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Report of Working Group I (Procurement) on the work of its eighteenth session (New York, 12-16 April 2010)

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, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). 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 that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. 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: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions (ERAs), including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and their procedural aspects.

3. At its seventh, eighth and tenth to twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders, including their early identification in the procurement process and the prevention of negative consequences of such tenders.

4. At its thirteenth and fourteenth (Vienna, 8-12 September 2008) sessions, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat. 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 revised Model Law, for reasons that would be set out in the Guide to Enactment. 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.

5. At its fifteenth session (New York, 2-6 February 2009), the Working Group completed the first reading of the draft revised model law 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.

6. At its sixteenth session (New York, 26-29 May 2009), the Working Group considered proposals for article 40 of the revised model law, dealing with a proposed new procurement method — competitive dialogue. The Working Group agreed on the principles on which the provisions should be based and on much of the draft text, and requested the Secretariat to review the provisions in order to align the text with the rest of the draft revised model law. The Secretariat was also entrusted with revising the draft provisions for chapter I.

7. At its seventeenth session (Vienna, 7-11 December 2009), the Working Group completed its reading of chapters I to IV of the draft revised Model Law contained in document A/CN.9/WG.I/WP.71/Add.1 to 4, and proceeded to consider the provisions contained in chapter V of the draft revised Model Law in document A/CN.9/WG.I/WP.71/Add.5. The Working Group settled most of the substantive issues that were outstanding in the provisions considered, and requested the Secretariat to redraft certain provisions to reflect its deliberations at the session.

8. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, 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 revised Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17 (Part one), para. 170, and A/63/17, para. 299). 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 revised 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.9/648, 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).

9. At its forty-second session, in 2009, the Commission considered chapter I of the draft revised model law and noted that most provisions of that chapter had been agreed upon, although some issues remained outstanding. It entrusted the Secretariat with the preparation of drafting suggestions that would address those outstanding issues, for consideration by the Working Group. The Commission noted that the draft revised model law was not ready for adoption at that session of the Commission. The importance of completing the revised model law as soon as reasonably possible was highlighted (A/64/17, paras. 283-285).

II. Organization of the session

10. The Working Group, which was composed of all States members of the Commission, held its eighteenth session in New York, from 12 to 16 April 2010.

The session was attended by representatives of the following States members of the Working Group: Austria, Belarus, Bulgaria, Canada, China, Czech Republic, Egypt, Fiji, France, Germany, Greece, Guatemala, Iran (Islamic Republic of), Lebanon, Madagascar, Mexico, Nigeria, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

11. The session was attended by observers from the following States: Bangladesh, Belgium, Croatia, Democratic Republic of the Congo, Kuwait, Panama, Philippines, Sweden and Turkey. The session was attended also by an observer from Palestine.

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

(a) *United Nations system*: the World Bank;

(b) *Intergovernmental organizations*: Common Market for Eastern and Southern Africa (COMESA), European Space Agency (ESA), European Union, Inter-American Development Bank (IADB), and International Development Law Organization (IDLO);

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

13. The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON (Sweden)[1]

Rapporteur: Mr. Seung Woo SON (Republic of Korea)

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

(a) Annotated provisional agenda (A/CN.9/WG.I/WP. 72);

(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.73 and Add.1-8).

15. 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.

[1] Elected in his personal capacity.

III. Deliberations and decisions

16. At its eighteenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law.

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

A. Chapter V. Procurement methods involving negotiations (A/CN.9/WG.I/WP.71, paras. 21-23, and A/CN.9/WG.I/WP.73/Add.5)

Article 42. Two-stage tendering

17. The Working Group noted that the draft article had been revised in the light of amendments agreed at its seventeenth session.

18. In response to a query as to whether references to the notion of "comparing" proposals should be retained along with the notion of "evaluation" in paragraph (4) (f) of the article and in similar provisions throughout the Model Law, it was agreed that the notion of "evaluation" necessarily encompassed the notion of "comparison". Accordingly, it was agreed to delete all references to "comparing" submissions throughout the text.

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

Article 43. Request for proposals with dialogue

20. The Working Group noted that the draft article had been revised in the light of amendments agreed at its seventeenth session. It recalled that the Working Group had not been able to consider the entire article at that session for lack of time.

21. In response to a query as to whether the method should be used only for the procurement of services, the Working Group confirmed its understanding that the revised Model Law should follow a "toolbox" approach and that all methods of procurement should be open for use in all types of procurement regardless of the subject matter being procured, subject to the conditions of use in chapter II.

22. The Working Group agreed:

(a) To include in paragraph (2) (h) wording to the effect that any price charged for request for proposals should reflect only the costs of providing them to suppliers (drawing on the wording of article 32);

(b) To delete the words in square brackets in paragraph (2) (i) and (j) and equivalent provisions throughout the Model Law. It was also agreed that the context of the deleted provisions should be addressed in the Guide;

(c) To delete the wording in square brackets in paragraph 5 (n), which was considered excessively detailed for the Model Law and too restrictive in some

situations. The point was made that the Guide should elaborate on the substance of the deleted provisions;

(d) To retain paragraph (9) as drafted, with further elaboration on the meaning of its provisions in the Guide, in particular that they sought to prevent the procuring entity from making the changes described (but would not prevent suppliers from making changes in their proposals as a result of the dialogue). Objections were raised to an alternative proposal to substituting the proposed wording with an alternative that would incorporate the definition of "material change" from article 2 (e). The latter was considered not well suited for the purposes of article 43, in particular since the definition of "material change" referred to responsiveness and ranking of submissions. The suggestion was made that the Guide should refer to the content of footnote 10 of document A/CN.9/WG.I/WP.73/Add.5.

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

Article 44. Request for proposals with consecutive negotiations

24. The Working Group recalled that, at its seventeenth session, it had heard several comments on certain provisions of the article but had not been able to consider the article in detail for lack of time.

25. Support was expressed for reflecting in the Model Law itself, such as in its article 27, or alternatively in the Guide as in the 1994 text, that this procurement method was appropriate only for advisory services (i.e. those with an intellectual output). In the view of some other delegations, however, including such a restriction on the use of this procurement method in the Model Law would contradict the "toolbox" approach agreed to be taken in the revised Model Law. Support was therefore expressed for stating in the Guide that that method was in particular appropriate for, and recommended for use by multilateral donors only in, the procurement of advisory services. This approach, it was stated, would ensure greater flexibility and the enhanced application of the Model Law's provisions in the longer term, considered necessary in the light of rapid changes in the nature of the subject matter of procurement and the manner in which procurement was conducted.

26. Whether this approach was advisable was, however, questioned in the light of the accumulated experience worldwide that indicated a need to distinguish the manner in which advisory/intellectual types of services were procured from that in which other procurement was conducted. That experience, it was said, indicated that the use of consecutive negotiations was appropriate for these specialized forms of services only. On the other hand, it was said, restricting this method to one type of procurement would raise the issue of whether other methods should be similarly restricted, and re-opening this issue would be undesirable. After discussion, it was agreed that the text would not restrict the use of the method, but that the Guide should recite the history and usage of the procurement method in question. It would also then be open for users to restrict the method in practice if they so desired.

27. With reference to paragraph (2) (a), questions were raised about whether it would be advisable or appropriate to restrict the negotiations under this method to issues of price, particularly given that the main use of this method would be for advisory services in which quality issues would be paramount. The suggestion was therefore made to delete the wording in square brackets in subparagraph (2) (a).

Some support was expressed for that suggestion, on the condition that the reference in paragraph (1) of that article to article 43 (9) would be replaced with a prohibition of any material change to the terms of the procurement as a result of the negotiations (the latter term as defined in article 2 (e)). This approach, it was explained, while allowing some flexibility with respect to the aspects to be negotiated, would not permit any changes to the ranking of suppliers that had previously been assigned as a result of the evaluation of technical and quality aspects of the proposals.

28. The opposing view shared by some delegations and observers was that the provisions of paragraph (2) (a) had stood the test of time and should be retained. Concerns were raised about the equality of treatment of suppliers if the provisions allowed for the negotiation of non-price criteria where not all participating suppliers were the given opportunity to participate in the negotiations. The differences between this procurement method and the request for proposals with dialogue method in article 43 on the one hand, and the similarities and differences between this procurement method and the request for proposals without negotiation method in article 41 on the other hand, were highlighted in this regard.

