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## **Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement**

### **Note by the Secretariat**

#### **Addendum**

This addendum sets out a proposal for a section in the Guide that would discuss general issues arising from the use of framework agreements, and a proposal for the Guide text to accompany article 31 on conditions for use of a framework agreement procedure and article 57 of chapter VII (Framework agreements procedures) of the UNCITRAL Model Law on Public Procurement.



## **GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT**

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### **A. Provisions on framework agreements to be included in Part I of the Guide, preceding the article-by-article commentary, or in the article-by-article commentary as an introduction to chapter VII**

#### **1. General description of framework agreement procedures**

1. Framework agreement procedures can be described as methods of making repeated purchases of a subject matter of the procurement over a period of time, which involve:

(a) The solicitation of submissions against pre-determined terms and conditions;

(b) The assessment of suppliers' or contractors' qualifications and the examination of their submissions against those terms and conditions, and, in closed framework agreements (described in ... below), the evaluation of those submissions;

(c) Selected supplier(s) or contractor(s) and the procuring entity entering into a framework agreement on the basis of the submissions. The framework agreement sets out the terms and conditions of future purchases, and is concluded for a given duration (steps (a)-(c) are the "first stage" of the procurement); and

(d) Subsequent and periodic placing of purchase orders with the supplier(s) or contractor(s) under the terms of the framework agreement, as particular requirements arise (which may involve a further round of competition. This is the "second stage" of the procurement, and the placement of purchase orders with a particular supplier or contractor is the award of procurement contracts).

2. Framework agreement procedures are often used to procure subject matters for which a procuring entity has a repeat need over a period of time, but does not know the exact quantities, nature or timing of its requirements. The purchases could otherwise be made through a single procurement, with a series of deliveries over the duration of the procurement contract. In essence, the framework agreement establishes the terms upon which purchases will be made (or establishes the main terms and a mechanism to be used to establish the remaining terms or refine the initially established terms). Terms that are not established at the outset or need to be refined may include the quantities to be delivered at any particular time, the time of deliveries, the overall quantity of the procurement and the price.

3. There is a variety of terminology in practical use for the type of procedures described above, including supply arrangements, indefinite-delivery/indefinite-quantity contracts or task-order contracts and umbrella contracts. The extent to which the first stage of the procurement includes all the steps set out in paragraph 1(a)-(c) above also varies. Enacting States, in considering introducing framework agreements procedures in their jurisdictions should consider that, because of these variables, practical experience and guidance from other jurisdictions may not necessarily be easily replicable in their jurisdictions.

## 2. Potential benefits and concerns observed in the use of framework agreements procedures

4. The main potential benefit of framework agreement procedures is that they are administratively efficient because they effectively aggregate procurement proceedings. Under a framework agreement procedure, many steps in the procurement process are undertaken once for what would otherwise be a series of procurement procedures each requiring the same steps. These steps include drafting terms and conditions, advertising, assessing suppliers' or contractors' qualifications, examining, and in some forms of framework agreements evaluating, submissions. As a result, purchases can be made with lower transaction costs and shorter delivery times than would be the case were each purchase procured separately. Other noted benefits include enhancing transparency and competition for smaller procurements, which are sometimes considered at risk of abuse or failure to achieve value for money because of the less transparent and open ways in which they are often conducted: the grouping of a series of smaller procurements can amortize advertising and other costs and can facilitate oversight, either by oversight agencies or by suppliers or contractors themselves. Framework agreements can also ensure security of supply,<sup>1</sup> and enable further costs savings to be made through centralized purchasing (that is, a central unit of one entity makes purchases for a number of units, or one entity or consortium makes purchases on behalf of several entities).

5. However, enacting States should be aware of concerns about the use of framework agreement procedures, some of which are inherent in the technique, and some that arise from its misuse or overuse. For example, the administrative efficiency that supports the use of the technique may compromise other procurement objectives, such as value for money, if procuring entities use framework agreements where they are not in fact the appropriate tool for the procurement concerned, simply to achieve administrative efficiencies. It is often the case that, under a framework agreement, prices do not remain current and competitive, because they tend to remain fixed rather than varying with the market. Nevertheless, procuring entities may decide to procure through an existing framework agreement, even though its terms and conditions do not quite meet their needs or reflect the current market conditions, to avoid having to go through the new procurement proceedings (and to draft new terms and conditions of the procurement, to issue a procurement notice, to ascertain the qualifications of suppliers or contractors, to conduct a full examination and evaluation of initial submissions and so on). As a result, procuring entities may fail to assess price and quality sufficiently, when placing a particular purchase order, and will tend to overemphasize specifications over price. In addition, where the operation of framework agreements is outsourced to centralized purchasing entities, the entities concerned may have an interest in keeping their fee earnings high by keeping prices high and promoting purchases that go beyond the needs of the procuring entity. Furthermore, centralized purchasing through framework agreements can encourage standardization across government, but the needs of individual ministries or agencies may themselves not be identical, with the result that some obtain better value for money than others.

