements procedures (A/CN.9/664, paras. 83-88 and 90). The Working Group approved the draft article without change.

Article 53. Minimum requirements of closed framework agreements

239. The Working Group noted that the proposed article was based on paragraphs 2 and 3 of draft article 22 ter, which was before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6). The text had been separated into an independent article for ease of reading, and applied to closed framework agreements procedures only (A/CN.9/664, para. 90).

240. The Working Group agreed to replace reference to "the envisaged frequency" in paragraph (e) with reference to "the possible frequency".

241. With respect to paragraph (1) (c), the Working Group was invited to consider whether the situation in which some terms and conditions of the framework agreement cannot be settled at the outset was sufficiently regulated (for example, the notion of "refining" terms at the second stage without a competition). It was agreed that the text would remain as drafted, but the need for effective regulation would be discussed in the Guide.

242. With respect to paragraph (1) (f), the Working Group was invited to consider the possibility of including an alternative method of awarding the procurement contract, such as rotation, and whether such alternative methods were possible in the light of the draft evaluation criteria article (proposed article 12). The Working Group noted that the policy considerations in the Model Law on evaluation criteria would not allow alternative methods of awarding the procurement contract, and agreed that the text would remain as drafted.

243. With respect to paragraph (2), the Working Group was invited to consider whether a provision to ensure effective competition in multi-supplier agreements was required; if so, whether any minimum (3 or 5) should be included and conformed to the number in the equivalent provisions regulating requests for proposals or quotations procedures (see para. 204 above). A suggestion was made that the reference to a defined number should be deleted, and a decision on any required number left to an enacting State.

244. 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.

245. The Working Group approved the draft article as revised at the current session.

Article 54. Second stage of a closed framework agreement procedure

246. The Working Group noted that the proposed article was based on draft articles 51 duodecies and terdecies, which were before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), and which had been consolidated in accordance with the Working Group's decision at that session (A/CN.9/664, para. 106), and updated to reflect the provisions of chapters I and II of the proposed revised Model Law.

247. It was noted that the proposed article 54 was identical to the proposed article 57, with the exception of paragraph (2) that contained provisions pertinent only to closed framework agreement procedure. It was agreed that these articles should be merged as appropriate.

248. With respect to paragraph (4) (b), 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 50 (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.

249. Subject to paragraph 247 above, the Working Group approved the draft article.

Article 55. First stage of an open framework agreement procedure

250. The Working Group noted that the proposed article was based on draft articles 51 octies and decies, which were before the Working Group at its fourteenth session (A/CN.9/WG.I/WP.62, para. 6), and which had been revised to implement the Working Group's decisions regarding separating open and closed framework agreements procedures (A/CN.9/664, paras. 83-88 and 90).

251. It was suggested that requiring the publication of the names of the parties to the framework agreement might lead to collusion and paragraph (4) (a) should be amended accordingly. The Working Group, noting the decision taken on the matter in the context of article 20 at the current session (see paras. 146-148 above), did not accept the suggestion.

252. It was agreed that the phrase "within a maximum of […] days" would remain in paragraph (6). The understanding was that an enacting State would fill in the missing information in square brackets, as appropriate.

253. The Working Group approved the draft article as revised at the current session.

Article 56. Minimum requirements as regards open framework agreements

254. The Working Group agreed that the article should contain a reference to the duration of the open framework agreement. Reference was made in this context to

footnote 16 of document A/CN.9/WG.I/WP.66/Add.4. With this change, the Working Group approved the draft article.

Article 57. Second stage of an open framework agreement procedure

255. The Working Group recalled its earlier decision that the proposed article 57 would be deleted since its content had already been reflected in article 54 (see para. 247 above).

7. CHAPTER VII. REVIEW

256. The Working Group noted that the entire chapter had been revised to reflect the decisions taken by the Working Group at its fourteenth session (A/CN.9/664, paras. 18-74). The Working Group proceeded with an article-by-article consideration of the chapter.