29. It was recalled that in its deliberations on article 41, the Working Group had agreed to replace the reference to price in the relevant context with a reference to the "financial aspects of the proposal". The Working Group was invited to consider whether the same change would be appropriate in article 44. The Working Group agreed to make such a change on the understanding that the Guide would explain what those financial aspects would encompass, in particular that no aspects of the proposal that had been considered as part of the assessment of responsiveness and evaluation of quality and technical characteristics of proposals should subsequently be open for negotiation. It further agreed to delete the cross-reference to article 43 (9) in paragraph (1), and to introduce a prohibition of any "material change" (as defined in article 2 (e)) to the procurement in the course of the consecutive negotiations.

30. Support was expressed for retaining paragraph (5) as drafted, with an explanation in the Guide that the notion "termination of negotiations" meant (in the context of this provision and of paragraph (3)) the rejection of a supplier's final price proposal and its consequent exclusion from further participation in the procurement proceedings. The notion, it was further explained, encompassed the idea that no procurement contract could be awarded to the supplier(s) with whom the negotiations were terminated pursuant to article 44 (3) and (5). The alternative view was that this approach would be excessively rigid, as only at the end of the process would the procuring entity know which was in fact the best offer, and although the procuring entity should not be permitted to reopen negotiations, it should be permitted to accept that best offer (and award the contract to the supplier that had proposed it). The prevailing view was, however, that the procuring entity should not be able to award the contract to a supplier with which negotiations had been terminated.

31. With reference to footnote 31, support was expressed for envisaging the possibility of pre-selection in this procurement method, and it was agreed to provide for it accordingly.

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

Article 45. Competitive negotiations

33. In the light of an observed overlap between articles 43 and 45, it was suggested that article 45 should be deleted. The other view was that, given the conditions for use set out in the newly proposed article 27 bis (which restricted the use of the method to urgent procurement and procurement for national defence and similar purposes), article 45 should be retained as an alternative to single-source procurement but not as an alternative to request for proposals proceedings. The Working Group agreed to retain article 45 in the light of proposed article 27 bis. The Secretariat was instructed to ensure that the text did not confuse procurement methods for situations of urgency and other negotiation or dialogue-based procurement.

34. The view was expressed that article 27 bis should itself be amended by deleting paragraph (b) (which allowed the use of competitive negotiations following catastrophic events) because the situation was adequately covered by single-source procurement under article 29 (b). The alternative view was that both articles 27 bis and 29 (b) should apply in catastrophic events, but that article 29 (b) should in addition make it clearer when recourse to single-source procurement, rather than to competitive negotiations, would be allowed (distinguishing extreme urgency and urgency). This latter approach was agreed, to be supported by discussion in the Guide, which would also refer the procuring entity to the general requirement in article 25 (2) to maximize competition when selecting procurement methods.

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

Article 46. Single-source procurement

36. The view was expressed that an obligation to negotiate in the course of single-source procurement should be introduced in the article. The alternative view was that the possibility of negotiations was inherent in the method (which was the reason for locating the method in chapter V). The Secretariat was requested to consider revising the provisions to refer to the need for negotiations. It was also agreed that the Guide should elaborate on the utility for the procuring entity to negotiate and request, when feasible and necessary, market data or costs clarifications, in order to avoid unreasonably priced proposals or quotations. It was further agreed that the Guide should also underscore single-source procurement as the method of last resort after all other alternatives had been exhausted, and should encourage the use of framework agreements to anticipate urgent procurement.

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

B. Chapter VI. Electronic reverse auctions (A/CN.9/WG.I/WP.71, para. 29, and A/CN.9/WG.I/WP.73/Add.6)

Article 47. Procedures for soliciting participation in electronic reverse auctions as a stand-alone procurement method

38. The Working Group noted that the article was based on the previous drafts approved by the Working Group at its earlier sessions, restructured to differentiate clearly between the requirements for ERAs as a stand-alone procurement method

and those applicable to ERAs used as a phase preceding the award in other procurement methods.

39. The Working Group heard the following suggestions and made the following decisions with regard to them:

(a) As the word "electronic" indicated the means by which a reverse auction could be held rather than the substance of the auction as such, that the Secretariat should consider whether a change in terminology from "electronic reverse auction" to "reverse auction conducted by electronic means" or a similar notion should be made throughout the Model Law. In this regard, the Working Group confirmed its previous decision that auctions in online form only should be permitted, in order to preserve the anonymity of the bidders;

(b) That the terms "most advantageous bid" or the "best evaluated bid" should be used to denote the successful bid (instead of "lowest evaluated bid"). Consistent with the Working Group's decision to use the term the "most advantageous tender" elsewhere in the Model Law, the Working Group decided to use the term the "most advantageous bid". The understanding was that the Guide should refer to the reasons of the Working Group for using this term;

(c) That differences between simple and complex stand-alone auctions (reflecting whether the auction would be of price or of price and other criteria) should be explained in detail in the Guide. The Working Group agreed with this suggestion;

(d) That the provisions of paragraph (2), listing the content of the invitation to participate in the procurement proceedings, should be shortened by using a cross-reference to relevant provisions found elsewhere in the Model Law, such as in draft article 33. The Working Group recalled that the suggested approach had been considered in previous drafts but had been considered by experts consulted by the Secretariat to be less user-friendly than the one in the current text, and decided to retain the formulation as presented in paragraph (2);

(e) That the provisions in paragraph (2) that were repetitive with those in article 49 (1) should be replaced with a cross-reference to article 49. The Working Group agreed with this suggestion;

(f) That the Guide text to paragraph (2) (l) should cross-refer to paragraph (4) (a). The Working Group agreed with this suggestion;

(g) That the provisions in paragraphs (2) (n) (i) to (iii) should be moved to the Guide, as suggested in the accompanying footnote. The Working Group agreed with this suggestion. It also recalled its decision earlier in the session also to move to the Guide the provisions in square brackets in paragraph (2) (i) (see para. 22 (b) above);

(h) That paragraph (2) (u) should be deleted and the wording of that paragraph used in other articles of the Model Law should be reconsidered. The Working Group agreed with this suggestion;

(i) That the provisions of paragraph (5) (a) should read "the auction may be preceded by an examination and where necessary by an evaluation of initial bids where the procurement contract is to be awarded to the most advantageous bid". The

Working Group agreed with this suggestion and that the Guide would elaborate on when examination and evaluation would be appropriate.

40. The Working Group requested the Secretariat to revise the article taking into account these suggestions and the Working Group's decision as regards them, as appropriate.

Article 48. Specific requirements for solicitation of participation in procurement proceedings involving an electronic reverse auction as a phase preceding the award of the procurement contract

41. The Working Group noted that the article was based on the previous drafts approved by the Working Group at its earlier sessions, restructured to differentiate clearly between the requirements for ERAs as a stand-alone procurement method and those applicable to ERAs used as a phase preceding the award in other procurement methods.

42. The Working Group heard the following suggestions and made the following decisions with regard to them:

(a) To shorten the title of the article, and to make the relevant safeguards of article 47 applicable, mutatis mutandis, to ERAs used as a phase in other procurement methods. The Working Group agreed with this suggestion;

(b) To retain the wording in the first set of square brackets in the chapeau of paragraph (1). In response, a concern was expressed that the resulting provision would allow ERAs in any procurement method. It was suggested that the provisions should exclude the use of ERAs in those procurement methods where it would be obviously inappropriate to do so. Strong support was expressed for retaining the wording in the first set of square brackets without change and without square brackets, in the light of the current practices in some jurisdictions and evolving practices that indicated the possibility of using ERAs in various procurement methods, and because the use was qualified by the phrase "as appropriate". The Working Group agreed with that approach, on the understanding that the Guide would elaborate on the procurement methods in which it would be appropriate or inappropriate to hold ERAs, in the light of the conditions for the use of ERAs as set out in article 28;

(c) To replace the narrow reference to a mathematical formula in paragraph (1) (a) with a broader reference to an automatic evaluation methodology including a formula, drawing on the relevant wording found in the WTO Agreement on Government Procurement (WTO GPA). The Working Group agreed with this suggestion.

43. The Working Group requested the Secretariat to revise the article taking into account these suggestions and the Working Group's decisions as regards them, as appropriate.

Article 49. Registration for the auction and timing of holding of the auction

44. The Working Group recalled that at its fifteenth session it had approved the draft article without change (A/CN.9/668, para. 222). It noted that some subsequent changes had been required in the light of revisions made elsewhere in the draft revised Model Law.

45. Paragraph (3), it was said, allowed an entirely subjective decision on the part of the procuring entity as to whether the number of suppliers or contractors registered for the auction was sufficient to ensure effective competition (and accordingly whether to hold or cancel the auction). The suggestion was made to revise the provision in the light of article 47 (2) (k) that required the disclosure in advance of the minimum number of suppliers or contractors that would have to be registered for the auction in order for the auction to take place. It was thus agreed to delete in article 49 (3) the part reading "in the opinion of the procuring entity".