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<sup>1</sup> Reference to security of supply is made in this and other similar context throughout this draft despite the fact that article 31 of the draft Model Law does not list security of supply as a condition for use of a framework agreement procedure.

6. Experience in the use of framework agreement procedures has also indicated risks to, or reduced, transparency, competition and value for money in the award of procurement contracts under the framework agreement as compared with traditional procurement methods. As suppliers or contractors that are not parties to the framework agreement cannot participate in the award of procurement contracts, there is in fact limited competition at the second stage. The negative consequences of restricted competition are exacerbated where the effect of the framework agreement is to create a monopolistic or oligopolistic market. The suppliers or contractors that are parties to the framework agreement will be aware of each other's identities, and so ensuring competition (rather than collusion) once the framework agreement is in place can also be difficult in practice. Framework agreements are also considered to involve a higher risk of procurement being directed to certain suppliers or contractors because of their relationships with procuring entities, without genuine competition among suppliers or contractors. Under some closed framework agreements, no competition among suppliers or contractors parties to the framework agreement takes place at all: without transparent award mechanisms at the second stage, there are significantly higher risks of favouritism and corruption. Furthermore, the flexibility in refining requirements at the second stage (further discussed in paragraphs ... below) means that there is a risk in practice of substantive changes in the ultimate procurement contract, without the safeguards of opening the procurement to full competition (i.e. by suppliers or contractors not parties to the framework agreement). Such risks are however lower in open framework agreements where newcomers can join the agreement on a continuous basis (see ... below).

7. The approach to the provisions enabling the use of framework agreement procedures under the Model Law has therefore been designed to facilitate the appropriate and beneficial use of the technique, but to discourage its use where framework agreement procedures will not maximise value for money. For example, the procedures can be appropriate for commodity-type purchases in a highly competitive market, such as stationery, spare parts, information technology supplies and maintenance, and where there will normally be regular purchases for which quantities may vary. They are also suitable for the purchase of items from more than one source, such as electricity, and for items for which the need can sometimes arise on an emergency basis, such as medicines (where a significant objective is to avoid the excessively high prices and poor quality that may result from the use of single-source procurement in emergency situations). These types of procurement may also require security of supply, as may be the case for specialised items requiring a dedicated production line, and framework agreements are suitable tools for such procurement.

8. Even where the framework agreement is the appropriate technique for the procurement(s) concerned, careful oversight is required to ensure the framework agreement is used appropriately. There will be no advantage in terms of administrative efficiency of a two-stage procedure over a one-stage procedure if the framework agreement is not subsequently used for repeated purchases. This point underlies why complex procurement for which the terms and conditions (including specifications) vary for each purchase, such as large investment or capital contracts, highly technical or specialized items, and more complex services procurement, would not be suitable for procurement through framework agreements. There is insufficient repetition in these procurements: tailoring the second stage to the

particular need at hand will require more steps of the first stage of the procurement to be repeated, compromising administrative efficiency (and transparency and competition, as described in paragraph ... above). Where the reason for use of framework agreements is not administrative efficiency but security of supply or preparation for future emergencies, the additional costs of a two-stage procedure are set against the other potential benefits.

9. The administrative costs of the two-stage procedure will be amortized over a greater number of purchases; i.e. the more the framework agreement is used. Nonetheless, effective management of the technique should include issuing notices of procurements as they arise under the framework agreement, with a view to stimulating further response from the market where, for example, the technical solution or product proposed is no longer the best that the market offers. A further aspect of best practice is for procuring entities to assess on a regular basis whether a framework agreement continues to offer value for money and continues to allow access to the best that the market can offer at that time, and to consider the totality of the purchases under the framework agreement to assess whether their benefits exceed their costs. These considerations are in particular relevant in the context of closed framework agreements.