Article 58. Right to review

257. The Working Group approved the proposed article without change.

Article 59. Review by the procuring entity or the approving authority

258. The Working Group noted that the proposed article was based on article 53 of the 1994 Model Law, which had been revised reflecting the Working Group's decisions taken at its fourteenth session (A/CN.9/664, paras. 28-33 and 65). It was noted that paragraph (1) (b) was to be considered together with proposed article 19 (provisions on a standstill period) and article 62 (provisions on suspension of procurement proceedings).

259. It was suggested that the proposed article should be redrafted to make clearer that the review under the article was optional. It was further noted that fixing a specific number of days in paragraph (1) (b) would be inappropriate, since this number would vary from procurement to procurement. It was agreed that no specific number of days should be included in the provisions but referred to the decision by an enacting State. It was also agreed that the Guide should in this respect bring to the attention of enacting States the time period specified in the WTO GPA.

260. Subject to these changes, the Working Group approved the draft article.

Article 60. Review before an independent administrative body

261. The Working Group noted that the proposed article was based on article 54 of the 1994 Model Law, which had been revised reflecting the Working Group's decisions taken at its fourteenth session (see A/CN.9/664, paras. 35, 36, 39, 44, 53, 55 and 56).

262. The Working Group agreed:

(a) To insert a footnote to this article as suggested in footnote 38 of document A/CN.9/WG.I/WP.66/Add.4;

(b) To delete in paragraph (2) the word "original", and to explain the intended meaning of the provisions in the Guide;

(c) To delete in paragraph (2) the reference to a specific number of days, with the appropriate explanation in the Guide, in conformity with the Working Group's decision taken on the same issue in conjunction with article 59 (1) (b) (see para. 259 above);

(d) To replace in paragraph (3) the current cross-reference to paragraph 62 (5) with the cross-reference to paragraph 62 (3);

(e) To retain in paragraph (5) (f) option I only, the wording of which should be aligned with the relevant provisions of international instruments, such as article XX (7) (c) of the WTO GPA and article XVIII (7) (b) of the provisionally agreed text of the revised WTO Agreement on Government Procurement;[6]

(f) To move option II from paragraph (5) (f) to the Guide with the explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses proved to be highly disruptive for procurement proceedings since it provided additional incentives for complaints. It was also suggested that the Guide should explain evolution in regulations on this matter and highlight the relevant provisions of the WTO GPA and the provisionally agreed text of the revised WTO Agreement on Government Procurement;

(g) To clarify in the Guide the meaning of the term "independent administrative body", in particular whether the body should be composed of outside experts. It was noted that the Guide might highlight the disruptions to the procurement proceedings if decision-taking at the review stage lacked independence since decisions would be subject to appeal and would cause further delays.

263. It was suggested that in paragraph (3) the word "timely" should be deleted as being subjective. It was explained that no subjectivity was involved as the reference intended to indicate that the complaints were to be submitted within the time limit prescribed in paragraph (2).

264. In response to the suggestion that paragraph (5) (a) should be included in the chapeau of the paragraph, the Secretariat was requested to research the drafting history of the provisions. The Working Group decided to defer the consideration of the suggestion until after the findings of the Secretariat were considered.

265. Subject to paragraph 264 above, the Working Group approved the draft article as revised at the current session.

Article 61. Certain rules applicable to review proceedings under articles 59 and 60

266. The Working Group noted that the proposed article was based on article 55 of the 1994 Model Law, which had been revised reflecting the Working Group's discussions at the Working Group's fourteenth session (A/CN.9/664, paras. 59-60).

267. The Working Group agreed:

(a) To redraft paragraph (4), so as to remove the ambiguity in reference to "relevant documents";

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[6] Document GPA/W/297, available as of the date of this report at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

(b) To consider including in paragraphs (3) and (4) exceptions to disclosure on the basis of confidentiality, with the Guide explaining that considerations of confidentiality should not impair a fair trial and a fair hearing;

(c) To clarify in the Guide that the term "participating in the procurement proceedings" could include a different pool of participants depending on the timing of the review proceedings, and further to specify that those whose submissions were rejected or disqualified might not have the right to participate in the review proceedings.