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

Article 50. Requirements during the auction

47. The Working Group recalled that at its fifteenth session it had approved the draft article without change (A/CN.9/668, para. 222). It noted that some subsequent changes had been required in the light of revisions made elsewhere in the draft revised Model Law.

48. Noting that the term "most advantageous bid" would be used in the article, the Working Group approved the article.

Article 51. Requirements after the auction

49. The Working Group recalled that at its fifteenth session it had approved the draft article subject to the consideration at a later stage of the use of the term "the lowest evaluated bid" (A/CN.9/668, para. 222).

50. The Working Group agreed to use the term the "most advantageous bid" in the article and to retain "shall" in preference to "may" in paragraphs (2) to (4) on the understanding that the procuring entity would always have an option either to award the procurement contract to the next successful bidder or to cancel the procurement. The Working Group agreed that the Guide should elaborate on the risks of collusion if the procuring entity were obliged to accept the next successful bid without an option to cancel the procurement.

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

C. Chapter VII. Framework agreements procedures (A/CN.9/WG.I/WP.71, para. 29, and A/CN.9/WG.I/WP.73/Add.7)

52. The Working Group was informed about World Bank draft revised guidelines on procurement of goods, works and non-consulting services under IBRD loans and IDA credits by World Bank borrowers (March 2010). The Working Group noted the following provisions of the draft guidelines that would address framework agreements:

> "3.6 A Framework Agreement (FA) is a long-term agreement with suppliers, contractors and providers of non-consulting services which sets out terms and conditions under which specific procurements (call-offs) can be made throughout the term of the agreement. FAs are generally based on prices that are either pre-agreed, or determined at the call-off stage through competition or a process allowing their revision without further competition.[*] FAs may be

permitted as an alternative to the Shopping and NCB methods for: (a) goods that can be procured off-the-shelf, or are of common use with standard specifications; (b) non-consulting services that are of a simple and non-complex nature and may be required from time to time by the same agency (or multiple agencies) of the Borrower; or (c) very small value contracts for works under emergency operations. The Borrower shall submit to the Bank for its no objection the circumstances and justification for the use of an FA, the particular approach and model adopted, the procedures for selection and award, and the terms and conditions of the contracts. FAs should be limited to a maximum duration of 3 years. Maximum aggregate amounts for the use of a FA shall be set in the procurement plan in accordance with risks, but in no case higher than the NCB thresholds, and shall be agreed with the Bank. FAs shall follow all guiding principles and procedures of NCB under paragraphs 3.3 and 3.4, including but not limited to the procedures for advertisement, fair and open competition, and transparent bid evaluation and selection criteria. Publication of award of the FA shall follow the procedure described in paragraph 7 of Appendix 1.

* Borrowers have adopted different models of FAs under different names. There are three most commonly used models, based on closed or open, one-stage or two-stage, competition methods; (i) "Closed FA" based on predefined criteria including for the award of "call offs", signed with one or multiple suppliers/contractors and not permitting new entrants during the duration of the agreement; (ii) "Closed FA" with a restriction on new entrants but conducted in two stages: a first stage to select more than one supplier/contractor, and a second stage when call offs are decided through competition among suppliers/contractors selected at the first stage and the award is made to the lowest evaluated bidder based on the offered priced and delivery conditions; and (iii) "Open FA" also following a two-stage approach as per the above model, but without any restrictions on the participation of new entrants."

53. The Working Group noted that the guidelines had not yet been approved, and that they had been made available for comments on the World Bank website. Concerns were raised as regards restricting framework agreements under the proposed draft to non-consulting services. A query was also raised regarding the grounds under the proposed draft for restricting framework agreements to emergency operations in case of very small value contracts for works.

Article 52. Award of a closed framework agreement

54. No comments were raised as regards the article. The Working Group approved the article without change.

Article 53. Requirements of closed framework agreements

55. The Working Group heard the following suggestions and took the following decisions with respect to them:

(a) That reference to one or more procuring entities should be retained without square brackets in paragraph (1). The opposing view was that the concept of multiple procuring entities as purchasers was no different in framework agreements procedures than in any other procurement proceedings. It was therefore suggested that the words in square brackets should be deleted and the Guide should explain that more than one procuring entity may be a party to a framework agreement. The

alternative approach suggested was to address the issue in the definition of the procuring entity. The Working Group agreed to consider the matter further when article 2 (Definitions) was considered;

(b) That a reference to months as well as to years should be added in paragraph 2 (a), as the duration of some framework agreements (in particular those dealing with items, such as IT products, whose price might fluctuate rapidly) might be measured in months rather than years. The Working Group agreed to replace the ending of paragraph (2) (a) with the following words that should remain in square brackets "[the enacting State specifies a maximum number of years or months]";

(c) That the word "possible" should be retained in paragraph 2 (d) (ii) and in other relevant instances because the alternative term proposed was too restrictive. The opposing view was that the word "anticipated" should be retained as it would encourage procurement planning. While the word "anticipated" was preferred, the point was made that the frequency of calls for second-stage submissions could not be always anticipated and therefore the provisions should be qualified with the opening words "if necessary". It was observed that the information about frequency of calls for second-stage submissions was not binding on the procuring entity. The Working Group agreed to retain the word "anticipated" and that the other matters raised would be addressed in the Guide;

(d) That the term the "most advantageous submission" should be used in paragraph 2 (d) (iii). The Working Group agreed with that suggestion. It recalled its decisions at the seventeenth and current sessions (see para. 39 (b) above) that the Guide would explain in all relevant instances why the Working Group preferred using the term the "most advantageous tender/submission/bid" to the term the "lowest evaluated tender" used in the 1994 Model Law;

(e) That the provisions such as those in paragraph 3 (b) should appear only in the article on the record of the procurement proceedings (article 23 of the current draft). Noting that the Guide would cross-refer to article 23 (where the requirements for the record would be centralized), flexibility as regards the extent to which other references would be included was suggested. The alternative view was that the provisions should be retained in the article as they provided an important procedural safeguard, which, if only found in article 23, could be overlooked. The Working Group agreed to retain paragraph (3) (b) in its current formulation, but that it would consider whether to retain similar references in other articles of the Model Law on a piecemeal basis;

(f) That in paragraph 4 reference to "electronic" should be deleted and reference to "equipment" should be replaced with "means" or a similar term. The Working Group agreed with that suggestion and recalled its earlier decision that the concerns arising from the use of electronic means of communication in procurement proceedings, such as over security, would be addressed in detail in the Guide.

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

Article 54. Establishment of an open framework agreement

57. With reference to paragraph (3) (a), some support was expressed for deleting the words in square brackets. Other delegations considered that the words should be retained without square brackets to maximize flexibility, which it was said, might be

required for example in open framework agreements used for transnational procurement. In support of this view, the specific features of open framework agreements were noted. In particular, the understanding of one delegation was that not only new suppliers but also new procuring entities might join the framework agreement at any time. That understanding was not shared by other delegations, which considered that, although the addition of purchasers during the operation of the framework agreement was permitted in one or perhaps more jurisdictions, the provisions as drafted were based on the understanding that all procuring entities would be identified at the outset. The importance of this information in contributing to the decision by suppliers to join the framework agreement was highlighted in this regard. The opposing view was that the Model Law should envisage the possibility of new procuring entities joining the framework agreement with the consent of suppliers that were parties to the agreement.

58. An alternative suggestion was to split the provisions in question in a manner that would differentiate the procuring entity that established the open framework agreement from other procuring entities that placed purchase orders under it. While a view was expressed that only the former would be considered the procuring entity for the purposes of the Model Law, the alternative view, which eventually prevailed, was that any procuring entity placing a purchase order under the framework agreement would in fact be a procuring entity under the Model Law. This notion was considered essential in order to ensure that all safeguards available to suppliers under the Model Law applied to the relations between suppliers and a procuring entity placing a purchase order. The Working Group agreed to consider the definition of the procuring entity in article 2 in due course to ensure that the definition adequately provided for framework agreement procedures. It also agreed that paragraph (3) (a) should be revised to ensure that there was sufficient flexibility to permit multiple users of the framework agreement, that suppliers were adequately informed as to the administrative arrangements for their operation, and that the parties to and users of the framework agreement should be appropriately described.

59. The Working Group agreed to retain paragraph (7) without square brackets.

60. The Working Group requested the Secretariat to revise the article taking into account these suggestions and the Working Group's decisions as regards them, as appropriate.

Article 55. Requirements of open framework agreements

61. Noting that a consequential change would need to be made in paragraph (1) (d) in the light of the Working Group's decision earlier at the session to use the word "anticipated" rather than "possible" in similar circumstances (see para. 55 (c) above), the Working Group approved the article.