10. The economic benefits of framework agreements will be realised where they are used to satisfy the procuring entity's needs for the subject matter of the procurement. Practical experience in the operation of framework agreements indicates that the value for money to be obtained through their use is maximized where procuring entities make full use of them to make their purchases, rather than conducting new procurements for the subject matter concerned. Where such full use is observed, suppliers and contractors should have greater confidence that they will receive orders to supply the procuring entity, and should give their best prices and quality offers accordingly. The use of estimated quantities in the solicitation documents and framework agreement can thus facilitate realistic offers based on a clear understanding of the extent of the procuring entity's needs. However, enacting States may wish to consider discouraging the framework agreement from operating as an exclusive purchasing agreement in normal circumstances, as the procuring entity will not be able to purchase outside the framework agreement if market conditions change. (There may, nonetheless, be circumstances in which the benefits of exclusivity are considered to outweigh this risk.) This approach allows commercial considerations to dictate the extent of use. Nonetheless, the terms of the framework agreement itself may limit commercial flexibility if guaranteed minimum quantities are set out as one of its terms, though this flexibility should be set against the better pricing from suppliers or contractors. Where the framework agreement no longer offers good commercial terms to the procuring entity, a new procurement procedure (classical or a new framework agreement procedure) will be required.

11. Thus the technique, properly used, can provide benefits in terms of value for money and security of supply, as well as administrative efficiency. Whether it will do so in any particular case will require a careful assessment of the costs and benefits of the procedure and the appropriate terms for the framework agreement itself.

### 3. The framework agreement

12. Under the Model Law (see article 2 (e)), the framework agreement procedure can take one of three forms:

(a) A “closed” framework agreement procedure without second-stage competition, involving a framework agreement concluded with one or more suppliers or contractors, and in which all terms and conditions of the procurement are set out in the framework agreement. As a result, there is no further competition between the suppliers or contractors at the second stage of the procurement, and the only difference of this type of framework agreement procedure as compared with traditional procurement procedures is that the items are purchased in batches over a period of time. These framework agreements are “closed” in that no new suppliers or contractors can become parties to the agreement after it has been concluded;

(b) A “closed” framework agreement procedure with second-stage competition, involving a framework agreement concluded with more than one supplier or contractor, and which sets out some of the main terms and conditions of the procurement. A further competition among suppliers or contractors parties to the framework agreement is required to award the procurement contract at the second stage of the procurement. These framework agreements are also “closed” in the sense described above. They can be concluded only where there is more than one supplier or contractor (although they could theoretically be concluded with one supplier or contractor (which is then invited to improve its offer for a particular purchase under the framework agreement), the Model Law does not allow for such a procedure. It is considered at too great a risk of abuse, and of effectively amending the terms and conditions of the procurement and framework agreement itself. For this reason, too, the Model Law does not envisage the possibilities of suppliers or contractors unilaterally improving their submissions during the operation of the closed framework agreement (other than through second-stage competition));

(c) An “open” framework agreement procedure, involving a framework agreement concluded with more than one supplier or contractor and involving second-stage competition between suppliers or contractors parties to the agreement. These framework agreements remain “open” to new suppliers or contractors, meaning that any supplier or contractor interested to become a party to the agreement after it has been concluded may become the party thereto at any time during the operation of the agreement if it satisfies the pre-established requirements, in particular as regards qualifications of suppliers or contractors parties to the agreement and responsiveness of their indicative submissions. This type of framework agreement is intended to provide for commonly used, off-the-shelf goods or straightforward, recurring services that are normally purchased on the basis of the lowest price. These agreements must operate electronically, as is explained in the commentary to article 59 below.

13. The framework agreement itself contains the terms and conditions of the envisaged procurement contracts (other than those to be established through the second-stage competition). The agreement itself should be complete in recording all terms and conditions, the description of the subject matter of the procurement (including specifications), and the evaluation criteria, both to enhance participation and transparency, and because of the restrictions on changing the terms and

conditions during the operation of the framework agreement (see also the commentary to articles 57 to 62 below).

14. The framework agreement, depending on its terms and conditions and the law that governs agreements by procuring entities in the enacting State concerned, may be a binding contract. Nonetheless, the definition of the “procurement contract” under article 2(i) of the Model Law, does not include a framework agreement. The procurement contract for the purposes of article 2(i) of the Model Law is concluded at the second stage of the procedure, when the procuring entity awards a procurement contract under the framework agreement. Technically, the award occurs when the procuring entity issues an acceptance notice accepting the supplier’s or contractor’s second-stage submission in accordance with article 21 of the Model Law.

15. Whereas the open framework agreement is required under the Model Law to be operated electronically, the procuring entity has flexibility in this regard as regards closed framework agreements. Enacting States may wish to note the advantages of an online procedure in terms of increased efficiency and transparency (for example, the terms and conditions can be publicized using a hyperlink; a paper-based invitation to the second-stage competition could be unwieldy and user-unfriendly. See further paragraphs ... of Part I of the Guide). Where the enacting State requires or encourages (or intends to do so) that all framework agreements be operated electronically, it may wish to require through regulations that all of them be maintained in a central location, which further increases transparency and efficiency in their operation.