268. Subject to these changes, the Working Group approved the draft article.

Article 62. Suspension of procurement proceedings and article 63. Judicial review

269. The Working Group noted that the proposed articles were based on articles 56 and 57 of the 1994 Model Law, respectively. The Working Group approved the draft articles without change.

8. Title of the Model Law

270. It was agreed that the title of the Model law should read "the UNCITRAL Model Law on Public Procurement".

9. Preamble

271. It was suggested that paragraph (b) of the preamble should be redrafted to indicate that the Model Law's goal was first of all to foster international trade. The proposal was to delete the words "especially where appropriate, participation by suppliers and contractors". Alternative views were expressed that the provisions as appeared in the 1994 text were important and should be retained, and that the main purpose of the Model Law was to foster the goal of the enacting States to maximize the efficiency of the public procurement processes. It was therefore noted that the priorities as reflected in the preamble were correct and the text should therefore remain unchanged.

10. Definitions

272. The Working Group noted that the proposed provisions in article 2 were to be considered together with the definitions set out in the draft articles 49 and 51 (see paras. 229 and 234-237 above) and together with the following new definitions:

> "'Open solicitation' means solicitation in … (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published).
>
> 'Direct solicitation' means solicitation from [chosen/identified] supplier(s) or contractor(s)."

273. It was agreed:

(a) To place the two new definitions reproduced in the preceding paragraph in article 2 in square brackets for future consideration;

(b) To retain in subparagraph (a) of article 2 the reference to "goods, construction and services" that should be followed with the term "subject matter of

the procurement" in parenthesis, which would then be used in the text of the Model Law;

(c) To explain in the Guide that the words "by any means" in subparagraph (a) of article 2 intended to indicate that procurement was carried out not only through acquisition by purchase but also by other means such as lease, and that these words should not therefore be interpreted as implying possibility of using unlawful means;

(d) To delete in subparagraph (k) of article 2 the reference to the "subject matter of the procurement";

(e) To remove the definitions in subparagraphs (l) (i) to (iii) of article 2 to the Guide;

(f) To include in article 2 the definitions contained in the proposed articles 49 and 51 as revised at the current session.

274. The Working Group approved draft article 2 as revised at the current session.

V. Other business

275. The Working Group noted that some delegates had expressed concerns with the quality of translated documents, in particular with French and Spanish versions. A complaint was voiced that some provisions of the English versions of the documents had not been translated at all, and difficulties had arisen in understanding other provisions that had been translated.

276. The Working Group heard views of some delegates that the completion of the project by the Commission's forty-second session, in 2009, should remain the desirable goal but the achievement of this goal should not jeopardize the quality of the considerations or of the resulting instrument, and should not put undue pressure on the delegates and the Secretariat.

277. The Working Group noted that the text, further revised to reflect the decisions taken at the current session, was expected to be before the Commission at its forty-second session, in July 2009. However, in the light of the revisions to be made in the text, the Working Group requested that every effort should be made to convene an additional session of the Working Group before the Commission's session in 2009, preferably in May.

278. The Working Group noted difficulties with the completion of the outstanding research and the drafting by an anticipated May session of the Working Group. As regards procurement methods involving negotiations, one delegation agreed to present a conference room paper proposing a revised chapter IV.

279. Doubt was expressed about the value of holding the May session if the results of that session were not reflected in an instrument presented to the Commission. In response, it was explained that the report of the May session could be presented to the Commission, and the revised text could be included in conference room papers that would be made available at the session. It was noted that further consultations would be held with the Bureau of the Commission regarding the advisability of

holding an additional session of the Working Group and more generally regarding planning for the forty-second session of the Commission.

280. The Working Group agreed to the suggestion that the documents prepared after the current session for continuation of the discussion before the forty-second session of the Commission should be posted on the UNCITRAL website upon their availability in various language versions.