Article 56. Second stage of a framework agreement procedure.

62. Noting that consequential changes in paragraphs (4) (a) and (c) might be needed in due course, and that paragraph (4) (b) (ix) should be deleted, the Working Group approved the article.

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

63. Whether the notion of "material change" as defined in draft article 2 was appropriate in the context of operation of framework agreements was questioned. It was also suggested that the opening words "during the operation of a framework agreement" were too restrictive and the provisions should cover the entire framework agreement procedure, in particular in order to apply the prohibition of material changes to the procurement contract as well as at the first stage of the procedure. A question was raised about the impact of these provisions on other procurement methods, in particular whether the absence of similarly explicit provisions in other procurement methods would imply that material changes were permitted.

64. A reservation was expressed about a proposal to delete the words "to the procurement" in the article, which were considered essential to indicate that no fundamental change should be permitted to the procurement. In response, it was observed that the definition of "material change" already addressed this point and the Working Group would consider that definition in due course. It was in addition observed that "procurement" was a defined term, which as defined in article 2 was not appropriate for article 57.

65. The Working Group agreed to retain the article with the deletion of the words "to the procurement", but to consider the definition of "material change" in due course, taking into account its envisaged use in two articles — articles 44 and 57. (For consideration of the definition of "material change," see paras. 96 to 99 below.)

D. Chapter VIII. Review (A/CN.9/WG.I/WP.71, paras. 26-27, and A/CN.9/WG.I/WP.73/Add.8)

Article 61. Right to review

66. The Working Group recalled that, at its fifteenth session, it had approved the draft article without change (A/CN.9/668, para. 257). The Working Group noted that the article had subsequently been significantly revised in the light of consultations of the Secretariat with experts.

67. No comments were made as regards the article. The Working Group approved the article without change. The Working Group noted that it would be desirable for the Guide to explain that, apart from those persons listed in the article, various State bodies might have the right to initiate review under chapter VIII.

68. As regards the chapter as a whole, it was commented that the provisions should strive to ensure an effective review process, and that the chapter touched upon many issues that were outside the scope of a model law on procurement. The Working Group confirmed its understanding that the chapter contained a minimum set of provisions that aimed at ensuring an effective review process, and that the Guide should therefore encourage enacting States to incorporate all the provisions of the chapter to the extent that the legal system of the enacting State so permitted. Evolving practices and ongoing reforms in procurement review mechanisms aimed at ensuring effectiveness of those review mechanisms, and the contribution that the revised Model Law might make in this respect, were noted in this regard.

Article 62. Review by the procuring entity or the approving authority

69. The Working Group heard the following suggestions:

(a) That the opening words in paragraph (1) should be deleted because they were superfluous;

(b) That the Model Law should provide for a broader spectrum of possibilities in the course of review, including the possibility of immediate judicial review (in the highest court rather than lower courts) of a decision made by an administrative review body; that any available administrative review process should be exhausted before any judicial review, and that reference should be made to the exhaustion of local remedies. As regards the latter two points, it was considered that they fell outside the scope of the Model Law;

(c) That in paragraph (2) (a), the reference to the terms of the solicitation in fact encompassed any addenda that might be issued as a result of clarification or modification and that the Guide should explain that point;

(d) That the proviso in the end of paragraph (2) (b) reading "provided that no complaint may be submitted after the entry into force of the procurement contract" should be deleted, because the proviso set out an unnecessary limitation. It was suggested that the Guide should explain that such a proviso might be relevant in some jurisdictions where it was not possible to set aside a procurement contract, but that it was irrelevant in those jurisdictions in which the procuring entity retained authority so to do;

(e) That if this proviso were deleted, additional wording should be inserted to prevent suppliers from disrupting the entry into force of the procurement contract by filing a complaint immediately before the contract was to be signed. The Working Group did not finalize the consideration of this issue;

(f) That paragraph (2) (b) should make a link with the provisions on standstill period as regards the time limits for filing a complaint, and should restrict the scope of complaints that could be filed under that paragraph, in particular in the light of paragraph (2) (a);

(g) That the words "the enacting State specifies the desired number of days" should be inserted in the square brackets in paragraph (2) (b);

(h) That the provisions should provide for liability of suppliers in the case of intentional disruption of the entry into force of, or the performance of, the procurement contract. In response, the view was expressed that article 65 already provided for a manner of handling unjustifiable complaints.

70. The Working Group requested the Secretariat to revise the article in the light of those suggestions.

Article 63. Review before an independent administrative body

71. The Working Group heard the following suggestions:

(a) That the opening words in paragraph (1) should be deleted;

(b) That as the chapeau in paragraph (5) might be interpreted to permit the administrative body to be given a limited power to grant only one of these remedies,

the text and the Guide should make it clear that the intent of the provisions was to ensure that the administrative body was able to exercise all these powers in order to create an effective remedies system;

(c) That the words "unless it dismisses the complaint" should be deleted in the chapeau provisions of paragraph (5) and that dismissal of the complaint should be added as remedy in the list contained in paragraph (5);

(d) That paragraphs (5) (a) to (c) should be deleted in that they did not provide remedies per se, but rather set out actions that the review body would usually take in the course of the review process and when granting the remedies listed in paragraphs (d), (e), (g) and (h). The opposing view was that the entire list of remedies in paragraph (5) should be retained. In response to a concern that some remedies necessarily encompassed the other steps listed, the view was expressed that the administrative review body would not grant all the remedies listed, but only those that were appropriate in the case concerned, and that the choice would depend on the stage of the procurement proceedings at which the review was held. The suggestion was made to omit the reference to "remedies" in the chapeau provisions of paragraph (5), or to replace it with a phrase along the lines of "measures and remedies" (instead of deleting any of the remedies listed in paragraph (5)). Another related suggestion was to merge some of the remedies in paragraph (5);

(e) That paragraph (5) (a) should be merged with the chapeau of paragraph (5), to avoid giving the impression that the measure was a remedy at the same level as the other ones listed in paragraph (5). Particular concerns were expressed in this regard about the power to declare the applicable legal rules or principles since such a measure was unlikely to constitute an effective remedy. The alternative view was that paragraph (5) (a) should be retained and perhaps expanded since in some situations a declaration of the legal rules or principles might be the only measure that an administrative review body could or needed to take;

(f) That the term "annul" in paragraphs (5) (d) and (h) and in any other places where it appeared should be replaced with another term that would not imply what the consequences of the action would be, and the Guide should explain that the term intended to cover both *ex nunc* and *ex tunc* effects, as appropriate in the given circumstances and under the law of the enacting State;

(g) That the remedy listed at the end of paragraph (5) (e) (substitution of a decision of the procuring entity with the decision of the administrative review body) should be reconsidered in the light of its questionable utility and appropriateness in practice. Concerns were expressed that the provisions, if retained, would change the nature of administrative review body from a purely oversight body to a decision-making body, allowing it to interfere in decisions as regards the procurement project in question that should be within the exclusive purview of the procuring entity. This approach, it was noted, would require the administrative review body to have expertise on procurement-related matters and knowledge of the procurement project in question, which in practice it did not usually possess. In response, it was observed that in some systems, it was common to give such a power to an administrative review body. The prevailing view was to retain the provisions, on the understanding that various types of decisions were made in the course of procurement and the administrative review body should be in position to substitute

those unlawful decisions of the procuring entity with respect to which the administrative review body had authority and capacity to do so;

(h) That paragraph (5) (e) should restate the ending from article 54 (3) (d) of the 1994 Model Law reading "other than any act or decision bringing the procurement contract into force". That wording, it was said, imposed an appropriate limit preventing the administrative review body from substituting its own decision on the award of a procurement contract. The alternative view was that no such unconditional restriction should be imposed: if the legal system of the enacting State allowed the administrative review body to substitute its own decision on the award of the procurement contract, this possibility should be preserved. The Working Group recalled in this respect its decision at an earlier session not to incorporate the wording in question in the revised Model Law (as a consequence of its decision to provide for the possibility by an administrative review body to annul the procurement contract entered into force);

(i) That the words "confirm a lawful decision by the procuring entity or the approving authority where applicable" should be added in paragraph (5) (e);