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

16. Controls over the use of framework agreements procedures are included in the text of the Model Law to address the concerns set out above. There are conditions for the use of framework agreement procedures in article 31, and mandatory procedures for conducting them in articles 57-62.

17. One of the main controls in the case of a closed framework agreement procedure is that a procuring entity that wishes to use such procedure will be required to follow one of the procurement methods of the Model Law to select the suppliers or contractors to be parties to the closed framework agreement (i.e. at the first stage). Thus all the safeguards applicable to the selected procurement method, including conditions for its use, will apply. An open framework agreement is to be established following specifically-designed open procedures.

18. The solicitation documents for a framework agreement procedure must follow the normal rules: that is, they must set out the terms and conditions upon which suppliers or contractors are to provide the subject matter of the procurement, the criteria that will be used to select the successful suppliers or contractors, and the procedures for the award of procurement contracts under the framework agreement. This information is required to enable suppliers or contractors to understand the extent of the commitment required of them, which itself will enable the submission of the best price and quality offers. Thus, the normal safeguard that all the terms and conditions of the procurement (including the specifications and whether the selection of suppliers or contractors will be based on the lowest-priced or most advantageous submission) must be pre-disclosed also applies.

19. The provisions regulating the award of procurement contracts under framework agreements have been drafted to ensure sufficient competition where a second-stage competition is envisaged. Application of provisions of article 21, including on a standstill period, ensures sufficient transparency in decision-taking at the second stage.

20. Another important control measure is contained in provisions of the Model Law envisaging the limitation of the duration of framework agreements. Since no supplier or contractor may be awarded a procurement contract under the closed framework agreement without being a party to the closed framework agreement, closed framework agreements have a potentially anti-competitive effect. Ensuing full competition for the purchases envisaged on a periodic basis, by limiting the duration of a closed framework agreement and requiring subsequent purchases to be reopened for competition is generally considered to assist in limiting the anti-competitive potential. Under article 58(1)(a) of the Model Law, the procuring entity is to set out the maximum duration of the closed framework agreement within the maximum established by the enacting State in the procurement regulations (i.e. no stated limit is set out in the Model Law itself). Practical experience in those jurisdictions that operate closed framework agreements indicates that the potential benefits of the technique are generally likely to arise where they are sufficiently long-lasting to enable a series of procurements to be made, such as a period of 3-5 years. Thereafter, greater anti-competitive potential may arise, and the terms and conditions of the closed framework agreement may no longer reflect current market conditions. As some types of subject matters may change more rapidly, especially where technological developments are likely, or the procuring entity's needs may not remain the same for a sustained period, the appropriate period for each procurement may be significantly shorter than the maximum.<sup>2</sup>

21. Enacting States, in addition to setting out the maximum duration of closed framework agreement in the procurement regulations, are thus encouraged to provide guidance on appropriate durations of closed framework agreement for particular procurement types, and may also wish to encourage procuring entities themselves to assess on a periodic basis during the currency of the closed framework agreement whether its terms and conditions remain current.

22. Because of the less anti-competitive effect of open framework agreements, the duration of the open framework agreement is established at the discretion of the procuring entity without any maximum limit imposed by the procurement regulations (see article 60 (1)(a)).

23. UNCITRAL has sought to avoid limiting the usefulness of framework agreements and their administrative efficiency by formulating too many conditions for their use or too many inflexible procedures. Both stages of the framework agreement procedures are subject to the challenge and appeal mechanisms of chapter VIII of the Model Law.

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<sup>2</sup> The provision of guidance to the Secretariat on mitigating risks of framework agreements of excessively long duration through extensions and exceptions to the initially established duration of the framework agreement is requested. At the thirteenth session of the Working Group, it was observed that procurement-related disputes in the framework agreement context arose relatively commonly regarding extensions or exceptions to the permitted duration of the framework agreement (A/CN.9/648, para. 43).

## **B. Provisions on framework agreements to be included in the article-by-article commentary**

### **Article 31. Conditions for use of a framework agreement procedure**

1. The purpose of the article is to set out the conditions for use of a framework agreement procedure (paragraph (1)) and provide for the record and justification requirements in resort to the procedure (paragraph (2)).