(j) That both options in paragraph (5) (f) should be retained as was the approach in the 1994 Model Law (i.e. by restating the 1994 text of both options). In response, the history of the Working Group's consideration of the question of compensation for anticipatory losses was recalled. In the light of concerns expressed at those earlier sessions about permitting the award of compensation for anticipated losses, such as the disruptive impact on procurement proceedings, the view prevailed that the wording in the first set of square brackets in paragraph (5) (f) should be retained (retaining the word "shall" in preference to "may") and limiting the compensation to the costs of the preparation of the tender or other submission, or relating to the complaint, or both. It was noted that the Guide should discuss that this approach would support a speedy and effective administrative review process, but did not exclude the possibility of seeking anticipatory losses through court action (or in proceedings before administrative review bodies where the legal system in an enacting State so permitted, or in an action under a contract that had been executed and where performance had commenced). It was noted that the latter point should be emphasized in the Guide text accompanying paragraph (5) (f) and in that addressing article 66 on judicial review;

(k) That paragraph (f) should be placed in the end of the list in paragraph (5) to make it clear that the provisions were intended to cover both complaints filed before the entry into force of the procurement contract and those filed thereafter;

(l) That whether it was appropriate to include the remedy listed in paragraph (5) (h) in a procurement law should be reconsidered. In response, it was observed that the remedy could be made optional. Opposition was expressed to that suggestion, both because the list of remedies was a list of possible remedies and because the provisions were considered essential as part of an effective system of review. The Working Group recalled in this respect its decision at its earlier session to overrule the approach in the 1994 Model Law that did not envisage that an administrative review body could annul the procurement contract once it entered into force;

(m) That imposing a time limit for any possible annulment of the procurement contract by the administrative body should be considered either in the

Model Law or the Guide. The point was made in this respect that all other remedies were linked to stages of the procurement proceedings before the entry into force of the procurement contract, and thus were limited in time, while the possibility of annulling the procurement contract appeared to be open-ended;

(n) That the following should be added in the end of the list in paragraph (5): "and the [insert name of administrative body] shall take the decision appropriate in the given circumstances";

(o) That the term "independent administrative review body," rather than simply "administrative review body" should be used throughout the chapter. Concern was expressed that, except for the change in the title of article 63, nothing had been built in the draft revised Model Law that ensured the independence of the administrative review body. Suggestions were made that the provisions of the article should contain at least minimum requirements that would ensure the independence of the body (for example, as regards its composition, in that its members should be independent from the Government concerned). The alternative view, which eventually prevailed, was that the Model Law should establish the principle of independence of the administrative review body, but should not prescribe the manner in which that independence should be achieved, with the understanding that there would be various ways of so doing in various jurisdictions depending on their prevailing conditions, and that the Guide would address these matters.

72. The Working Group decided that certain of the above suggestions should be incorporated into paragraph (5), which would then be revised to read as follows:

"The [insert name of administrative body] may declare the legal rules or principles that govern the subject matter of the complaint and shall be empowered to do one or more of the following:

(a) [deleted];

(b) to (d) [as is, except for replacement of the word "annul" in subparagraph (d) with a more appropriate term and accompanying explanation of the term in the Guide];

(e) Revise an unlawful decision by the procuring entity or the approving authority where applicable or substitute its own decision for such a decision[, other than any act or decision bringing the procurement contract into force] or confirm the lawful decision by the procuring entity or the approving authority, where applicable; [with the statement in the Guide that the part in square brackets might be omitted in those enacting States where substituting the procurement contract by the administrative review body would be permissible]

(f) [moved as revised at the session in the end of the list];

(g) [as is];

(h) [as is, except for replacement of the word "annul" with another more appropriate term and the accompanying explanation in the Guide];

(i) Dismiss the complaint;

(j) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint in connection

with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity or the approving authority where applicable, and for any loss or damages suffered, which shall be limited to costs for the preparation of the submission or the costs relating to the complaint or both;

and the [insert name of administrative body] shall take the decision appropriate in the circumstances."

73. The understanding of the Working Group was that the accompanying Guide text would emphasize that the list of measures in paragraph (5) was a minimum set of measures that the administrative review body should be able to take according to the circumstances, in order to ensure an effective and independent administrative review. The enacting State therefore would be expected to incorporate all of the listed measures except when so doing would be in violation of the constitution or other laws of the State. The Working Group also noted that the Guide text would state that the last phrase added to the provisions of paragraph (5) aimed at ensuring an effective review process.

Article 64. Certain rules applicable to review proceedings under articles [62 and 63]

74. The Working Group recalled that, at its fifteenth session, it had approved the draft article as revised at that session (A/CN.9/668, paras. 267-268) but that it had deferred the consideration of the possible exceptions to disclosure (A/CN.9/668, para. 131). It was noted that, subsequently, amendments had been proposed by the informal drafting party, in July 2009, to include the words "and the right to request that the proceedings take place in public" in paragraph (3) in square brackets for further consideration, in particular in order to accommodate concerns regarding national defence and security and other grounds justifying exemptions of information from public disclosure. The Working Group noted that some provisions of the article had been further revised in the light of the consultations between the Secretariat and experts, in particular as regards exceptions to disclosure on the basis of confidentiality, and pursuant to the Working Group's consideration at its fifteenth session (A/CN.9/668, para. 267 (b)).

75. The Working Group agreed: (a) to use the term "complaint" rather than "claim" throughout the chapter to ensure consistency; (b) to retain the words in square brackets in paragraph (3) without square brackets, on the understanding that the provisions were to be read together with paragraph (6) that would permit the review body to reject the right to request that the proceedings take place in public on the grounds of confidentiality; (c) to replace the final phrase of paragraph (3) with "the right to present evidence, including witnesses"; and (d) to retain paragraph (7) without square brackets, which should ensure adequate transparency and that the record of the procurement proceedings would be complete. It was noted that article 23 (1) (r) should be made consistent with paragraph (7) by requiring that the decision, rather than a summary of the decision, should be included in the record of the procurement proceedings.

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

Article 65. Suspension of procurement proceedings

77. The Working Group recalled that, at its fifteenth session, it had approved the draft article, which was based on article 56 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

Paragraph (1)

78. The Working Group heard the following suggestions:

(a) That the chapeau provisions of paragraph (1) should make it clear to which review body a complaint was submitted, drawing on article 56 (1) of the 1994 Model Law (by cross-referring to the appropriate articles under which complaints were submitted). A query was raised as to whether cross-references to articles 62 and 63 without a cross-reference to article 66 would be sufficient;

(b) That the reference to a "frivolous complaint" should be deleted from paragraph (1) (a) because it was superfluous in that a complaint that satisfied the other element of the proviso could not be frivolous. The alternative view was that the concept of "frivolous complaint" should not be abandoned, as in practice there could be obviously inappropriate complaints that should be dismissed immediately and that there would be no need to consider the substance of the complaint in order to demonstrate that it could not succeed;

(c) That an alternative term to the term "frivolous" that would better convey the intended meaning and encompass a complaint that was intended to obstruct the process should be considered. The Working Group decided to use the term "a complaint manifestly without merit" on a provisional basis;

(d) That paragraph (1) (a) should be redrafted as follows:

"(1) The submission of a complaint suspends the procurement proceedings for a period to be determined by the review body:

(a) Provided that:

(i) The complaint contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer serious injury in the absence of a suspension;

(ii) The complaint is not manifestly without merit and therefore it is probable that the complaint will succeed;

(iii) The granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors;"

(e) That paragraph (1) (a) should alternatively be redrafted as follows:

"(1) The submission of a complaint suspends the procurement proceedings for a period to be determined by the review body:

(a) Provided that the complaint is not manifestly without merit and contains a declaration the contents of which, if proven, demonstrate that:

(i) The supplier or contractor will suffer serious injury in the absence of a suspension;

(ii) It is probable that the complaint will succeed; and

(iii) The granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors;"

(f) That the issues of fraudulent declarations that could be made under paragraph (1) (a) should be left to the other branches of law.

79. Concerns were expressed about the proposed alternative wordings of paragraph (1) (a) since they did not eliminate the superfluity referred to above: if the complaint was manifestly without merits on its face, it could not succeed. After subsequent discussion, the Secretariat was requested to redraft paragraph (1) to reflect the following principles:

(a) There would be no automatic suspension if the complaint on its face were manifestly without merit;

(b) If the complaint on its face was not manifestly without merit, then the complaint should contain a declaration that the supplier or contractor would suffer serious injury in the absence of a suspension and that it was probable that it would succeed. It was the burden on the supplier to demonstrate or prove the content of such declaration;

(c) If the procuring entity wished to challenge an automatic suspension, or intended not to apply a suspension, in situations described in paragraph (b) above, it would have the burden of proving that the suspension would cause or had caused disproportionate harm to the procuring entity or to other suppliers or contractors or that the conditions of article 65 (1) (b) were present. A further reservation was expressed about the ability of the procuring entity to challenge any automatic suspension at all;

(d) The provisions should make it clear to whom the declaration and demonstration or proof of the conditions in paragraphs (a) to (c) above were to be made.