2. Paragraph (1) lists conditions for use of framework agreement procedures, regardless of whether the procedure will result in a closed or open framework agreement. The conditions are based on the notion that framework agreement procedures can offer benefits for procurement notably in terms of administrative efficiency where the procuring entity has needs that are expected to arise in the short to medium term, but where not all terms and conditions can be set at the outset of the procurement. (For a description of the benefits, see paragraphs ... above.) Paragraph (1) permits the use of framework agreement procedures to reflect two situations where these circumstances may arise: first, where the need is “indefinite”, meaning its frequency, extent, timing and/or quantity are unknown, and, secondly, where the need is expected to arise on an urgent basis. The first set of circumstances may arise for repeat purchases of relatively standard items or services (office supplies, simple services such as janitorial services, maintenance contracts and so forth). The second set of circumstances may arise where a government agency is required to respond to natural disasters, pandemics, and other known risks; this condition will normally, but need not, be cumulative with the first condition. Security of supply is usually a concern in this type of situations but also may become in the first type of situations where indefinite need for repeat purchases will arise with respect to the items requiring specialist production.<sup>3</sup> (See the general discussion of the types of procurement for which framework agreements are suitable in paragraphs ... above). Where the procedure will result in a closed framework agreement, the conditions for use applicable to the procurement method intended to be used for the award of the agreement are also to be satisfied. This is because, in accordance with article 57 (1) of the Model Law, a closed framework agreement is to be awarded by means of open tendering proceedings unless resort to other procurement methods is justified under chapter II of the Model Law.

3. The specific conditions for the use of a framework agreement procedures are considerably more flexible than the conditions for use of the procurement methods listed in article 26 (1): they do not require the procuring entity to state definitively that the needs will arise indefinitely or on an urgent basis, but merely that the need is expected to arise. The inherent subjectivity of the conditions means that it is more difficult to enforce compliance with them than with the conditions for use of the procurement methods listed in article 26 (1), but it will be possible to evaluate objectively whether decisions are reasonable in the circumstances of a given

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<sup>3</sup> As noted above, security of supply cannot be used as a ground for use of a framework agreement procedure unless one of the specific conditions for use listed in article 31 is also satisfied (i.e. expected indefinite or urgent needs during a given period of time).

framework agreement. In this manner, the conditions do facilitate accountability and promote best practice.

4. As is noted above (paragraphs ...), the costs of establishing and operating framework agreement procedures, which involve two stages, will normally be higher than those for one single-stage procurement, and so whether framework agreement procedures are appropriate will depend on whether the potential benefits will exceed these higher costs. Where the need is expected to be indefinite, the administrative costs of setting up and operating the framework agreement can be amortized over a series of repeat procurements; where the need is expected to arise urgently, the administrative costs are to be considered against the value-for-money benefits that the earlier setting of the terms and conditions of the procurement may bring by comparison with the procedures available for urgent or emergency procurement. The procuring entity, therefore, will need to conduct a cost-benefit analysis based on probabilities before engaging in a framework agreement procedure, and enacting States will wish to provide guidance and training to ensure that the procuring entity has the appropriate tools to do so. The above considerations are relevant particularly in the context of closed framework agreements.

5. In addition, the use of framework agreements should not be considered to be an alternative to effective procurement planning. In the context of a closed framework agreement in particular, unless realistic estimates for the ultimate procurement are determined and made known at the outset of a framework agreement procedure, potential suppliers will not be encouraged to submit their best prices at the first stage, meaning that a closed framework agreement may not yield the anticipated benefits, or that the administrative efficiency may be outweighed by price and/or quality concerns that compromise value for money.

6. A further reason for including conditions for use is to address the potential restriction on competition that the use of the technique, in particular a closed framework agreement, involves (see ... above). The conditions are supported by the limited duration provided for closed framework agreements in article 58 (1)(a), and the defined duration required by article 60 (1)(a), which require the needs concerned to be reopened to full competition after the duration of the agreement expires.

7. The conditions for use should be read together with the definition of the term "procuring entity", which allows for more than one purchaser to use the framework agreement. If enacting States wish centralized purchasing agencies to be able to act as agents for one or more procuring entities, so as to allow for the economies of scale that centralized purchasing can offer, they may wish to promulgate regulations or issue guidance to ensure that such arrangements can operate in a transparent and an effective fashion.

8. Paragraph (2) requires the procuring entity to justify the use of the framework agreement procedure in the procurement record; the intention is that the cost-benefit analysis referred to in the preceding paragraphs be included. In the case of the award of a closed framework agreement, the paragraph will be supplemented by article 27 (3) of the Model Law that requires the procuring entity to put on the record a statement of the reasons and circumstances upon which it relied to justify the use of the procurement method other than open tendering in the award of the agreement. Given the observed risks of overuse of framework agreements because of their perceived administrative efficiency (see paragraphs ... above), and the

broad conditions for use, timely and appropriate oversight of the justification in the record will be important (also to facilitate any challenge to the use of the framework agreement procedure by suppliers and contractors). Effective oversight will involve the scrutiny of the extent of purchases made under the framework agreement to identify over- or under-use as described above (see ...).

### **Article 57. Award of a closed framework agreement**

1. The purpose of the article to set rules for the award of a closed framework agreement. Provisions apply to both framework agreement procedures with second-stage competition and framework agreement procedures without second-stage competition, both of which, as explained in ... above, may lead to the award of a closed framework agreement.

2. Paragraph (1), by referring to in its subparagraph (b) to chapter II of the Model Law, requires the procuring entity to follow the provisions of chapter II of the Model Law in selecting the procurement method appropriate for the award of a closed framework agreement, and the procedures applicable to the procurement method selected. Neither the conditions for use nor this paragraph limit the procurement methods that can be used to award a closed framework agreement, on the condition, however, that resort to open tendering must be considered first and resort to an alternative method of procurement must be justified. The choice takes account of both the circumstances of the procurement(s) concerned and the need to maximize competition as required by article 27. However, the importance of rigorous competition at the first stage of closed framework agreements means that the application of exceptions to open tendering should be carefully scrutinized, particularly in the light of the competition risks in framework agreements procedures and types of purchases for which framework agreements are appropriate (as to which, see ... and ...).

3. Examples of when procurement methods alternative to open tendering may be appropriate include the use of framework agreements for the swift and cost-effective procurement of low-cost, repeated and urgent items, such as maintenance or cleaning services (for which open tendering procurements may not be cost-effective), and specialised items such as drugs, energy supplies and textbooks, for which the procedure can protect sources of supply in limited markets. The use of competitive negotiations or single-source procurement may be appropriate for the award of a closed framework agreement in situations of urgency. If the procuring entity is unable to draft specifications or define the main terms and conditions of the procurement at the outset, such as in more complex services or construction procurement, framework agreements are less likely to be appropriate because the uncertainties involved may diminish participation, but there are examples in practice of effective framework agreements concluded through dialogue-based request for proposals methods.<sup>4</sup> (See the guidance to conditions for use of procurement methods at ... ). [The linked decisions to use a framework agreement procedure and the choice of the procurement method and type of solicitation, which involve discretion and require appropriate capacity, are such that guidance and

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<sup>4</sup> The statement reflects the results of consultations with experts. The provision of guidance to the Secretariat on specific examples is requested.

regulations to enhance decision-making will be crucial to allow for the potential benefits of the technique to accrue.]

4. Paragraph (1) also envisages derogations from the procedures for the procurement method chosen as required to reflect a framework agreement procedure, such as that references to “tenders” or other submissions are to be construed as references to “initial” tenders or submissions where there will be second-stage competition involving second-stage tenders or submissions, and references to the selection of the successful supplier or contractor and to the conclusion of a procurement contract are to be construed as references to the admission of supplier(s) or contractor(s) to the framework agreement and the conclusion of that agreement. Enacting States may wish to provide guidance on the possible derogations, noting that the flexibility required to provide for closed framework agreements with and without second-stage competition and with one or more supplier or contractor parties means that the extent of the derogations will vary from case to case.

5. Paragraph (2) sets out the information that should be provided when soliciting participation in the framework agreement procedure. The solicitation documents must follow the normal rules for the procurement method chosen: that is, they must set out the terms and conditions upon which suppliers or contractors are to provide the subject matter of the procurement and the procedures for the award of procurement contracts (which will take place under the framework agreement).<sup>5</sup> The two-stage nature of framework agreement procedures, which end with the award of procurement contract(s), means that the information provided to potential suppliers or contractors at the outset should cover both stages of the procurement. Hence the provisions regulate information pertaining to both stages, while making allowance for the fact that some terms and conditions of the procurement, disclosed in the solicitation documents in “traditional” procurement, will be refined or established at the second stage of the procedure.

6. The chapeau to paragraph (2) requires the normal solicitation information to be set out in full “mutatis mutandis”, meaning that information should be adapted to particularities of any given framework agreement procedure. This information must be repeated in the framework agreement itself, or, if it is feasible and would achieve administrative efficiency, and the legal system in the jurisdiction concerned treats annexes as an integral part of a document, the solicitation documents can be annexed to the framework agreement.

7. Deviations from the requirement to provide exhaustive information about the terms and conditions of the procurement at the time of solicitation of participation in the framework agreement procedure are permitted only so far as needed to accommodate the procurement concerned. For example, the procuring entity is unlikely to be able to fulfil the requirement of article 38(d) for the solicitation documents to set out “the quantity of the goods; services to be performed; the location where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided”.