Footnotes 16 and 17

80. With reference to footnote 16, the Working Group was invited to address whether there should be a further short suspension once the complaint had been decided in order to allow an appeal, and who determined, and on what basis, whether the complaint fulfilled the requirements of subparagraph (1) (a). The suggestion was made that paragraph (2) could address these issues.

81. Support was expressed for reflecting the content of that footnote and footnote 17 only in the Guide. A related suggestion was also to move paragraph (2) to the Guide. The Working Group did not agree with this suggestion.

Paragraph (4)

82. The Working Group agreed that paragraph (4) should be retained without square brackets.

Article 56 (2) of the 1994 Model Law

83. The Working Group recalled that at its fourteenth session it had decided not to include the provisions of article 56 (2) in the revised Model Law in the light of the introduction of a standstill period (A/CN.9/664, para. 71). The Working Group also recalled that draft article 20 (3) provided that there might be no standstill period under certain conditions. In the light of this, the Working Group considered whether the provisions of article 56 (2) should be reinstated in the revised Model Law. While support was expressed for that suggestion, the view was expressed that the reinstated provisions should be made applicable only in the absence of a standstill period.

84. The Working Group decided to reinstate the provisions of article 56 (2) in the revised Model Law after paragraph (2) of article 65, without reference to a standstill period.

Time limits for submission of complaints

85. Concern was expressed that the time limits for submission of complaints established under articles 62 and 63 (and as a related matter that the period during which suspension of the procurement contract would be possible) were indefinite. The Working Group was invited to consider establishing reasonable deadlines after which no complaints should be entertained.

86. After discussion, the Working Group requested the Secretariat to redraft the relevant provisions to provide for a deadline for submission of complaints, which in turn would determine the period during which suspension of the procurement contract would be possible. It was suggested that the date from which the deadline would run should be linked to the publication of the award where publication was required, or otherwise from the date of the notice of the award to the suppliers or contractors in accordance with article 20 (10). It was also suggested that the determination of the specific deadline should be left to enacting States as had been done with respect to the standstill period, and that the attention of enacting States should be drawn to the need for alignment of all the relevant time limits left for their determination throughout the Model Law. The Working Group deferred the consideration of the same issues in the context of failed procurement (i.e. procurement not resulting in a procurement contract).

87. Concern was expressed that the Model Law did not indicate whether time periods were to be expressed in calendar or working days. The Secretariat was requested to make a clear reference to working or calendar days in the redraft of the relevant provisions and to explain in the Guide that working days should be used for short period of time.

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

Article 66. Judicial review

89. The Working Group recalled that, at its fifteenth session, it had approved the draft article, which was based on article 57 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

90. The suggestion was made that the article should be expanded to make its provisions more effective by incorporating the contents of articles 62 to 65, in

particular the provisions ensuring due process and transparency, the provisions on available remedies and those on suspension of the procurement proceedings or of the entry into force or performance of the procurement contract. Reservations were expressed about this suggestion, as those issues would be regulated or were intended to be regulated in a separate body of law in enacting States, and so as not to interfere in the independence of the judicial branch. It was also noted that some provisions from articles 62 and 65 would not be appropriate or applicable in the context of judicial review. The Working Group emphasized that broader powers of the courts should not be inadvertently restricted (such as the powers to award compensation for anticipatory costs or to grant interim measures). It was proposed alternatively, to redraft the article to reflect the requirements of the United Nations Convention against Corruption[2] (the "Convention against Corruption"). A query was also raised as to whether ways to achieve effective judicial review should instead be discussed in the Guide alone.

91. Concern was expressed that some jurisdictions would not recognize the procedures of articles 63 to 65, as was indicated in a footnote to article 63, and would provide only for judicial review. It was noted that the safeguards built into these articles might therefore not be available in such jurisdictions. The point was made that these safeguards should be ensured in judicial review proceedings if articles 61 to 65 were not enacted.

92. The Working Group requested the Secretariat to incorporate additional provisions in chapter VIII for those jurisdictions that would not enact articles 62 to 65, which would ensure that the appropriate safeguards of those articles would be present in judicial review proceedings.

93. It was suggested that the Guide provisions accompanying chapter VIII should refer to the applicable provisions of the Convention against Corruption. It was also noted that those Guide provisions should contain a discussion, along the lines suggested in footnote 21 of document A/CN.9/WG.I/WP.73/Add.2, of the relevance of other branches of law and of other bodies if a review were triggered for example by fraud or corruption (including the need to alert the relevant authorities to ensure that appropriate action was taken).

E. Chapter I. General provisions (A/CN.9/WG.I/WP.73/Add.1 and 2)

Preamble

94. Concern was expressed about the wording of paragraph (b) as regards nationality, which might indicate general support for national competition, rather than international competition. The suggestion was therefore made to delete the words ", especially where appropriate, participation by suppliers and contractors" in that paragraph. The Working Group agreed with this suggestion.

Title and article 1

95. No comments were made with respect to the title and article 1 of the draft.

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[2] United Nations, *Treaty Series*, vol. 2349, No. 42146.

Article 2. Definitions

"Material change"

96. Concern was expressed that the definition did not refer to one of the primary risks of material change — that the pool of potential suppliers might be affected. It was suggested that the definition should be revised to ensure that such a consequence would be covered.

97. It was noted that, as a result of the deliberations at the current session, the revised Model Law would prohibit any material change in the context of article 44 (consecutive negotiations) and article 57 (framework agreement procedures). Concern was expressed that no such prohibition was envisaged in article 14 (clarifications and modifications of solicitation documents). A query was raised as to the possible consequences if a material change to the procurement took place in the course of a modification of the solicitation documents. The Working Group was invited to consider the following options:

(a) To introduce a general prohibition of any material change in the course of procurement proceedings, which would be applicable to all procurement methods, with very limited exemptions, such as in the request for proposals with dialogue procedure (article 43). The understanding was that in such cases any material change must lead to a new procurement;

(b) Permitting a material change on the condition that such changes would be advertised or distributed in the same manner as the original solicitation. The need for taking a more flexible approach in some procurement methods, such as the dialogue procedure (article 43) was noted.

98. The Working Group agreed that it would be difficult to formulate one definition of steps that might involve a material change suitable for all situations in which the prohibition of material change was warranted. The Working Group requested the Secretariat to revise the definition, so that it provided that a material change was any change to any aspect of the procurement that had the effects described in the latter part of the definition. In addition, article 14 and if necessary other articles of the Model Law should be revised to ensure that a material change was publicized as above (or that the provisions would require a new procurement where necessary). A related comment was that the provisions of article 14 (2) should cross-refer to article 13 bis (3), so that any addendum amending the solicitation issued by the procuring entity should lead to an appropriate extension of the submission deadline.

99. The Secretariat was also invited to consider reflecting in the Guide that a "material change" arose when, for reasons of competition, efficiency, fairness or otherwise, a procurement must be reopened because the nature of the procurement — the goods or services being bought, for example — had changed so substantially that the original competition did not put prospective bidders or others fairly on notice of the government's true requirements. It was recalled that the point of material change in a procurement contract was not addressed in the deliberations and was open for further deliberations.

"Prequalification documents"

100. It was agreed that the definition should remain in the text without square brackets.

"Procurement"

101. The Secretariat was requested to reconsider the phrase "by any means".

"Procuring entity"

102. The suggestion was made to amend the definition to allow multiple entities to become parties to a framework agreement. The alternative suggestion was to amend the definition of "public procurement" to allow for such a possibility. It was understood that the issue of multiple procuring entities was relevant not only in the context of framework agreements.

103. A reservation was expressed about amending the definition of "public procurement" for this purpose. The primary purpose of that definition — to highlight that the Model Law dealt with public procurement rather than with private procurement — was noted. The Working Group decided to adopt the first suggestion in paragraph 102 above. It was also agreed that the words "in this State" should be deleted in the definition of "procuring entity", to allow for transnational procurement.

"Socio-economic policies"

104. The need for the definition was questioned. Concern was expressed that it was drafted in excessively broad terms, allowing virtually any policy to be considered as a socio-economic policy of the State. The alternative view was that the definition should remain, as it set out an important safeguard that socio-economic policies should be defined in the legislation.

105. Suggestions were made to delete the words in square brackets and the words "and other". Support was expressed for both suggestions. In response to the concern about deletion of the words "and other", a query was raised as to which policies other than environmental, social and economic policies were intended to be covered. On the understanding that the definition was also intended to cover policies of a political as well as of an environmental, social or economic nature, and that their application in procurement should be permitted, provided that the transparency requirement that they be set out in legislation or regulations was met, the view prevailed that the words "and other" should be retained in the definition.

106. The Working Group agreed to retain the definition with the words "and other" and without the words in square brackets. It was agreed that the Guide should explain that the reference to other socio-economic policies in the definition was not intended to be open-ended but encompass those set out in the legislation of the enacting State, and those that could be triggered by international regulation such as United Nations Security Council anti-terrorism measures or sanctions regimes.

107. The Working Group also heard that practice in some jurisdictions would indicate that there would normally be more than one organ in a State with the authority to adopt socio-economic policies. The Secretariat was requested to revise

the comments in footnote 16 (the substance of which might be reflected in the Guide) in the light of these reported practices.

"Solicitation"

"Direct solicitation"

108. The views varied on whether the word "exceptional" in the definition should be retained. After discussion, the Working Group decided to delete the word.

"Standstill period"

109. The suggestion was made that the phrase "anticipated decision" should be replaced with the phrase "anticipated award" and that the rest of the definition should be deleted. Concern was expressed about this suggestion, as it ignored the possibility that the procuring entity could award the contract to the next successful submission or could cancel the procurement under the conditions set out in the Model Law.

110. The Secretariat was requested to align the definition with article 20 (2) so that the intended meaning of that article would be more accurately conveyed.

"Successful submission"

111. It was agreed that the definition should be deleted.

Other definitions

112. No comments were made with respect to other definitions in the article.

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

113. It was the understanding that the Guide would explain references to treaties and their effect on national implementation of this law, in particular that more stringent requirements might be applicable but international commitments should not be used as a pretext to avoid basic safeguards under the Model Law.

Article 4. Procurement regulations

114. No comments were made with respect to the article.

Article 5. Publication of legal texts

115. Concern was expressed about the ending of paragraph (2) reading "and updated if need be". The Working Group agreed to delete these words.

Article 6. Information on possible forthcoming procurement

116. No comments were made with respect to the article.

Article 7. Communications in procurement

117. Suggestions were made that the accompanying Guide text should explain that: (a) in procurement containing classified information, classified information could be

included in an appendix to the solicitation documents that would not be made public unlike the remainder of the solicitation documents; and (b) that the means of communication could be changed by issuing an addendum to the original solicitation documents.

Article 8. Participation by suppliers or contractors

118. The Working Group heard the following suggestions as regards paragraph (1) (a):

(a) That it should refer to "law", not to "procurement regulations", since some jurisdictions might not have procurement regulations;

(b) That it should be redrafted or deleted to avoid providing for the automatic right to have recourse to domestic procurement in case of low-value procurement. The view was expressed that limitation of competition could be achieved through the application of socio-economic policies as permitted in the Model Law and that the aim of the provisions was to allow more efficient procurement where international competition would not take place. The view was also expressed that the provisions contradicted one of the objectives of the Model Law — to promote international competition. In support of that view, it was also stated that the provisions would otherwise lead to unfair or unequal treatment and negatively restrict freedom of opportunities and participation;

(c) That it should be retained as drafted because many systems including that of the World Bank envisaged recourse to domestic procurement, and efforts to open markets to foreign suppliers or contractors were not universal. If the proposed amendments, it was added, made the provisions unreasonably restrictive, they would be ignored by enacting States;

(d) That it should be redrafted to achieve a better balance between the goal of promoting competition and acknowledging the sovereign right to use the procurement system for the purpose of promoting local development and local entrepreneurship. The Working Group recalled that one of the guiding principles in drafting the provisions of article 8 was that the State was free to use procurement for promoting its socio-economic and other policies to the extent that the latter were made known and transparently applied throughout the procurement process;

(e) That it should be retained, with the Guide explaining what was meant by low-value procurement, to prevent enacting States from setting the threshold high to exclude the bulk of its procurement from international competition. It was noted that the threshold for the low-value procurement would not be the same, and it would be impossible to set out a single threshold, for all enacting States. However, the Guide should promote a common understanding what low value was meant to involve;

(f) That the provisions should be redrafted to require both the low value consideration, and an anticipated lack of a cross-border interest in participating in the procurement concerned, drawing in this respect on the provisions of article 23 of the 1994 Model Law. It was recalled that the respective provisions of the 1994 text sought to convey that even if the procuring entity held an international competition, no international participation would result in the absence of interest on the part of foreign suppliers or contractors;

(g) That reinstating the provisions from the 1994 Model Law would eliminate the blanket prohibition on participation of foreigners in low-value procurement. The view was expressed that foreign suppliers should be allowed to participate in such procurement if they so chose, but (following the 1994 Model Law approach) the procuring entity would not be required to apply certain procedures relevant only for international procurement (e.g. publication of the solicitation in a newspaper of wide international circulation in a language customarily used in international trade).

119. As regards other paragraphs of the text, the Working Group heard the following suggestions:

(a) That paragraph (1) (b) should refer to socio-economic policies of the State. The opposing view was that the provisions, based on the equivalent provisions of the 1994 Model Law, should be retained as drafted;

(b) That paragraph (2) should state "Except when required or permitted", to cover possibility of excluding from participation in procurement as a result of debarment;

(c) That paragraph (4) should be included without square brackets.

120. The Working Group agreed: (i) to revise paragraph (1) (a) along the lines of the text in article 23 of the 1994 Model Law; (ii) to retain paragraph (b) as drafted; (iii) to redraft paragraph (2) as suggested; (iv) to retain paragraph (4) without square brackets; and (v) to reconsider the need for a definition of the socio-economic policies.

Article 9. Qualifications of suppliers and contractors

121. With respect to the opening phrase in paragraph (2) in square brackets, views varied as to whether the 1994 wording should be reinstated. The Working Group requested the Secretariat to combine the 1994 wording with the current text.

122. The Working Group agreed with the suggestion that reference to the applicable ethical and other standards should be removed from paragraph (2) (i) and should be set out as a separate requirement not linked to the ability to perform the procurement contract.

123. A suggestion to replace in paragraph (4) "be set out" with the word "refer" did not gain support. The reasons for the suggestion were noted, in particular that in some jurisdictions standard qualifications requirements were found in procurement regulations and the prequalification documents cross-referred to those regulations instead of restating the requirements. It was pointed out, however, that for reasons of transparency and equal treatment, the Model Law required all requirements to be set out in the solicitation and prequalification documents. It was suggested that the Guide would state that the requirements of paragraph (4) would be satisfied where the prequalification or solicitation documents would refer to the qualification requirements set out in sources that were transparent and readily available.

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement

124. The Working Group requested the Secretariat to consider redrafting the broad reference to an "obstacle" to the participation of suppliers or contractors in the procurement proceedings in paragraph (2). It was also agreed that paragraph (5) (b) should refer to standardized terms and conditions.

125. In response to a suggestion that paragraph (3) should be prescriptive, the point was made that not all listed items would necessarily be required to be included in the description of the subject matter of the procurement. It was suggested that the Guide should state that the description must be sufficiently precise.

Article 11. Rules concerning evaluation criteria and procedures

126. No comments were made with respect to the article.

Article 12. Rules concerning estimation of the value of procurement

127. It was the understanding that the Guide would explain that estimates were to be used for internal purposes of the procuring entity and not to be revealed to suppliers.

Article 13. Rules concerning the language of documents

128. No comments were made with respect to the article.

Article 13 bis. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or submissions

129. The Working Group agreed that the accompanying Guide text should state that: (i) the mechanism for presenting submissions should be reasonably accessible to suppliers; (ii) the procurement regulations should specify a minimum period for presenting submissions for each procurement method (reference in this regard was made to the provisions of the WTO GPA, article XI (2) for open procedures that required the period to be not less than 40 days); (iii) such a period should be sufficiently long in international and complex procurement to allow suppliers reasonable time to prepare their submissions; and (iv) failures in electronic presentation of submissions and allocation of risks should be addressed in the Guide and procurement regulations.

Article 14. Clarifications and modifications of solicitation documents

130. The Working Group recalled its decisions as regards article 14 taken earlier at the session (see paras. 97 and 98 above), in particular that in paragraph (2) a cross-reference to article 13 bis (3) should be inserted and the article should address the issue of occurrence of a material change in the solicitation documents.

Article 15. Tender securities and Article 16. Prequalification proceedings

131. The articles were adopted with changes to paragraphs (3) (g) and (h) of article 16 to reflect the Working Group's earlier decisions on similar provisions in article 43 (see para. 22 (b) above).