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<sup>5</sup> This guidance may need to be amended in the light of specifics of request for proposals with dialogue, if it is considered that this method is appropriate for the award of framework agreements. See the relevant concern in paragraph 3 and the accompanying footnote above.

However, the extent of the necessary deviation will vary: the procuring entity may know the dates of each intended purchase, but not the quantities, or vice versa; alternatively, it may know the total quantity but not the purchase dates; or it may know none or all of these things.

8. Details, which are normally required to be provided when soliciting participation in a single-stage procedure, and which will be omitted in a framework agreement procedure will vary from procedure to procedure. Any failure to provide information that goes beyond the permissible deviations will be susceptible to challenge. So if the total quantity and delivery details regarding the purchases envisaged under the framework agreement are known at the first stage of the procurement, they must be disclosed. If the total quantity is not known at the first stage of the procurement, minimum and maximum quantities for the purchases envisaged under the framework agreement should be included, to the extent that they are known, failing which estimates should be provided.

9. Paragraph (2)(b) requires disclosure of whether there will be one or more supplier or contractor parties to the agreement. The administrative efficiencies of framework agreements tend to indicate that multiple-supplier framework agreements are more commonly appropriate, but the nature of the market concerned may indicate that a single-supplier framework agreement is beneficial (for example, where confidentiality or security of supply is an important consideration, or where there is only one supplier or contractor in the market).

10. There is no requirement for either a minimum or a maximum number of suppliers or contractors parties to a framework agreement. A minimum number may be appropriate to ensure security of supply; where second-stage competition is envisaged, there need to be sufficient suppliers or contractors to ensure effective competition, and the terms of solicitation may require a minimum number, or a sufficient number to ensure such effective competition. Where the stated minimum is not achieved, the procuring entity may/must cancel the procurement using the provisions of article 18.<sup>6</sup>

11. A maximum number may also be appropriate where the procuring entity envisages that there will be more qualified suppliers or contractors presenting responsive submissions than can be accommodated. This situation may reflect the administrative capacity of the procuring entity, notably in that more participants may defeat the administrative efficiency of the procedure. An alternative reason for limiting the number of participants is to ensure that each has a realistic chance of being awarded a contract under the framework agreement, and to encourage it to price its offer and to offer the best possible quality accordingly.

12. Where a minimum and/or a maximum of suppliers or contractors is or are to be imposed, the relevant number(s) must be notified in the solicitation documents. The procurement record should, as a matter of best practice, include a justification of the procuring entity's decision(s) — and recording such information is an example of the additional information that the enacting State may wish to include under article 24 (1), or in supporting regulations under article 24 (1)(w). Where a

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<sup>6</sup> The provision of guidance to the Secretariat is requested on consequences of the failure to achieve the minimum required number, for example where it was intended to have a multi-supplier framework but only one supplier or contractor is qualified and responsive.

maximum is stated, the criteria and procedures for selecting the participants should be to identify the relevant number of lowest-priced or most advantageous submissions. This approach involves ranking to select the suppliers or contractors to become parties to the framework agreement; although a defined maximum may be administratively simple, it has been observed, identifying a strictly defined number in advance could invite challenges from those whose submissions are ranked just below the winning suppliers or contractors' (i.e. where there is very little to choose between successful and unsuccessful suppliers or contractors). A statement that a number within a defined range may be an appropriate alternative approach, provided that its intended use is clearly set out in the solicitation documents.

13. Paragraph (2)(d) requires that the form, terms and conditions of the framework agreement including, for example, whether there is to be second-stage competition, and evaluation criteria for the second stage, are to be provided in the solicitation documents. These transparency provisions are an application of the general principle of the Model Law that all terms and conditions of the procurement are to be determined in advance, as also reflected in the chapeau provisions of paragraph (2) (see paragraphs ... above).

14. There is no exemption regarding the qualification and evaluation criteria and procedures for their application both for admission to the framework agreement and for any second-stage competition, save that the evaluation criteria to be applied at the second stage can vary within a pre-determined range, as explained in the commentary to article 58(1)(d) below. If this flexibility is to be used, the applicable range must be disclosed in the solicitation documents.

15. One feature of selection that is more complex in the context of framework agreements than traditional procurement is the relative weight to be applied in the selection criteria for both stages of the procurement, if any. Particularly where longer term and centralized purchasing are concerned, there may be benefits in terms of value for money and administrative efficiency in permitting the procuring entity to set the relative weights and their precise needs only when making individual purchases (that is, at the second stage of the procedure). On the other hand, transparency considerations, objectivity in the process, and the need to prevent changes to selection criteria during a procurement are central features of the Model Law designed to prevent the abusive manipulation of selection criteria, and the use of vague and broad criteria that could be used to favour certain suppliers or contractors. Permitting changes to relative weights during the operation of a framework agreement might facilitate non-transparent or abusive changes to the selection criteria. The Model Law seeks to address these competing objectives by providing that relative weights at the second stage can be varied within a pre-established range or matrix set out in the framework agreement and thus also in the solicitation documents, and provided that the variation does not lead to a change in the description of the subject matter of the procurement (see article 62).

16. Further guidance on the form, terms and conditions of the framework agreement is provided in the commentary to article 58 below.

17. Paragraph (3) provides that the provisions of article 21 on the acceptance of the successful submission and entry into force of the procurement contract apply to the award of a closed framework agreement, adapted as necessary to the framework agreement procedure (the commentary to article 21 appears at ... above).

This provision is necessary because article 21 addresses the conclusion of a procurement contract and, as the definitions of the framework agreement and relevant procedures in article 2 make clear, the framework agreement itself is not a procurement contract (see, further, paragraphs ... above).

18. The suppliers or contractors that will be parties to the framework agreement are selected on the basis set out in the solicitation documents, i.e. those submitting the lowest-price or most advantageous submission(s). The selection is made on the basis of a full examination of the initial submissions (where there is to be second-stage competition) or of the submissions (where there is no second-stage competition), and assessment of the suppliers' or contractors' qualifications. The responsive submissions are then evaluated, applying the evaluation criteria disclosed in the solicitation documents, and subject to any applicable minimum or maximum number of suppliers or contractors parties as set in the solicitation documents.<sup>7</sup>

19. Thereafter, the notification provisions and standstill period required by article 21 apply to the procedure through a cross reference in paragraph (3) (the exemptions envisaged to the standstill period under article 21 (3) either do not or are most unlikely to apply to the award of a closed framework agreement). The award of the closed framework agreement may also be made subject to external approval; where framework agreements are being used across government ministries and agencies, ex ante control mechanisms of this type may be considered appropriate. If so, additional wording can be included in paragraph (3) or elsewhere in article 57 or in supporting regulations, based on the optional wording found in article 29 (2).

20. In order to forestall concerns that the normal publicity mechanisms under procurement systems may not apply to framework agreements (because they are not procurement contracts) and to some procurement contracts under them (if they are under the publication threshold), article 22 of the Model Law requires the publication of a notice where a closed framework agreement is made in the same manner as the award of a procurement contract. (Article 22 also applies in full to procurement contracts concluded under a framework agreement.)

21. As the definitions of the framework agreement and relevant procedures in article 2 make clear, the framework agreement is not a procurement contract as defined in the Model Law, but it may be an enforceable contract in enacting States. States may therefore wish to issue guidance on the implications of binding the Government through the first stage of the procedure. Suppliers' or contractors' submissions may be binding under the law of the enacting State; under a closed framework agreement without second-stage competition, the terms and conditions of the procurement are set and the first-stage submissions will be enforceable in the normal manner. Where there is to be second-stage competition, however, States may

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<sup>7</sup> With reference to paragraph (2) (c) of article 57 of the draft Model Law, the provision of guidance to the Secretariat is requested on whether a maximum number must always be required in a closed framework agreement (under the current wording the procuring entity has the discretion to establish either maximum or minimum). Otherwise, all suppliers or contractors presenting responsive submissions must be accepted and there would be no evaluation at the first stage. This would create no difference between open and multi-supplier closed framework agreements.

wish to provide guidance to ensure that the extent to which suppliers or contractors can vary their first-stage (initial) submissions at the second stage is clear, where the result is less favourable to the procuring entity (e.g. by increasing prices if market conditions change).

22. More generally, the extent to which suppliers or contractors may improve their submissions is not addressed in the Model Law. Enacting States may wish to suggest that procuring entities make specific provision in framework agreements, or to address the matter by regulation or using a combination of the two approaches, while ensuring that equitable treatment is preserved. For example, it may be necessary to allow suppliers or contractors to improve their submissions under framework agreements without second-stage competition, or, if significant amendments are proposed, to reopen the procurement to full competition using the most appropriate procurement method for the circumstances concerned. Where there is second-stage competition, it may be sufficient to notify the other suppliers or contractors parties of the revised offer.<sup>8</sup>

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<sup>8</sup> The provision of guidance to the Secretariat on the points raised in this paragraph that have not been discussed in the Working Group is requested.