Article 17. Cancellation of the procurement

132. It was suggested that paragraph (1) should refer to cancellation for good cause with the Guide explaining what these causes might be, such as the public interest. The Working Group recalled its extensive consideration of the matter at previous sessions and the resulting compromise reflected in the current draft, which aimed at preserving flexibility on the part of the procuring entity to cancel the procurement, but provided in paragraph (3) of the article for liability for doing so irresponsibly.

133. It was suggested that the wording in square brackets in paragraph (1) should remain without square brackets. Another suggestion was that the wording should be retained with the addition of the phrase "or afterwards as expressly provided by the Model Law". Reference in this respect was made to article 20 (8). The difference between articles 17 and 20 (8) was, however, highlighted in that while under article 17 cancellation was at the discretion of the procuring entity, cancellation under article 20 was triggered by the failure of the winning supplier to sign the procurement contract or to provide a contract performance security (requirements that would be stated in the solicitation documents). The Working Group requested the Secretariat to revise the provisions in this respect to ensure consistency between the provisions in question.

134. It was agreed to retain the words in square brackets in paragraph (2) without square brackets.

Article 18. Rejection of abnormally low submissions

135. The article was adopted with the retention of the provisions without square brackets.

Article 19. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest

136. The suggestion was made that the Guide should refer to applicable international regulations addressing corrupt practices, should explain that such regulations would evolve, and should encourage enacting States to consider the standards applicable at the time of enactment of the Model Law. The Guide should also emphasize that the article was intended to be consistent with international standards and should outlaw any corrupt practices regardless of their form and how they were defined.

137. The article was adopted with the retention of the provisions in square brackets without square brackets.

Article 20. Acceptance of the successful submission and entry into force of the procurement contract

138. As regards two alternatives in paragraph (2) (c), suggestions were made to combine both alternatives and to retain the first alternative (with the Guide explaining that the period should be reasonably long). The Working Group agreed with the second suggestion (to retain the first alternative in the text with the appropriate explanation in the Guide), and approved the article as revised, and with the retention of the provisions in paragraph (3) (c) without square brackets.

Article 21. Public notice of awards of procurement contract and framework agreement

139. As regards two alternatives in square brackets in paragraph (3), views varied as to whether the word "may", being more flexible, or the world "shall" would be appropriate for such legal provisions. The view prevailed that the word "shall" should be used.

Article 22. Confidentiality

140. Concern was expressed about the wording in paragraph (1), which permitted withholding information for reasons of public interest. The public interest exemption was considered to be excessively broad and open to abuse if no guidance as regards the definition of "public interest" were provided. It was suggested that, at a minimum, the accompanying Guide should make it clear that the procuring entity should be required to define the public interest with reference to objective standards set out in law or procurement regulations. It was noted that the same concern was valid with respect to article 23 (4) (a). The Secretariat was requested to redraft both provisions to make their intended content clearer.

141. The suggestion was made that the qualifier "essential" before the words "national security" or "national defence" in paragraph (1) should be deleted. The Secretariat was requested to align the wording in question with any equivalent wording in the WTO GPA used in the same context.

142. The preference was expressed for the first alternative wording in paragraph (2) and that the word "communications" should be used in paragraph (3) in consistent fashion. The need for consistency with the use of square or round brackets throughout the Model Law was noted.

Article 23. Documentary record of procurement proceedings

143. The Working Group recalled its decisions as regards article 23 (4) (a) made in the context of article 22 (see para. 140 above). It agreed to use the second alternative wording in paragraph (1) (i) and the first alternative wording in paragraph (2). It was the understanding that the other text in the article would be retained without square brackets, except for the provisions in paragraph (1) (t) that would be redrafted by the Secretariat in due course.

Article 23 bis. Code of conduct

144. The Working Group heard the suggestion that the words "unless addressed in other law" should be added in the beginning of the article or that the Guide should cross-refer to other law where codes of conduct might be located. The second approach to drafting was preferred, especially in the light of the end of the article, unless the entire article was to be redrafted.

145. The suggestion was that the Guide should address the "revolving door" concept. The alternative view was that article 23 bis itself should address this issue along with some other issues covered by the Convention against Corruption. The suggestion was made that the accompanying Guide should elaborate on aspects of a code of conduct not covered by the article, such as its application to private entities participating in the procurement and procurement-specific conflicts of interest.

Reservations were expressed about the appropriateness of providing for a code of conduct for private entities. The Working Group agreed to reflect in the Guide that even though a code of conduct was addressed to public officials, it also indirectly established boundaries for the behaviour of private parties in their relation with public officials.

F. Chapter II. Methods of procurement and methods of solicitation and their conditions for use (A/CN.9/WG.I/WP.73/Add.3)

Article 24. Methods of procurement

146. The Working Group agreed to reinstate a footnote to article 18 of the 1994 Model Law as the footnote to the title of the article, modified to exclude any reference to open tendering.

Article 25. General rules applicable to the selection of a procurement method

147. The Working Group approved the article with paragraph (3) without square brackets.

Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)

148. The Working Group approved the article without change.

Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue and [request for proposals with consecutive negotiations])

149. The view was expressed that the grouping of procurement methods should be reconsidered. Reservations were expressed about any changes that would fundamentally amend the suggested structure of the Model Law. The Working Group heard suggestions that concerns about the current grouping of procurement methods could be addressed by less significant redrafting, such as the deletion of references to negotiations in the titles of chapters IV and V, and the formulation of separate conditions for use of some procurement methods currently grouped together with other procurement methods.

150. The location of the consecutive negotiations method and of two-stage tendering in article 27 was questioned in particular. It was noted that two-stage tendering did not involve bargaining, but rather discussions with the aim of refining the specifications and criteria, and thus should not be grouped with the request for proposals with dialogue that indeed involved bargaining. The alternative view, however, was that placing two-stage tendering in article 27 was appropriate in the light of the conditions for use it contained (which were applicable to both the request for proposals with dialogue and two-stage tendering procedures). It was suggested that paragraph (a) could be redrafted to allow more flexibility by replacing the inability to describe the subject matter of the procurement with the inability to describe the procuring entity's needs and solution thereto. An alternative suggestion was to leave paragraph (a) as drafted for the request for proposals with

dialogue, but that a separate provision for two-stage tendering should make it clear that discussions with suppliers or contractors were needed to refine conceptual designs or functional specifications and not to define specifications. The Working Group agreed with the latter suggestion.

151. It was considered that conditions for use set out in paragraph (a) would not apply to request for proposals with consecutive negotiations. The suggestion was made that the conditions for use of that procurement method could draw on article 26 (3), and should make it clear that: (i) the negotiations were consecutive; (ii) the negotiations were intended to encompass only the financial aspects of the proposals for the purpose of arriving at a reasonable price; and (iii) the conditions for use of this procurement method should not merely describe the procedures at issue. Concerns about opening the use of the request for proposals without negotiations and with consecutive negotiations methods to all types of procurement were reiterated.

152. It was suggested that the suggested optional text of footnote 8 should be included in the beginning of both articles 27 and 27 bis. The alternative view was to retain the approach suggested in footnote 8. It was agreed that the text from footnote 8 should be put in square brackets in the beginning of article 27, with an understanding that enacting States could decide whether to retain or remove it in the text of the law. Opposition was expressed to inserting such a text in the beginning of article 27 bis. (For further consideration of this issue in the context of article 27 bis, see paras. 154 and 155 below.)

153. The Secretariat was requested to revise article 27 taking into account the deliberations at the session.

Article 27 bis. Conditions for use of competitive negotiations

154. The Working Group recalled its consideration of the suggestion to reflect the content of footnote 8 in square brackets in the beginning of both articles 27 and 27 bis. It also recalled that there was opposition to insert the content of that footnote in article 27 bis (see para. 152 above).

155. The Working Group further recalled that a decision on this issue had already been taken and there had also been an agreement not to reopen issues on which decisions had been taken. Concerns were also raised about requiring a higher-level approval in articles 27 and 27 bis procurement methods but not in other procurement methods to be used as exceptions to open tendering. The alternative suggestion was to include the suggested wording only in subparagraph (c). The Working Group deferred the consideration of the issue to a later date.

V. Other business

156. The Working Group considered its future work. It agreed that, at its nineteenth session (Vienna, 11-15 October 2010), it would focus on the remaining outstanding issues in chapters II, III and IV of the Model Law and drafting issues throughout the text with a view to finalizing the Model Law. The understanding was that informal consultations would be held to seek to advance the work on the Model Law in the interim.

157. It was recalled that the Working Group was expected to work subsequently on a draft revised Guide to Enactment. The Working Group noted that a draft revised Guide text that would be before the Working Group at its next session would incorporate provisions addressed to legislators. The Working Group further noted that a Guide for adoption by the Commission in 2011 might also contain a checklist of issues to be addressed in procurement regulations.